# VICTIMIZING THE VICTIM: EVICTING DOMESTIC VIOLENCE VICTIMS FROM PUBLIC HOUSING BASED ON THE ZERO-TOLERANCE POLICY

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## I. INTRODUCTION

In the early morning of August 2, 1999, Tiffani Ann Alvera was physically assaulted by her husband, Humberto Mota, in their Seaside, Oregon apartment.[1] The assault was so brutal that Ms. Alvera sustained a concussion and a broken cheekbone.[2] Ms. Alvera immediately sought and obtained a temporary restraining order against her husband.[3] The restraining order not only required Mr. Mota to move from their residence and not return, but also prohibited him from contacting or coming within one hundred feet of Ms. Alvera.[4] Mr. Mota was arrested and eventually convicted of fourth degree assault.[5]

Tiffani Alvera immediately provided a copy of the temporary restraining order to the manager of the government-subsidized, low-income housing development where she resided.[6] Two days later, management served Ms. Alvera with a twenty-four hour eviction notice terminating her tenancy at the housing complex.[7] The eviction notice stated, "You, someone

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[1] United States v. C.B.M. Group, Inc., No. 01-857-PA, 5 (D. Or., filed July 10, 2001), http://www.aclu.org/court/alvera.pdf; *see also* Robin Franzen, *Suit Aims at Spousal Abuse Victim*, OREGONIAN, July 11, 2001, at A01; Tamar Lewin, *Zero-Tolerance Policy is Challenged*, N.Y. TIMES, July 11, 2001, at A10; American Civil Liberties Union, *Civil Rights Groups Fight Eviction of Battered Women Under "Zero Tolerance" Housing Policy* (July 10, 2001), *at* http://www.aclu.org/ news/ 2001/n071001a.html (last visited Oct. 10, 2001); National Organization for Women, *NOW Legal Defense Challenges Landlord's Policy of Evicting Domestic Violence Survivors, at* http://www.nowldef.org/html/ issues/vio/housing.htm (last visited Oct. 11, 2001).

[2] Franzen, *supra* note 1.

[3] *C.B.M. Group, Inc.*, No. 01-857-PA at 5; *see also* Franzen, *supra* note 1; Lewin, *supra* note 1; National Organization for Women, *supra* note 1.

[4] *C.B.M. Group, Inc.*, No. 01-857-PA at 5; *see also* Franzen, *supra* note 1; American Civil Liberties Union, *supra* note 1; National Organization for Women, *supra* note 1.

[5] *C.B.M. Group, Inc.*, No. 01-857-PA at 5; *see also* Franzen, *supra* note 1; Lewin, *supra* note 1.

[6] *C.B.M. Group, Inc.*, No. 01-857-PA at 5; *see also* Franzen, *supra* note 1; Lewin, *supra* note 1; National Organization for Women, *supra* note 1.

[7] *C.B.M. Group, Inc.*, No. 01-857-PA at 6; *see also* Franzen, *supra* note 1; Lewin, *supra* note 1; American Civil Liberties Union, *supra* note 1; National Organization for Women, *supra* note 1.

in your control, or your pet, has seriously threatened immediately to inflict personal injury, or has inflicted substantial personal injury upon the landlord or other tenants"[8] and specifically noted the August second incident.[9] The zero-tolerance policy adopted by the Oregon Housing Authority was the basis for this eviction.[10] Ms. Alvera never anticipated the possibility of eviction due to the fact that her lease agreement did not stipulate that the landlord or property management had the authority to evict a tenant on the basis of her status as a victim of domestic abuse.[11]

In response to the eviction notice, Ms. Alvera attempted to remove her husband's name from the lease[12] and pay the rent for the months of August and September.[13] Ms. Alvera also submitted an application to move from a two-bedroom apartment into a one-bedroom apartment since she would now be a single person household.[14] The management of the housing complex subsequently denied Ms. Alvera's attempts to pay the rent and move into a smaller apartment.[15] However, Ms. Alvera did not abandon her attempts to remedy her situation. In October 1999, she submitted a second application to the management of the housing complex for a smaller apartment.[16] This new lease was ultimately secured[17] but was based upon conditions not imposed upon other tenants of the housing complex.[18]

Tiffani Alvera's ordeal is not an isolated incident.[19] Public Housing Authorities ("PHAs") across the United States have adopted zero-tolerance

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[8] *C.B.M. Group, Inc.*, No. 01-857-PA at 6. The complaint responds to the eviction notice alleging that Humberto Mota "was not a person in the control" of Tiffani Alvera and that neither Ms. Alvera nor Mr. Mota had ever "inflicted, threatened to inflict, or been accused of inflicting or threatening to inflict personal injury upon the landlord or any tenant" of the apartment complex. *Id.; see also* Franzen, *supra* note 1; Lewin, *supra* note 1.

[9] *C.B.M. Group, Inc.*, No. 01-857-PA at 6; *see also* Franzen, *supra* note 1; Lewin, *supra* note 1.

[10] *See* Franzen, *supra* note 1; Lewin, *supra* note 1; American Civil Liberties Union, *supra* note 1; National Organization for Women, *supra* note 1.

[11] *C.B.M. Group, Inc.*, No. 01-857-PA at 7 ("Ms. Alvera's lease agreements . . . provided, in pertinent part, that '[t]he Management shall not discriminate against the Tenant in the provision of services, or in any other manner, on the grounds of . . . sex . . . .'").

[12] Lewin, *supra* note 1.

[13] *C.B.M. Group, Inc.*, No. 01-857-PA at 7; *see also* Franzen, *supra* note 1; Lewin, *supra* note 1; National Organization for Women, *supra* note 1.

[14] *C.B.M. Group, Inc.*, No. 01-857-PA at 7; *see also* Franzen, *supra* note 1; Lewin, *supra* note 1; National Organization for Women, *supra* note 1.

[15] *C.B.M. Group, Inc.*, No. 01-857-PA at 7; *see also* Franzen, *supra* note 1; Lewin, *supra* note 1.

[16] *C.B.M. Group, Inc.*, No. 01-857-PA at 7; *see also* Franzen, *supra* note 1; Lewin, *supra* note 1.

[17] *C.B.M. Group, Inc.*, No. 01-857-PA at 7; *see also* Franzen, *supra* note 1; Lewin, *supra* note 1.

[18] Franzen, *supra* note 1; *see also C.B.M. Group, Inc.*, No. 01-857-PA at 7 (Ms. Alvera received a letter from the attorney of the housing complex stating, "[t]his letter is to advise you that if there is any type of recurrence of the past events described above, that Creekside would have no alternative but to cause an eviction to take place.").

[19] *See* Robin Franzen, *Eviction Suit A Win for Violence Victims*, OREGONIAN, Nov. 3, 2001, at E01. After filing a federal sex discrimination suit against the property management company, Tiffani Alvera's attorneys learned of similar cases in Colorado, North Carolina, New York and Illinois. *Id.*

policies similar to that of Oregon.[20] These policies mandate the eviction of entire families if a single member of the household commits a drug-related or violent offense during the term of the lease.[21] As a result, victims of domestic violence[22] have lost their homes and have been denied housing opportunities based upon the actions of their abusers.[23]

Tiffani Alvera's story, and others just like hers, leads one to question how the eviction of domestic violence victims based upon the actions of their abusers can ever be justified. From the perspective of PHAs, such evictions protect the living environment of other tenants.[24] Since many domestic violence victims remain with their abusers,[25] the eviction of the entire household completely eliminates the cycle of violent disturbances and maintains residential tranquility. Evicting the entire household also serves as an economic safeguard for PHAs. To terminate the tenancy of the abuser only to have the victim allow him[26] back on the premises is an unnecessary expenditure of the fees required to secure the lone eviction of the abuser.[27]

Although the aforementioned explanations appear to be legitimate reasons for zero-tolerance evictions, they do not justify the consequences that follow. The remedy intended by zero-tolerance evictions can be just as damaging, if not more so, than the ill they are meant to prevent. In addition to the physical and emotional turmoil domestic violence victims endure at the hands of their abusers, zero-tolerance evictions subject these women to further victimization.[28] Victims of domestic violence are disproportionately

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[20] Some of the states where PHAs have implemented the zero-tolerance policy include California, Colorado, Louisiana, Massachusetts and Michigan. *See* Lewin, *supra* note 1; *Punishing Victims*, ST. PETERSBURG TIMES, July 16, 2001, at 8A; American Civil Liberties Union, *supra* note 1.

[21] *See Punishing Victims*, *supra* note 20.

[22] *See generally* ANN JONES, NEXT TIME, SHE'LL BE DEAD 83 (Beacon Press 2000).

> The terms 'battered woman,' 'domestic violence victim,' and 'abused woman,' which emphasize a woman's situation as the victimized object of another's actions . . . suggest that 'battered woman' is all she is, that 'victim' is her identity. Yet women who have lived through such violence, who know the immense daily expenditure of strength . . . it takes to survive, rarely identify themselves as 'victims.'

*Id.*

[23] American Civil Liberties Union, *supra* note 1. *But cf.* JONES, *supra* note 22, at 31 ("[T]he law is reluctant to evict an assaultive husband from the family home because a man has a right to enjoy 'his' home as 'his' castle, even when it is the scene of his crimes.").

[24] *See Punishing Victims*, *supra* note 20; *see also* Franzen, *supra* note 1.

[25] Franzen, *supra* note 1.

[26] The author recognizes that the roles of "victim" and "abuser" are not gender specific. However, for the purpose of convenience, the author will refer to "victim" in the feminine, and "abuser" in the masculine throughout this Note.

[27] Franzen, *supra* note 1.

[28] Franzen, *supra* note 19 (statement of Ellen Johnson, Esq.) ("[T]he unintended consequence of zero-tolerance policies is that the victim gets victimized again.").

women;[29] therefore, zero-tolerance evictions covertly discriminate on the basis of sex.[30] Domestic violence is also prevalent among low-income women.[31] As a result, zero-tolerance evictions burden battered women with the difficult task of finding replacement low-income housing[32] and possibly even homelessness.[33] Zero-tolerance evictions can also have a negative impact on measures taken to address the problem of domestic violence.[34] Furthermore, how does one justify the eviction of Tiffani Alvera, and domestic violence victims just like her, who sever all contact with their abusive partners?[35]

In July 2001, the Department of Housing and Urban Development ("HUD") filed a federal sex discrimination[36] suit on behalf of Tiffani Alvera[37]

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[29] *See* Lewin, *supra* note 1; Program Against Sexual Violence, *National Domestic Violence Statistics* (2001), *at* http://www1.umn.edu/aurora/nationaldvstats.htm; *see also* American Civil Liberties Union, *Fact Sheet on Domestic Violence* (July 10, 2001), *at* http://www.aclu.org/ news/ 2001/ domviolence_factsheet.html (last visited Oct. 10, 2001).

> Women are two to three times more likely than men to report that an intimate partner threw something that could hurt them, or pushed, grabbed or shoved them. Women are seven to fourteen times more likely than men to report that an intimate partner beat them up, choked or tried to drown them, or threatened them with a gun or knife.

*Id.*

[30] National Organization for Women, *supra* note 1 (statement of Martha Davis) ("Victims of domestic violence across the country are vulnerable to this hidden discrimination.").

[31] *See, e.g.*, American Civil Liberties Union, *supra* note 29.

> While domestic violence occurs across class lines, low-income women are at a higher risk of being physically assaulted by an intimate partner than are their counterparts with higher socio-economic statuses. Department of Justice data reveal that rates of intimate partner violence increases as household income decreases, with women in families with a household income less than $9,999 experiencing intimate partner violence at a rate over five times as high as women in families with income over $30,000.

*Id.*

[32] *See, e.g., id.* ("Victims and survivors of domestic violence can have trouble finding apartments because they may have poor credit, rental, and employment histories due to their abuse.").

[33] *See* Lewin, *supra* note 1; *Punishing Victims, supra* note 20; *see also* National Coalition for the Homeless, *Domestic Violence and Homelessness* (Apr. 1999), *at* http://nch.ari.net/domestic.html (last visited Mar. 8, 2002).

> Lack of affordable housing and long waiting lists for assisted housing means that many women and their children are forced to choose between abuse at home or the streets. Many studies demonstrate the contribution of domestic violence to homelessness, particularly among families with children. A 1990 Ford Foundation study found that 50% of homeless women and children were fleeing abuse.

*Id.*

[34] *See* discussion *infra* Part IV.

[35] *C.B.M. Group, Inc.*, No. 01-857-PA at 5 ("Ms. Alvera has not had any contact with Mr. Mota since his arrest."); *see also* Franzen, *supra* note 1; Lewin, *supra* note 1.

[36] *C.B.M. Group, Inc.*, No. 01-857-PA at 1, 7 ("Defendants terminated Ms. Alvera's tenancy . . . only because she had been the victim of domestic abuse and because of her sex.").

[37] *Id.* at 2. Tiffani Alvera also intervened as a plaintiff on her own behalf. *Id.*

against the property management company that evicted her.[38] Up until this time, zero-tolerance policies remained relatively unchallenged with respect to the evictions of domestic violence victims.[39] When the action settled in November 2001 it ultimately became the first victory in the war against zero-tolerance evictions.[40] As a result of the settlement,[41] the defendant property management company[42] agreed not to "evict, or otherwise discriminate against tenants because they have been victims of domestic violence" at any rental property owned or managed by them.[43] The settlement agreement also required that the defendant revise all manuals, handbooks and policy directives to reflect the settlement terms, retrain its staff, and post notices on all of its properties indicating that the company would not evict a tenant on the basis of her status as a victim of domestic violence.[44] However, despite accepting the terms of the consent decree, the defendants still denied that Ms. Alvera suffered any damages or that they committed any wrong against her.[45]

Although Tiffani Alvera's challenge proved to be successful, it did not eradicate the practice of evicting domestic violence victims from public housing based upon the actions of their abusers.[46] The parties to this matter ultimately chose to resolve this action through settlement in order to avoid costly and protracted litigation.[47] Due to this lack of litigation, the terms of the settlement agreement are not binding upon PHAs that were not named

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[38] *Id.* at 2-3. In addition to naming the property management company as a defendant in this action, the complaint also named the apartment complex, as well as its general partners, resident manager and its supervising property manager as defendants. *Id.*

[39] *See* Franzen, *supra* note 1; Lewin, *supra* note 1; American Civil Liberties Union, *supra* note 1; National Organization for Women, *supra* note 1.

[40] *See, e.g.*, American Civil Liberties Union, *Settlement Reached in Case of Oregon Domestic Abuse Victim Who Faced Eviction; Important Precedent Set for Battered Women Nationwide* (Nov. 5, 2001), *at* http://www.aclu.org/news/2001/n110501a.html (statement of Ellen Johnson, Esq.) ("For too long, victims of domestic violence have lost their homes and been denied housing opportunities solely because of the behavior of their abusers – today we took a substantial step forward on the long road toward ending this kind of discrimination.").

[41] *See* Consent Decree at 11, United States v. C.B.M. Group, Inc. (D. Or. 2001) (No. CV 01-857-PA), http://www.aclu.org/court/alveraconsentdecree.pdf (last visited Mar. 10, 2002). The consent decree is binding for a period of only five years. The United States attorney will monitor the property management company in order to ensure compliance with the terms of the settlement. *Id.*; *see also* American Civil Liberties Union, *supra* note 40.

[42] *See* Franzen, *supra* note 19 (stating that defendant property management company has hundreds of properties in Oregon, Arizona, California, Nevada and Hawaii).

[43] Consent Decree at 4, *C.B.M. Group, Inc.* (No. CV 01-857-PA).

[44] *Id.* at 7-10; *see also* Frazen, *supra* note 19.

[45] Consent Decree at 4, *C.B.M. Group, Inc.* (No. CV 01-857-PA) (stating that this settlement does not impart any admission of liability on the part of the defendants).

[46] PHAs now have indirect support for implementing zero-tolerance evictions of domestic violence victims. In March 2002, the Supreme Court held that PHAs have the discretion to impose zero-tolerance evictions upon tenants for any drug related or other criminal activity. *See* discussion *infra* Part II.C.

[47] Consent Decree at 4, *C.B.M. Group, Inc.* (No. CV 01-857-PA).

parties to this suit. For the time being this settlement can only have a deterrent effect and serve as a model for other PHAs throughout the country, if they so choose to follow its example.[48]

This Note explores the harsh ramifications of applying the zero-tolerance policy[49] to victims of domestic violence. Part II will begin by discussing 42 U.S.C. § 1437d(l)(6) – the statutory basis of the policy – and President William J. Clinton's "one strike and you're out" policy. It will then explore the two standards of liability applied in the enforcement of the statutory provision – strict liability and totality of the circumstances. Part II will conclude with a discussion of *Department of Housing and Urban Development v. Rucker*,[50] the pivotal Supreme Court case that held that § 1437d(l)(6) allows for strict liability enforcement. Part III of this Note will argue that the strict liability standard is ultimately unfair and irrational in its application to domestic violence victims. It will conclude that a standard that takes into account the totality of the circumstances is the proper approach to take. Part IV of this Note will contend that the zero-tolerance policy is self-defeating because it has an adverse effect on § 1437d(l)(6)'s goal of combating crime in public housing and contravenes attempts to address domestic violence. Part V of this Note will argue that the zero-tolerance policy has a disparate impact upon domestic violence victims. Part VI of this Note will compare the zero-tolerance evictions of domestic violence victims with the practice of removing children from the custody of battered women. It will conclude that since the latter practice will likely be rejected, it provides support for prohibiting strict liability evictions of domestic violence victims. Part VII of this Note will argue that Congress should either amend § 1437d(l)(6) to incorporate a standard of liability that takes into account the totality of the circumstances or create an exception for battered women in order to adhere to the policy of protecting domestic violence victims and properly serve justice.

## II. THE ZERO-TOLERANCE POLICY

Public housing in the United States is not a right but rather a privilege.[51] Government assisted housing programs were created for the purpose of providing decent and safe living environments for low-income

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[48] *See, e.g.*, American Civil Liberties Union, *supra* note 40 (stating that plaintiffs' attorneys remarked that "the settlement agreement will be a model for ending discriminatory evictions of victims of domestic violence in housing facilities throughout the country").

[49] This Note will use the concepts "zero-tolerance," "one-strike," "strict liability," and "no-fault" interchangeably.

[50] 122 S. Ct. 1230 (2002).

[51] *See, e.g.*, Henry Cisneros, Briefing On Public Housing Policy (Mar. 27, 1996), 1996 WL 139523, at *2 ("We have only money for about a quarter of the Americans who are eligible to live in some kind of assisted housing.").

families.[52] In furtherance of this goal, PHAs utilize zero-tolerance evictions as a means of combating crime on their premises and preserving residential sanctity.[53] Such evictions have relieved many low-income housing developments from the shoot-outs and drug transactions that have prevented tenants from enjoying a peaceful living environment.[54]

### *A. Origin and History of the Zero-Tolerance Policy*

The zero-tolerance policy is based on federal statutory law, specifically 42 U.S.C.A. § 1437d(l)(6).[55] This statute originated[56] as part of the Anti-Drug Abuse Act of 1988,[57] which established an accountability provision for PHAs to include in their leases.[58] The accountability provision prohibited

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[52] 42 U.S.C.A. § 1437(a)(1)(A) (West Supp. 2002) ("It is the policy of the United States to assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families."); *see also* Thorpe v. Hous. Auth. of City of Durham, 393 U.S. 268, 281 (1969) ("One of the specific purposes of the federal housing acts is to provide a decent home and a suitable living environment for every American family that lacks the financial means of providing such a home without governmental aid.").

[53] *See, e.g.*, Nelson H. Mock, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 TEX. L. REV. 1495, 1501-02 (1998).

[54] *Id.*; *see also* William J. Clinton, Remarks by the President at One Strike Crime Symposium (Mar. 28, 1996), 1996 WL 139526, at *3.

> We know this policy works . . . [W]e know that in North Carolina, at the Greensboro Housing Authority, where this policy has been implemented, crime is down 55 percent. We know that in Georgia at the Macon Housing Authority, drug-related arrests have fallen 91 percent since the policy was implemented in 1989. In both of those cities, and in other cities all across the country where one strike has been implemented, one statistic is rising – the number of residents who feel safe.

*Id.*; Jason Dzubow, *Fear-Free Public Housing?: An Evaluation of HUD's "One Strike and You're Out" Housing Policy*, 6 TEMP. POL. & CIV. RTS. L. REV. 55, 67 (1996-1997) ("The Lucas Metropolitan Housing Authority in Toledo, Ohio reported a 24% drop in drug-related crime . . . between 1993, before their "One Strike" Policy was implemented, and 1994, the first year of implementation.").

[55] The statute reads:

> 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 the cause for termination of tenancy.

42 U.S.C.A. § 1437d(l)(6) (West Supp. 2002).

[56] *See* Dep't of Hous. and Urban Dev. v. Rucker, 122 S. Ct. 1230, 1232 (2002); Barclay Thomas Johnson, *The Severest Policy Is Not the Best Policy: The One-Strike Policy in Public Housing*, 10 J. AFFORDABLE HOUSING & CMTY. DEV. L. 234, 236 (2001).

[57] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended at 42 U.S.C.A. § 1437d(l)(5) (1989) (current version at 42 U.S.C.A. § 1437d(l)(6) (West Supp. 2002))).

[58] Leases are to provide that:

> [A] 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, including drug-related 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

any tenant, member of the tenant's household, guest[59] or other person under the tenant's control[60] from engaging in any criminal or drug-related activity on or near the housing complex and designated eviction as the penalty for participation in such conduct. [61] The passage of the Drug Abuse Act of 1988 and its codification signaled the birth of zero-tolerance evictions of both criminal tenants and innocent third parties associated with them.

In 1990, Congress amended the accountability provision of the Drug Abuse Act of 1988 through the passage of the Cranston-Gonzalez National Affordable Housing Act.[62] As a result of this Act, public housing leases provided that:

> [A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug related activity on or near 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 the cause for termination of tenancy.[63]

Several years later, the accountability provision was again amended through the passage of the Housing Opportunity Program Extension Act of 1996.[64] This amendment replaced the language "on or near such premises" with "on or off such premises,"[65] thereby increasing the sphere of authority of the

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of tenancy.

Rucker v. Davis, 237 F.3d 1113, 1116 (9th Cir. 2001), *rev'd sub nom.* Dep't Hous. & Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002), *remanded sub nom. to* Rucker v. Davis, 293 F.3d 1111 (9th Cir. 2002) (quoting 42 U.S.C.A. § 1437d(l)(5) (West 1989) (current version at 42 U.S.C.A. § 1437d(l)(6) (West Supp. 2002))).

[59] "Guest means a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant." Generally Applicable Definitions and Federal Requirements; Waivers, 24 C.F.R. § 5.100 (2002).

[60] *Id.*

> Other person under the tenant's control . . . means that the person, although not staying as a guest . . . in the unit, is, or was at the time of the activity in question, on the premises . . . because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. Absent evidence to the contrary, a person temporarily and infrequently on the premises solely for legitimate commercial purposes is not under the tenant's control.

*Id.*

[61] *See supra* note 58.

[62] Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 504, 104 Stat. 4079, 4185 (1990) (codified as amended at 42 U.S.C.A. § 1437d(l)(5) (West 1994) (current version at 42 U.S.C.A. § 1437d(l)(6) (West Supp. 2002))).

[63] 42 U.S.C.A. § 1437d(l)(5) (West 1994) (current version at 42 U.S.C.A. § 1437d(l)(6) (West Supp. 2002)).

[64] Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9(a)(2), 110 Stat. 834, 838 (1996) (codified as amended at 42 U.S.C.A. § 1437d(l)(5) (West 1994) (current version at 42 U.S.C.A. § 1437d(l)(6) (West Supp. 2002))).

[65] § 9(a)(2).

PHAs.[66] The 1996 amendment was the last alteration made to the language of the statute, although the provision was re-designated in 1998 from § 1437d(l)(5) to § 1437d(l)(6).[67]

The accountability provision of § 1437d(l)(6) is unambiguous as to the authority PHAs have to evict for drug-related and other criminal activity that threatens the residential environment. However, many PHAs did not fully comprehend the scope of their legal authority and were not enforcing the accountability provision.[68] In response to this lack of enforcement and as part of an effort to combat drugs and violent crime in public housing, President William J. Clinton introduced the "one-strike and you're out" policy in his 1996 State of the Union Address.[69] The President announced this new policy with the intent to "restore the rule of law to public housing."[70] Based on existing legislation,[71] the "one-strike and you're out" policy added two new components to allow for the proper implementation of the accountability provision by PHAs.[72]

The first new component required the Secretary of HUD to issue guidelines on how PHAs are to enforce the "one-strike and you're out" policy.[73] The enforcement guidelines incorporate several elements for "creating conditions of peacefulness and safety for residents and dealing harshly with those who would abuse, intimidate, threaten or hurt people who

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66 *See* Mock, *supra* note 53, at 1503; Johnson, *supra* note 56, at 236.

67 *See* Rucker v. Davis, 237 F.3d 1113, 1116 (9th Cir. 2001), *rev'd sub nom.* Dep't Hous. & Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002), *remanded sub nom. to* Rucker v. Davis, 293 F.3d 1111 (9th Cir. 2002); Johnson, *supra* note 56, at 236.

68 *See* Johnson, *supra* note 56, at 235.

69 William J. Clinton, State of the Union Address of the President (Jan. 23, 1996), 1996 WL 23253, at *9 ("And I challenge local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule for residents who commit crime and pedal drugs should be one strike and you're out."); *see also* Dzubow, *supra* note 54, at 56; Adam P. Hellegers, *Reforming HUD's "One-Strike" Public Housing Evictions Through Tenant Participation*, 90 J. CRIM. L. & CRIMINOLOGY 323, 324 (1999); EJ Hurst II, *Rules, Regs, and Removal: State Law, Forseeability, and Fair Play in One Strike Terminations From Federally Subsidized Public Housing*, 38 BRANDEIS L.J. 733, 740 (2000); Johnson, *supra* note 56, at 235; Mock, *supra* note 53, at 1496.

70 Clinton, *supra* note 54, at *1.

71 *Id.* at *2; *see also* Hellegers, *supra* note 69, at 335; Johnson, *supra* note 56, at 235; Mock, *supra* note 53, at 1503.

72 Clinton, *supra* note 54, at *2.

73 *Id.*

> Now there will be no more excuses, for these national guidelines tell public housing authorities the steps they must take to evict drug dealers and other criminals. They explain how housing authorities must work with tenants, with the police, with the courts, with our government to get the job done. They also tell housing authorities how to screen tenants for criminal records. With effective screening, many of the bad people we're trying hard to remove today won't get into public housing in the first place.

*Id.*

live in public housing."[74] Leases are to be drafted in such a manner as to provide a legal basis for evicting tenants.[75] They are to specifically state that involvement with guns, gangs, drugs or criminal activity is a basis for termination of tenancy[76] regardless of whether there has been an arrest or conviction.[77] The guidelines also require PHAs to screen applicants by conducting comprehensive criminal background checks.[78] The PHAs are also encouraged to obtain cooperation from tenants, police and courts in order to remain informed of the criminal activity conducted by the residents of their premises.[79]

The second component of President Clinton's "one-strike and you're out" policy required HUD to propose rules that penalize PHAs that do not combat crime and enforce the policy.[80] Although PHAs are not required to conform to the one-strike policy[81] it is beneficial for them to do so.[82] Nonconformity can result in penalties that include increased federal supervision and loss of additional federal funding.[83]

### *B. Standards of Liability*

Federal law mandates the inclusion of accountability provisions in public housing leases, and the "one-strike and you're out" policy strongly encourages their enforcement, yet there is no set standard as to how these provisions are to be interpreted.[84] Congress enacted § 1437d(l)(6) without specifying a standard of liability for its enforcement. "The statutory provision does not expressly address the level of personal knowledge or fault that is required for eviction, or even make it clear who can be evicted. Although the statute permits 'termination of tenancy,' it does not answer the question of whose tenancy."[85] As a result, there are essentially two standards of

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[74] Cisneros, *supra* note 51, at *1.

[75] *Id.*

[76] *Id.*

[77] *See, e.g.*, Dzubow, *supra* note 54, at 71.

[78] *See, e.g.*, Clinton, *supra* note 54, at *2; Dzubow, *supra* note 54, at 71.

[79] *See, e.g.*, Clinton, *supra* note 54, at *2; Dzubow, *supra* note 54, at 71.

[80] Clinton, *supra* note 54, at *2.

[81] *See, e.g.*, Dzubow, *supra* note 54, at 70; Hellegers, *supra* note 69, at 336.

[82] HUD is required to evaluate individual PHAs based on a number of factors such as the number of vacancies, the amount of federal funds that have not been used, outstanding maintenance orders, average repair times and inspection rates. In addition to these factors, enforcement of the one-strike policy is used as a criterion whose adherence can lead to a higher grade for the PHA. *See, e.g.*, Dzubow, *supra* note 54, at 70; Hellegers, *supra* note 69, at 337; Mock, *supra* note 53, at 1503.

[83] *See, e.g.*, Dzubow, *supra* note 54, at 70; Hellegers, *supra* note 69, at 336; Mock, *supra* note 53, at 1503.

[84] *See, e.g.*, Johnson, *supra* note 56, at 242; Mock, *supra* note 53, at 1503.

[85] See, e.g., Rucker v. Davis, 237 F.3d 1113, 1120 (9th Cir. 2001), *rev'd sub nom.* Dep't Hous. & Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002), *remanded sub nom. to* Rucker v. Davis, 293 F.3d 1111 (9th Cir. 2002).

liability applied in the enforcement of § 1437d(l)(6).[86] One standard encompasses a no-fault, strict liability approach,[87] while the other incorporates the elements of fault, knowledge, forseeabilty and causal nexus.[88]

The strict liability standard is essentially a per se termination of a tenant's lease.[89] Under this approach only the criminal activity and its connection with the tenant and/or apartment are taken into consideration.[90] It does not take into account knowledge, fault or any other mitigating factors.[91] Courts adopting this interpretation have generally construed the accountability provisions as "unambiguous contract language" that "must be given its plain meaning."[92] The application of the strict liability standard has resulted not only in a decrease of crime within public housing,[93] but also in the evictions of many innocent tenants and their families.[94]

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[86] *See* Johnson, *supra* note 56, at 242; Mock, *supra* note 53, at 1504.

[87] *See* Johnson, *supra* note 56, at 242; Mock, *supra* note 53, at 1504.

[88] *See* Johnson, *supra* note 56, at 242; Mock, *supra* note 53, at 1504.

[89] *See, e.g.*, Johnson, *supra* note 56, at 242.

[90] *Id.*

[91] *See.* Johnson, *supra* note 56, at 242.

[92] *See, e.g.*, Burton v. Tampa Hous. Auth., 271 F.3d 1274, 1278 (11th Cir. 2001); City of South San Francisco Hous. Auth. v. Guillory, 49 Cal. Rptr. 2d 367, 370 (Super. Ct. 1995) ("A lease between a housing authority and a tenant in California is a contract. Where the terms of the lease are clear and unambiguous, the terms of the contract must be enforced."); *see also* Johnson, *supra* note 56, at 242.

[93] *See, e.g.*, sources cited *supra* note 54.

[94] *See, e.g.*, Syracuse Hous. Auth. v. Boule, 701 N.Y.S.2d 541 (App. Div. 1999). This case involved a tenant who was evicted from her apartment because while she was at work her babysitter engaged in drug-related criminal activity on or near the premises of the public housing complex where she resided. *Id.* The New York Appellate Division rejected the tenant's claim that good cause did not exist for her eviction due to her lack of knowledge and consent to the criminal conduct. *Id.* at 542. The court upheld the eviction concluding that the housing authority was not bound to exercise its discretion and consider mitigating factors in its decision to evict. *Id.*

In Housing Authority of New Orleans v. Green, 657 So. 2d 552 (La. Ct. App. 1995), the tenant, Ms. Green, was evicted from her apartment because her daughter's overnight guest had secretly hidden drugs in the closet of her apartment. *Id.* The Louisiana Court of Appeal was faced with the question as to whether a tenant may be evicted without having knowledge of the criminal activity. *Id.* This question was answered in the affirmative. *Id.* Although Congress may have not intended for evictions to occur in the absence of knowledge, § 1437d(l) was enacted without a knowledge requirement. *Id.* at 554. The court concluded that it is not unreasonable for the Housing Authority of New Orleans ("HANO") to strictly enforce the zero-tolerance policy in furtherance of maintaining a safe environment for its tenants. *Id.* at 555.

The Eleventh Circuit also upheld the eviction of ignorant tenants in Burton v. Tampa Housing Authority, 271 F.3d 1274, 1275 (11th Cir. 2001). The Tampa Housing Authority ("THA") commenced an action to evict Ms. Burton and her family because her adult son, who was listed as a household member on her lease, was arrested for participating in a drug transaction on the premises. *Id.* at 1276. Ms. Burton had no knowledge of this illegal activity. *Id.* The court found § 1437d(l)(6) to be "unmistakably clear" and concluded that it did authorize the eviction of ignorant tenants. *Id.* at 1277. Furthermore, the Eleventh Circuit noted that "the eviction of ignorant tenants due to the conduct of those associated with them is supported by a 'reasonable rationale based on sound public policy.'" *Id.* at 1278 (quoting Rucker v. Davis, 237 F.3d 1113, 1131 (9th Cir. 2001) (Sneed, J., dissenting)).

In contrast to strict liability, a standard based on fault, knowledge, forseeabilty and causal nexus is less inclusive[95] and warrants analysis on an individualized basis. This standard, by taking into account the totality of the circumstances, avoids punishing the innocent and imposes liability only on those having some responsibility for the criminal acts. [96]

HUD has provided no assistance in clarifying the standard of liability to be applied in the enforcement of § 1437d(l)(6).[97] According to its regulation that corresponds with the requirement for accountability lease provisions:[98]

> [T]he PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the lease holder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.[99]

At first glance, this provision leaves the impression that the PHAs are required to consider the totality of the circumstances when deciding to evict tenants. However, the operative word in the language of this provision is

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[95] *See, e.g.*, Mock, *supra* note 53, at 1528.

[96] *See, e.g.*, Tyson v. New York City Hous. Auth., 369 F. Supp. 513 (D.C.N.Y. 1974). This case involved a class action suit brought on behalf of tenants that faced eviction "solely and exclusively because of the misdeeds of [their] adult child" who did not reside with them. *Id.* at 516. The New York District Court noted that "when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt . . . ." *Id.* at 518-519 (quoting Scales v. United States, 367 U.S. 203, 224-225 (1961)). The court concluded that some causal nexus must exist between the tenant's own conduct and the basis for the eviction. *Id.* at 519. As a result, New York City Housing Authority's ("NYCHA") motion to dismiss was denied because its reliance on the existence of a parent-child relationship was insufficient to satisfy the causal nexus requirement. *Id.*

In Charlotte Housing Authority v. Patterson, 464 S.E.2d 68 (N.C. Ct. App. 1995), eviction proceedings were brought against the tenant because her son, who resided with her, shot and killed a man. *Id.* at 69-70. The tenant had no knowledge of the shooting until after it occurred, the gun used was not kept in her home, nor did it belong to anyone in her household. *Id.* at 70. The North Carolina Court of Appeals interpreted § 1437d(l)(5) and the lease to have no requisite of personal fault. *Id.* at 72. However, "legislative history makes clear that Congress did not intend the statute to impose a type of strict liability whereby the tenant is responsible for all criminal acts regardless of her knowledge or ability to control them." *Id.* at 72. The court found this legislative intent to be controlling and concluded that it would be "inconsistent with the federal statute . . . and indeed shock our sense of fairness" if Ms. Patterson, and her family members who were not personally at fault in the shooting, were evicted from their home. *Id.* at 73.

[97] *See* Johnson, *supra* note 56, at 245.

[98] Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4(f)(12)(i) (2002). This provision requires PHAs to incorporate a lease provision making tenants responsible for assuring that no tenant, member of the tenant's household, or guest engages in "(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or (B) Any drug-related criminal activity on or off the premises[.]" *Id.*

[99] Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4(l)(5)(vii)(B) (2002).

"may." This regulation merely gives the PHAs the discretion to decide whether they will take into account extraordinary or mitigating circumstances when implementing § 1437d(l)(6) evictions.[100] In addition, there is commentary from HUD that appears to support a strict liability approach. The Department has stated:

> Contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and a valuable tool for management of the housing. The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.[101]

HUD further noted that "in practice it will be extremely difficult for the PHA to show that the tenant knew, could have foreseen, could have prevented, or failed to take all reasonable measures to prevent crime by a household member."[102] In effect, this commentary, as well as the language of the regulation, provides PHAs with the option of selecting between strict liability and the totality of the circumstances rather than establishing a uniform standard of liability.

### *C. The Debate Over Congressional Intent*

In the absence of an explicit standard of liability, PHAs maintain the freedom to interpret and apply § 1437d(l)(6) as they see fit. Although both standards of liability aide in eradicating the "epidemic of drug related crime and violence in public housing,"[103] their approaches, as well as their impact, are quite different. The totality of the circumstances standard is deferential and imposes eviction on an ad hoc basis. Strict liability, on the other hand, is more severe in its approach. It imposes eviction on an entire household even in the absence of knowledge or fault for the criminal activity.[104] As a result, many innocent tenants fall prey to the strict liability standard.[105] Since these innocent evictions do not necessarily foster § 1437d(l)(6)'s goal of crime prevention,[106] it leaves one to question whether Congress intended the

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[100] *See* Hellegers, *supra* note 69, at 337.

[101] Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51560-01, 51567 (Oct. 11, 1991).

[102] *Id.*

[103] Rucker v. Davis, 237 F.3d 1113, 1128 (9th Cir. 2001), *rev'd sub nom.* Dep't Hous. & Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002), *remanded sub nom. to* Rucker v. Davis, 293 F.3d 1111 (9th Cir. 2002) (Sneed, J., dissenting).

[104] *See* Johnson, *supra* note 56, at 242.

[105] *See, e.g.*, cases cited *supra* note 94.

[106] *See, e.g., Rucker*, 237 F.3d at 1121 ("[E]victing the innocent tenant will not significantly reduce drug-related criminal activity in public housing, since the tenant has not engaged in any such activity personally or knowingly allowed such activity to occur.").

application of the strict liability standard.[107]

The pivotal case regarding congressional intent is *Department of Housing and Urban Development v. Rucker*,[108] in which the Supreme Court reversed an en banc court of appeals decision[109] and held that § 1437d(l)(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."[110] This case involved four elderly tenants who were threatened with eviction because members of their households engaged in drug-related criminal activity.[111] In each situation, the tenants either had no knowledge of the criminal activity or took measures to prevent it.[112]

The Supreme Court dismissed several arguments made by the Ninth Circuit against the strict liability standard. The first argument involved the text of § 1437d(l)(6), namely Congress' use of "any" to modify "drug-related criminal activity" and the phrase "or other person under the tenant's control." The court of appeals found that the text of § 1437d(l)(6) alone did not support any of the interpretations proffered by the parties.[113] Instead,

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[107] Several courts have passed on the issue of congressional intent. *See, e.g.*, Hous. Auth. of New Orleans v. Green, 657 So. 2d 552, 554 (La. Ct. App. 1995) ("That a [c]ongressional committee may not have intended for tenant evictions to take place in the absence of knowledge, does not change the fact that when the Congress as a whole enacted this law it did so without the imposition of a knowledge requirement."); Charlotte Hous. Auth. v. Patterson, 464 S.E.2d 68, 72 (N.C. Ct. App. 1995).

> With no mention of personal fault, the statute . . . provide[s] that criminal activity by a member of the tenant's household is cause for ending a tenancy . . . . The legislative history makes clear that Congress did not intend the statute to impose a type of strict liability . . . regardless of [] knowledge or ability to control [the criminal acts].

*Id.*

[108] 122 S. Ct. 1230 (2002).

[109] *See Rucker*, 237 F.3d at 1126 (holding that "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(l)(6) does not authorize the eviction of such a tenant").

[110] *Rucker*, 122 S. Ct. at 1233.

[111] The Oakland Housing Authority ("OHA") instituted eviction proceedings against the following tenants: (1) Pearlie Rucker, age sixty-three, because her mentally disabled daughter, listed on the lease as a resident, was found in possession of cocaine three blocks from the apartment; (2) William Lee, age seventy-one, and Barbara Hill, age sixty-three, because their grandsons were caught smoking marijuana in the apartment complex parking lot; and (3) Herman Walker, age seventy-five and disabled, because his caregiver and two guests were found with cocaine in his apartment on three occasions. *Rucker*, 122 S. Ct. at 1232; *Rucker*, 237 F.3d at 1117.

[112] *See Rucker*, 237 F.3d. at 1117. Rucker regularly searched her daughter's room for drugs, but never found any evidence or observed signs of use. *Id.* Hill and Lee denied knowledge of any drug-related activity by their grandsons. *Id.* Walker, who was not capable of living independently, fired his caregiver. *Id.*

[113] *Id.* at 1120. HUD argued that the term "any" essentially meant "all," thereby permitting eviction of all tenants regardless of involvement or knowledge. *Id.* at 1119-20. HUD also

the court looked to the place of the provision in the "overall statutory scheme and 'fit, if possible, all parts into a harmonious whole.'"[114] The Ninth Circuit concluded that as a result of reading section (l) as a "harmonious whole," Congress intended subsection (6) "to be construed as a reasonable lease term and to permit eviction only if there is good cause."[115] Therefore, allowing the eviction of tenants who had no knowledge or personal involvement in the criminal activity would be irrational,[116] and would require unreasonable lease terms and eviction without good cause in contravention of congressional intent.[117] The Supreme Court, on the other hand, concluded that the plain language of § 1437d(l)(6) granted PHAs the discretion to evict tenants absent any knowledge of criminal activity.[118] "Congress' decision not to impose any qualification in the statute, combined with its use of the term 'any' to modify 'drug-related criminal activity,' precludes any knowledge requirement."[119] The Court reasoned that since the word "any" has an "expansive meaning,"[120] the text of § 1437d(l)(6) applies to all drug-related activity, not just that which the tenant knew or should have known about.[121] Furthermore, the Supreme Court noted that the phrase "under the tenant's control" means "control in the sense that the tenant has permitted access to the premises," and that it only applies to "other person."[122] This in turn dismisses any contention that "under the tenant's control" refers to the ability of a tenant to influence or affect the behavior of household members or guests.

Both courts also examined § 1437d(l)(6) in the context of a related

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contended that the phrase "under the tenant's control" only modified "other person" and that "'control' means only that this other person has the tenant's consent" to be in the apartment. *Id.* at 1120. The tenants, on the other hand, maintained that "'control' involves 'the exercise of a restraining or directing influence' over and other, and that this applies to . . . household members, guests *and* other persons." *Id.* (emphasis in original).

114 *Id.* at 1120 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

115 *Id.* The Ninth Circuit relied on two subsections in particular in coming to this conclusion. The first subsection requires that each public housing agency utilize leases that "do not contain unreasonable terms and conditions." 42 U.S.C.A. § 1437d(l)(2) (West Supp. 2002). The second subsection requires "that the public housing agency may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause." 42 U.S.C.A. § 1437d(l)(5) (West Supp. 2002).

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

117 *Id.* The Ninth Circuit also relied on legislative history in coming to this conclusion. *See infra* text accompanying notes 130-35.

118 *Rucker*, 122 S. Ct. at 1234.

119 *Id.* at 1233.

120 *Id.* According to the Supreme Court, the word "any" means "one or some indiscriminately of whatever kind." *Id.* (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)).

121 *Id.*

122 *Id.* at 1234. This interpretation of the language of § 1437d(l)(6) by the Supreme Court clearly supports HUD's argument and rejects that made by the aggrieved tenants. *See supra* note 113.

statutory provision – the civil forfeiture statute – and came to different conclusions. The civil forfeiture statute, which was amended as part of the Anti-Drug Abuse Act of 1998,[123] the same Act that created § 1437d(l)(6),[124] provides an "innocent owner"[125] exception for leaseholds subject to forfeiture due to the use of the property in drug-related criminal activities.[126] The Ninth Circuit presumed that since § 1437d(l)(6) and the civil forfeiture statute governed the same subject matter and were enacted simultaneously as part of the Anti-Drug Abuse Act, Congress intended that they be read consistently.[127] In other words, the court of appeals concluded that the knowledge requirement of the civil forfeiture act applied equally to § 1437d(l)(6).[128] The Supreme Court rejected this interpretation. Rather, the Court rationalized that since "Congress knew exactly how to provide an 'innocent owner' defense,"[129] and had not explicitly enacted one for § 1437d(l)(6),[130] such a defense should not implicitly be read into the provision.

Legislative history was also a topic of disagreement among the Ninth Circuit and the Supreme Court. The court of appeals, in its determination of congressional intent, gave great weight to a 1990 Senate report, which provided that:

> The committee anticipates that each case 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

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123 *See Rucker*, 122 S. Ct. at 1234; *Rucker*, 237 F.3d at 1121.

124 *See Rucker*, 122 S. Ct. at 1234.

125 The term "innocent owner" is defined as an owner who "did not know of the [illegal] conduct giving rise to the forfeiture[,] or upon learning of the [illegal] conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." 18 U.S.C.A. § 983(d)(2)(A)(i) & (ii) (West Supp. 2002).

126 *See Rucker*, 122 S. Ct. at 1234. The civil forfeiture statute provided that "no property shall be forfeited under this paragraph . . . by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of the owner." 21 U.S.C. § 881(a)(7) (1994).

127 *See Rucker*, 237 F.3d at 1122.

128 *See id.*

> Although different processes, the purpose of both is the same. Moreover, the result is the same: the tenant loses the leasehold interest, which is taken over by a governmental entity. It makes little sense to provide protections for the innocent tenant from the federal government but not from local housing authorities.
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> . . . .
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> . . .To say that Congress could have drafted the [innocent owner] defense more explicitly in § 1437d(l)(6) is not to say that it did not do so at all.

*Id.*

129 *Rucker*, 122 S. Ct. at 1234.

130 *See id.*

> steps under the circumstances to prevent the activity.[131]

The Senate report also contained a similar remark with regard to the section eight housing assistance program: "The [c]ommittee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exist."[132] Based on these passages, the Ninth Circuit concluded that Congress did not intend for the eviction of innocent tenants.[133] The Supreme Court, in contrast, held that it was not even necessary to consult legislative history since it found the text of § 1437d(l)(6) to be unambiguous.[134] However, the Court still addressed the matter and noted that the Senate report relied upon by the Ninth Circuit was for an amendment that was never enacted.[135] Furthermore, when § 1437d(l)(6) was amended in 1996, Congress "'presumed to be aware' of HUD's interpretation rejecting a knowledge requirement, made no other change to the statute."[136] Thus, the court of appeals' conclusion was without merit.

The next issue addressed by the Ninth Circuit was the potential "absurd results"[137] that can result from applying § 1437d(l)(6) without a requirement of personal knowledge or fault. Noting that "[it] is well established [] not [to] assume Congress intended an odd or absurd result,"[138] the court of appeals concluded that the "absurdity and unjustness [that can potentially result from a strict liability standard] confirms that HUD missed the mark in discerning Congress'[] intent."[139] Furthermore, in response to an argument regarding Congress' failure to amend § 1437d(l)(6), the Ninth Circuit pointed out that:

> [t]he One Strike policy, which has led to increased enforcement and less exercise of discretion by the PHA's, was only announced in 1996,

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131 *Rucker*, 237 F.3d at 1123 (quoting S. REP. NO. 101-316, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941).

132 *Id.* (quoting 1990 U.S.C.C.A.N. 5763, 5889).

133 *See Rucker*, 237 F.3d at 1123.

134 *See Rucker*, 122 S. Ct. at 1234.

135 *See id.* n.4. The Supreme Court also did not agree with the Ninth Circuit's interpretation of the 1990 Senate report. Rather, the Court credited Judge Sneed's dissenting opinion and noted that "the passages may plausibly be read as a mere suggestion about how local public housing authorities should exercise the 'wide discretion to evict tenants connected with drug-related criminal behavior' that the lease provision affords them." *Id.* (quoting *Rucker*, 237 F.3d at 1134 (Sneed, J., dissenting)).

136 *Id.* The amendment to § 1437d(l)(6) referred to by the Supreme Court consisted of changing "on or near" to "on or off." *See supra* text accompanying notes 64-66.

137 *Rucker*, 237 F.3d at 1124.

138 *Id.*

139 *Id.* The Ninth Circuit addressed a hypothetical situation in coming to this conclusion. In response to a remark made by the dissent concerning the Supreme Court's dislike for consideration of hypothetical situations, the majority noted that "the Court itself has clearly looked beyond the facts of individual cases to the broader ramifications of a given interpretation when evaluating whether such interpretation creates absurd results." *Id.*

> the same year as the last substantive amendment to the section. Only now are cases beginning to surface which illustrate the breadth of HUD's interpretation and which may attract enough attention to merit reconsideration or clarification of the statute by Congress.[140]

The Supreme Court did not accept this supposition. The Court noted that § 1437d(l)(6) "does not *require* the eviction of any tenant who violate[s] the lease provision,"[141] but rather allows local PHAs to make eviction determinations because they are in the best position to take into account mitigating circumstances.[142] In addition, "[s]trict liability maximizes deterrence and eases enforcement difficulties."[143] Due to the devastating effect drugs and violence have on public housing,[144] "it was reasonable for Congress to permit no-fault evictions in order to 'provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs.'"[145]

Finally, the Ninth Circuit invoked the canon of constitutional avoidance.[146] The court found that a strict liability interpretation of § 1437d(l)(6) would "raise serious questions under the Due Process Clause of the Fourteenth Amendment"[147] because it penalizes conduct that involves no intentional wrongdoing.[148] The Supreme Court, on the other hand, concluded that the application of this canon was misplaced due to the unambiguous nature of § 1437d(l)(6).[149] Furthermore, the Court found the due process concerns to be unfounded.[150] The Ninth Circuit had relied upon two cases that dealt with government action as a sovereign, whereas, in the case at hand, the government was "acting as the landlord of property that it owns, invoking a clause in a lease [that the tenants] agreed [to] and [that] Congress [] required."[151]

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140 *Id.*

141 *Rucker*, 122 S. Ct. at 1235.

142 *See id.* Mitigating circumstances include "the degree to which the housing project suffers from 'rampant drug-related or violent crime,' 'the seriousness of the offending action,' and the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action." *Id.*

143 *Id.*

144 *See id.* Such effects include "'murders, muggings, and other forms of violence against tenants,' and [] the deterioration of the physical environment that requires substantial governmental expenditures." *Id.* (quoting 42 U.S.C. § 11901(4) (1994 ed., Supp. V)).

145 *Id.*

146 *See Rucker*, 237 F.3d at 1124 ("[W]henever possible, a statute should be construed to avoid substantial constitutional concerns.").

147 *Id.*

148 *Id.* at 1124-25 (citing Scales v. United States, 367 U.S. 203, 224-25 (1961); Southwestern Tel. & Tel. Co. v. Danaher, 283 U.S. 482, 490 (1915)).

149 *See Rucker*, 122 S. Ct. at 1235.

150 *See id.* at 1236.

151 *Id.* The Supreme Court noted that instead, a deprivation of due process would occur in the state court where the OHA brought the unlawful detainer action against the tenants. *Id.*

As a result of *Rucker*,[152] PHAs maintain the discretion to enforce § 1437d(l)(6) without a knowledge or fault requirement.[153] Furthermore, the holding of *Rucker* is not confined solely to drug-related activity, as § 1437d(l)(6) encompasses other types of crime.[154] Thus, there exists a vast potential for innocent evictions and extreme cause for concern. Although the application of the strict liability standard has indirect support from the highest court of this nation,[155] this support does not justify the severe consequences strict liability imposes upon those tenants that are not personally at fault for criminal activity. This injustice is even more apparent when victims of domestic violence are subjected to strict liability evictions.

## III. THE APPLICATION OF THE STRICT LIABILITY STANDARD TO VICTIMS OF DOMESTIC VIOLENCE

It is apparent that Tiffani Alvera's eviction resulted from the housing management's application of the strict liability approach to § 1437d(l)(6). Ms. Alvera took all the proper measures to alleviate her abusive situation. She immediately obtained a restraining order, presented it to housing management and severed all ties with her abusive husband.[156] This eviction signifies that none of Ms. Alvera's preventative measures were taken into consideration. Rather, Ms. Alvera's status as a victim of a crime was used against her. Such an eviction only leads one to question how justice is served when the strict liability standard is applied to victims of domestic violence.

### A. *The Application of the Strict Liability Standard to Domestic Violence Victims is Unjustified and Irrational*

In *Rucker*, the Supreme Court was not given the opportunity to address the effects of strict liability evictions on domestic violence victims because the case was premised on drug-related activity.[157] Its holding, on the other hand, does impact domestic violence victims living in public housing. Domestic violence is a crime[158] and thus falls within the purview of §1437d(l)(6).

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[152] 122 S. Ct. 1230.

[153] *See id.* at 1233.

[154] *See supra* note 55.

[155] The strict liability standard has support from the Supreme Court in the sense that the Court held that § 1437d(l)(6) does not prohibit its enforcement.

[156] United States v. C.B.M. Group, Inc., No. 01-857-PA, 5 (D. Or., filed July 10, 2001); *see also* Franzen, *supra* note 1; Lewin, *supra* note 1; National Organization for Women, *supra* note 1.

[157] This issue was briefly mentioned during oral arguments by the attorney for the evicted tenants, but received no response from the Supreme Court. *See* Transcript of Oral Argument, Dep't of Hous. and Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002) (Nos. 00-1770, 00-1781), 2001 WL 334536, at *48.

[158] *Contra* JONES, *supra* note 22, at 28.

> [I]n a great many jurisdictions, even today, a domestic assault is not regarded as a *real* assault – that is, not really criminal. When police refuse to arrest, prosecutors

Although the parties involved are engaged in an intimate relationship, the distinction between their roles must be recognized. The abuser engages in the criminal activity; the victim is the innocent object of these criminal acts.[159] Battered women are plagued on a daily basis with the possibility of being subjected to yet another brutal assault,[160] or even worse, death at the hands of their partners.[161] Unfortunately, according to a strict liability standard, the domestic violence victim is treated no differently than the perpetrator and is attributed equal responsibility for the crime.[162]

An argument can be made that the eviction of domestic violence victims is warranted due to the failure of the victims to remove themselves from their abusive situations. The courts have encountered numerous cases where tenants have been subjected to eviction due to the actions of third parties and have held that the evictions were warranted.[163] In such cases, the courts have argued that these tenants were not being punished for the acts of another, but rather for their own failure to prevent the criminal activity.[164]

Despite the justification for these no-fault evictions, such an argument is completely misplaced with respect to victims of domestic violence. Domestic violence is of a different nature than drugs, gangs and other violent crimes because it involves intimate partners.[165] It encompasses

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> to prosecute, and judges to sentence a man because the victim he assaulted is (or was) his wife or girlfriend, the state redefines this criminal assault against a woman as a special category of violence immune from criminal law. The state magically transforms a crime into a non-crime.

*Id.* (emphasis in original).

159 *See, e.g.*, Brief of the Amici Curiae Nat'l Network to End Domestic Violence et al. at 12, Dep't of Hous. and Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002) (Nos. 00-1770, 00-1781), 2001 WL 1663790, at *10 ("Women are not engaging in criminal activity when they are beaten or abused in their home."); JONES, *supra* note 22, at 26 ("Faced with a typical battering case, the law remains judiciously 'neutral,' weighing the 'adversaries' in the scales of 'justice' as though they were equally matched, quarreling man to man, instead of what they are: a criminal and a crime victim.").

160 *See* JONES, *supra* note 22, at 93 ("In the extreme, physical violence passes over into torture: sleep deprivation, burns, electric shock, bondage, semi-starvation, choking, near drowning, exposure, mutilation, rape, forcible rape with objects or animals, and so on.").

161 *See, e.g.*, Ethan Breneman Lauer, *Housing and Domestic Abuse Victims: Three Proposals for Reform in Minnesota*, 15 LAW & INEQ. 471, 479-80 (1997).

162 *See, e.g.*, Mock, *supra* note 53, at 1517 (stating the proposition that the strict liability interpretation of third party evictions could be used against victims of crime).

163 *See, e.g.*, Burton v. Tampa Hous. Auth., 271 F.3d 1274, 1276 (11th Cir. 2001) (upholding an eviction despite the fact the tenant had no knowledge that her son participated in a shooting and the gun was not kept in her home); Syracuse Hous. Auth. v. Boule, 701 N.Y.S.2d 541 (App. Div. 1999) (upholding the eviction of a tenant for the drug-related activity her babysitter engaged in while she was at work); Hous. Auth. of New Orleans v. Green, 657 So. 2d 552 (La. Ct. App. 1995) (upholding an eviction despite the fact the tenant had no knowledge that her daughter's overnight guest had secretly hidden drugs in her closet).

164 *See, e.g.*, Willock v. Schenectady Mun. Hous. Auth., 706 N.Y.S.2d 503, 505 (App. Div. 2000) ("Although petitioner claims that she was unaware that the guest in her apartment was in possession of marijuana, the lease specifically provides that it was the petitioner's responsibility to prevent any guests from conducting illegal activities.").

165 Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a*

elements foreign to these other crimes that must be given deference.[166] Domestic violence is a personal crime[167] that involves a pattern of abusive and controlling behaviors[168] that become more frequent and intense over time.[169] The range of pressures exerted on domestic violence victims makes it almost impossible for them to leave the abusive relationship.[170] Domestic

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*Problem Solving Approach*, 27 W. ST. U. L. REV. 1, 4 (1999/2000).

> Without question, the relationship between the perpetrator and the victim makes domestic violence different from the prototypical "stranger" crimes. Unlike participants in a barroom brawl or street skirmish, perpetrators of domestic violence present a particularly high risk for continuing, even escalating violence against the complainant as they seek further control over her choices and actions. Unlike victims of random attacks, battered women offer compelling reasons – like fear, economic dependence or affection – to feel ambivalent about cooperating with the legal process.

*Id.*

166 *See, e.g.*, *id.*

167 *See, e.g.*, JONES, *supra* note 22, at 27.

> Today, . . . when [battered women] sue . . . for violat[ion] [of] their constitutional rights . . . they are told that our Constitution is merely a charter of 'negative liberties,' forbidding the state to deprive its citizens of life, liberty, or property, but in no way obliging it to protect them against 'private violence' . . . But from the standpoint of women and children – the common objects of 'private violence' – this perspective is inappropriate, and cruelly so . . . [T]his 'hands off view of the law effectively abets the batterer . . . and turns a deaf ear to the battered woman,' who often has no other options . . . [T]he legal concept of privacy (which usually means *male* privacy) 'operates as a mask for inequality, protecting male violence against women.' Thus, the law is 'not separate from the violence' against women, but part of it, for the failures of the law and those charged with enforcing it to intervene in 'domestic violence' are 'public, not private, actions.'

*Id. But cf.*, Kaye, *supra* note 165, at 2.

> In recent years . . . public attitudes toward domestic violence have changed. No longer viewed as just a private family matter, domestic violence is now recognized as a public policy issue with major implications for the health and safety of women and children. This new awareness, in turn, is leading many to question the adequacy of traditional approaches to cases involving violence between intimates.

*Id.*

168 *See* Eastside Domestic Violence Program, *What Is Abuse?*, *at* http://www.edvp.com/AboutDV/ whatisabuse.htm (last visited Feb. 4, 2002). Some examples of abuse domestic violence victims endure are emotional abuse, isolation from families and friends, economic abuse, actual or threatened physical harm, sexual assault, stalking, harassment and intimidation. *Id.*; *see also* JONES, *supra* note 22, at 89 (stating the proposition that abusive behavior is a method of control in which the abuser "trains 'his' woman to be what he wants her to be").

169 *See* Eastside Domestic Violence Program, *supra* note 168.

170 *See* Lauer, *supra* note 161, at 479; *see also* Melissa A. Trepiccione, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable Solution When Her Child Witnesses Domestic Violence?*, 69 FORDHAM L. REV. 1487, 1510 (2001) ("A woman . . . may remain with her batterer for a multitude of reasons . . . fear of violence toward herself or her children . . . or apprehension of losing her children to child protective services."); Frank M. Ochberg, M.D., *Understanding the Victims of Spousal Abuse*, *at* http://www.sourcemaine./com/gift/Html/spusal.html (last visited Feb. 8, 2002).

> For some, there is simply no exit. She has no resources of her own. Her children need her. She is terrified of the police. Social workers are people who can declare you an unfit mother . . . There is no federal witness protection program for domestic assault victims. Her fear is real, the threat is real, the pathway to

violence victims essentially lose their capacity to function as individuals and become subject to their abusers' domination and intimidation tactics.[171] Fear of further bodily harm, and even death, overwhelms these victims and eradicates any thought of leaving the abusive relationship.[172] Economic deprivation and fiscal dependence also burden the prospect of exodus for battered women.[173] "Violence not only makes women poor, it keeps women poor."[174] This proclivity toward poverty presents domestic violence victims with the difficult task of choosing between abuse and homelessness.[175] Domestic violence victims also remain in their abusive relationships due to internal factors such as low self-esteem and dependence upon their abusers for emotional support.[176] Extraneous pressures stemming from society, family, religion and culture also play a role in deterring flight.[177]

It is the policy of the United States to provide for fair housing.[178] In light of all the pressure that exists to remain in abusive relationships,[179] it is

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freedom cannot be found.

*Id.*

171 *See, e.g.*, JONES, *supra* note 22, at 88 ("It's vital to understand that battering is not a series of isolated blow-ups. It is a process of deliberate intimidation intended to coerce the victim to do the will of the victimizer.").

172 *See, e.g.*, Lauer, *supra* note 161, at 479-80.

> Many victims describe the kind of fear they live with every day as an 'agonizing fear of death' . . . That level of trepidation may actually increase when an abuser threatens a victim he suspects is trying to leave. Abuse victims have good cause to fear separation as greater bodily harm often occurs when the woman flees.

*Id.; see also* Kaye, *supra* note 165, at 4.

173 *See, e.g.*, Symposium, *A Leadership Summit: The Link Between Violence and Poverty in the Lives of Women and Their Children*, 3 GEO. J. ON FIGHTING POVERTY 5 (1995) ("For many women and children, poverty is caused, exacerbated, or prolonged by an abusive relationship. Women's efforts to flee are hampered, and often thwarted, by the economic deprivation that accompanies domestic violence."); Lauer, *supra* note 161, at 480 ("The abuser may prevent the victim from establishing independent financial security, forcing the woman to choose between staying with him or 'plunging . . . into poverty and homelessness.'").

174 Symposium, *supra* note 173, at 6.

175 *See, e.g.*, American Civil Liberties Union, *supra* note 29 (reporting that in a survey conducted by the U.S. Conference of Mayors, fifty-six percent of cities cited domestic violence as a primary cause of homelessness); Lauer, *supra* note 161, at 483.

176 *E.g.*, Elizabeth Barravecchia, *Expanding the Warrantless Arrest Exception to Dating Relationships*, 32 MCGEORGE L. REV. 579, n.24 (2001).

177 *See* JONES, *supra* note 22, at 242 ("[M]any members of the clergy still adhere to family values . . . and . . . maintain that a wife's duty is to love and cherish her husband, even when he beats her nearly to death."); Barravecchia, *supra* note 176, n.24; Lauer, *supra* note 161, at 481.

> [T]he victim has been raised to believe that the success or failure of her relationship is a reflection of her worth as a woman; the battering is characterized as her failure to maintain her relationship. The victim's family, even with the awareness of the violence, may advise her to remain with the abuser.

*Id.*

178 Fair Housing Act of 1968, 42 U.S.C.A. § 3601 (West 1995).

179 *See* Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency, in* THE PUBLIC NATURE OF PRIVATE VIOLENCE 59, 73 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

unjustified and irrational to subject domestic violence victims to strict liability evictions[180] based on their failure to prevent or foresee the criminal activity. "When a tenant is a victim of domestic abuse who may feel that she does not exist, or who may be attacked while she is sleeping, it would truly shock one's sense of fairness to assign her personal responsibility for disturbing the neighbors. A victim who is awake has no greater capacity to foresee or prevent violence which violates the lease."[181] Furthermore, abusive partners engage in coercive tactics that deceive their victims and convince them that the violence is permanently over.[182] Often labeled "honeymoon phases,"[183] these "seductive periods of male contrition"[184] or "good days"[185] involve apologies, indulgences and recesses from physical abuse.[186] As a result, battered women "look to the good"[187] and attempt to forget the past abuse.[188] With this in mind, how can liability justifiably be placed upon domestic violence victims for not preventing or foreseeing violent behavior that they believed would never happen again?

It is also utterly impossible for battered women to control the conduct of their abusive partners for the purpose of compliance with lease provisions.[189] To control is to "exercise restraining or directing influence over; to have power over."[190] In abusive relationships, the violent partner maintains all the control, not the victim.[191] This control can evade all aspects of a battered woman's life.[192] A battered woman's life is no longer her own, rather she succumbs to the domination of her abuser.[193] If domestic violence

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> [A] woman may continue the relationship because of uncertainty about other options or her ability to subsist or care for dependents, because of depression and dislocation . . . or because she is afraid that leaving will trigger lethal danger . . . survival is her primary concern . . . will only involve flight when it seems either possible or safer than staying.

*Id.*

180 *See* Brief of the Amici Curiae of the Nat'l Network to End Domestic Violence et al. at 12, *Rucker* (Nos. 00-1770, 00-1781), 2001 WL 1663790, at *10 ("Strict liability eviction policies that aggravate the harsh effects of domestic violence are counterproductive, unsound, and unlawful.").

181 *See* Lauer, *supra* note 161, at 495.

182 *See id.* at 482; JONES, *supra* note 22, at 93.

183 *See, e.g.*, JONES, *supra* note 22, at 93.

184 *Id.*

185 Lauer, *supra* note 161, at 482.

186 *See id.*; JONES, *supra* note 22, at 93.

187 Lauer, *supra* note 161, at 482.

188 *See id.*; JONES, *supra* note 22, at 93.

189 *See* Lauer, *supra* note 161, at 495.

190 MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, http://www.aolsvc.merrrriamwebster.aol.com/cgi-bin/dictionary (last visited Mar. 22, 2002).

191 *See* JONES, *supra* note 22, at 89; Lauer, *supra* note 161, at 495.

192 *See* Lauer, *supra* note 161, at 476 ("Battering is a multi-faceted pattern of control . . . these acts cause the woman's life . . . to be subject to her abuser's whim or desire.").

193 *See id.*

victims had any control over their abusers they would not be victims in the first place. Thus, the application of the strict liability interpretation to domestic violence victims only proves to be unjust and irrational by punishing battered women based on their status as victims.

The strict liability interpretation of § 1437d(l)(6) completely disregards the circumstances of domestic violence. It overestimates the ability of victims to control the actions of their abusers[194] and underestimates the difficulty of leaving an abusive relationship. Strict liability also does not take into account how fear for their lives overwhelms any possible concern battered women may have for adherence to lease provisions. Furthermore, as apparent in the case of Tiffani Alvera, any attempt to prevent future abusive situations is not given deference by the strict liability standard.

### *B. A Standard that Takes into Account the Totality of the Circumstances is the Rational Approach to Adopt with Respect to Domestic Violence Victims*

In comparison to strict liability, a standard that caters to the individual merits of each case is the more rational approach to take when determining whether to evict domestic violence victims from public housing. Eviction determinations made on an ad hoc basis take into account factors such as fault, knowledge and causal nexus. Although consideration of these factors is crucial to any § 1437d(l)(6) eviction determination, their role is even more pivotal when such a determination involves battered women. Domestic violence is comprised of elements distinguishable from drug-related and other violent criminal activity[195] that make it difficult for its victims to adhere to the provisions of §1437d(l)(6).[196] In the absence of acknowledging these differences and taking into account mitigating circumstances, battered women are treated as if they are the perpetrators rather than as what they really are – victims.

A totality of the circumstances standard reveals that domestic violence victims cannot be penalized for § 1437d(l)(6) violations. These women can neither control the criminal conduct of their abusers,[197] nor can they foresee or prevent it.[198] Battered women also are not the origin or cause of the violent conduct.[199] Rather, most domestic violence victims make unsuccessful attempts to alleviate the abuse by rationalizing ways they can

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194 Brief of the Amici Curiae of the Nat'l Network to End Domestic Violence et al. at 11, *Rucker* (Nos. 00-1770, 00-1781), 2001 WL 1663790, at *9.

195 *See* Kaye, *supra* note 165, at 4.

196 *See* Lauer, *supra* note 161, at 495.

197 *See id.*; JONES, *supra* note 22, at 89.

198 *See* Lauer, *supra* note 161, at 495.

199 *See* JONES, *supra* note 22, at 92.

change their own behavior.[200] However, the abuse is inevitable.[201] Violence occurs not because of the manner in which battered women behave, but as part of the abuser's coercive tactics.[202] Furthermore, taking into account the circumstances of domestic violence reveals that battered women cannot be held liable for remaining in abusive relationships. Domestic violence victims not only have to fear for their safety and lives while in abusive relationships, but also if they attempt to leave.[203] Separation assault may actually be more severe than the abuse battered women endure during the relationship.[204] It is a coercive tactic[205] the abuser uses to punish his victim for leaving the relationship and convincing her to return.[206] Thus, in reality, leaving may not be the choice option over staying, if it is even a viable option at all.[207]

A standard that takes into account the mitigating circumstances of domestic violence is the more rational approach to take towards § 1437d(l)(6) evictions. It acknowledges factors that a per se standard of liability ignores, such as emotional and physical turmoil, financial dependence, absence of control and the complexity of leaving an abusive relationship. An individualized approach to § 1437d(l)(6) also avoids the injustice of penalizing domestic violence victims based on their relationship with their abusers and extinguishes liability based upon status.

## IV. THE ADVERSE EFFECT OF STRICT LIABILITY

The goal of § 1437d(l)(6) and "the one strike and you're out" policy is to combat crime in public housing.[208] However, this goal is not served when the strict liability standard is applied to victims of domestic violence.[209] Rather, such an application has an adverse effect upon both crime

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200 *See id*; *see also* Mahoney, *supra* note 179, at 76 ("Women's successes at ending violence are virtually invisible . . . .").

201 *See* JONES, *supra* note 22, at 92.

202 *See id.*

203 *See, e.g.*, JONES, *supra* note 22, at 150; Mahoney, *supra* note 179, at 76; Lauer, *supra* note 161, at 479-80.

204 *See* Lauer, *supra* note 161, at 479-80.

205 *See* JONES, *supra* note 22, at 150.

206 *See id.*; Lauer, *supra* note 161, at 479-80.

207 *See* Mahoney, *supra* note 179, at 76.

> The question 'why didn't you leave' implies that exit is always the appropriate response to violence . . . [and] implicitly asserts both that leaving is possible and that it will bring safety . . . . staying or leaving are often dangerous acts for women. When a woman tries to stop battering without leaving, or stays because she fears retaliation, she may find that failure to exit is used against her socially and legally.

*Id.*

208 *See* Clinton, *supra* note 69, at *8; *see also* Dzubow, *supra* note 54, at 56; Hellegers, *supra* note 69, at 324; Hurst, *supra* note 69, at 740; Johnson, *supra* note 56, at 235; Mock, *supra* note 53, at 1496.

209 *See, e.g.*, Mock, *supra* note 53, at 1517.

prevention and attempts to address domestic violence. Once viewed as a personal family matter,[210] domestic violence is now an issue of public concern.[211] As a result, this "socially entrenched epidemic"[212] has faced governmental challenge. On a state level, warrantless arrests are now allowed, and in some states, the arrest of a domestic violence perpetrator is mandated.[213] Various jurisdictions have even established domestic violence specialty courts.[214] However, Congress made perhaps the most impressive challenge to domestic violence when it enacted the Violence Against Women Act ("VAWA")[215] in 1994. VAWA contains myriad provisions geared toward domestic violence[216] including civil rights remedies,[217] criminal offenses and penalties,[218] and funding allocations.[219]

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[210] *See* Kaye, *supra* note 165, at 2; Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1288 (2000).

[211] *See* Kaye, *supra* note 165, at 2; Tsai, *supra* note 210, at 1296.

[212] Tulin D. Acikalin, *Debunking the Dichotomy of Nonintervention: The Role of the State in Regulating Domestic Violence*, 74 TUL. L. REV. 1045, 1045 (2000).

[213] *See* Johanna Niemi-Kielsiläinen, Note, *The Deterrent Effect of Arrest in Domestic Violence: Differentiating Between Victim and Perpetrator Response*, 12 HASTINGS WOMEN'S L.J. 283, 283 (2001).

[214] *See, e.g.*, Kaye, *supra* note 165, at 6, 9. An example of an effort to address domestic violence is the Brooklyn Felony Domestic Violence Court in New York. The goals of this court are promotion of victim safety, increased defendant accountability and coordination among all the institutions in the criminal justice system that deal with domestic violence. In the first two years of this court's operation, dismissal rates declined almost sixty percent. *Id. See also* Tsai, *supra* note 210 (examining domestic violence court programs in Massachusetts, New York and Florida).

[215] Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C. and 42 U.S.C. (1994)).

[216] *See, e.g.*, 18 U.S.C.A. § 2264 (West 2000) (authorizing the court to order restitution for the full amount of a victim's losses); 18 U.S.C.A. § 2265 (West Supp. 2002) (providing that any protection order issued that is consistent with the provision will receive full faith and credit and enforcement by the court of another state); 42 U.S.C.A. § 13951 (West 1995) (securing the confidentiality of domestic violence shelters and victim's addresses).

[217] *See* 42 U.S.C.A. § 13981 (West 1995). This provision established a federal civil rights cause of action for victims of gender related violent crimes. § 13981(a). However, this section was invalidated on the basis that Congress lacked authority to enact such a remedy under the Commerce Clause and Fourteenth Amendment. *See* 42 U.S.C.A. § 13981 (West Supp. 2002); United States v. Morrison, 529 U.S. 598, 619, 627 (2000).

[218] *See, e.g.*, 18 U.S.C.A. § 2261 (West Supp. 2002). Subsection (a) of this provision defines two interstate domestic violence offenses:

> (1) Travel or conduct of offender. – A person who travels in interstate or foreign commerce . . . with the intent to kill, injure, harass, or intimidate a spouse or intimate partner, and who, in the course of or as a result of such travel, commits or attempts to commit a crime of violence against that spouse or intimate partner, shall be punished as provided in subsection (b).
>
> (2) Causing travel of a victim. – A person who causes a spouse or intimate partner to travel in interstate or foreign commerce . . . by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse of intimate partner, shall be punished as provided in subsection (b).

*Id.* Participation in any of the two offenses results in imprisonment, the term of which depends on the extent of the injuries suffered by the victim. *See* § 2261(b).

[219] *See, e.g.*, 42 U.S.C.A. § 13971(a) (West Supp. 2002). This provision authorizes the

The threat of a strict liability eviction may persuade a domestic violence victim to keep her desperate situation to herself.[220] Instead of going to the police, a battered woman may choose to further endure abuse or personally handle the situation out of fear that the police will notify the housing authority that an incident of domestic violence has taken place on their premises.[221] Such avoidance of law enforcement assistance can result in the severe injury, or even worse, the fatality of a domestic violence victim. Regardless of which outcome occurs, both results stunt the prerogative of preventing the occurrence of domestic violence and combating crime in general.

Fear of eviction also defeats efforts made to address and prevent the pervasive problem of domestic violence. There already exists a general unwillingness among domestic violence victims to cooperate with law enforcement and the legal process.[222] This reluctance to cooperate results in fewer arrests of abusers and increases dismissals of court cases.[223] The threat of strict liability evictions will only magnify this lack of cooperation.

The adverse effect a per se standard of liability has upon crime prevention and domestic violence provides further support for adopting a standard that takes into account the totality of the circumstances. Absent the lingering fear of eviction, domestic violence victims may be more willing to turn to the law rather than try to address the situation themselves, thus fostering the goals of § 1437d(l)(6) and the "one-strike and you're out"

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allocation of grants:

> (1) to implement, expand, and establish cooperative efforts and projects between law enforcement officers, prosecutors, victim advocacy groups, and other related parties to investigate and prosecute incidents of domestic violence . . .
>
> (2) to provide treatment, counseling, and assistance to victims of domestic violence . . .
>
> (3) to work in cooperation with the community to develop education and prevention strategies directed toward such issues.

*Id.*; *see also* 42 U.S.C.A. § 10416(a) (West 1995) (grant for a national domestic violence hotline); 42 U.S.C.A. § 13991 (West Supp. 2002) (grants for training judges and court personnel in the laws of the states on domestic violence and other gender related crimes).

220 *See* Brief of the Amici Curiae of the Nat'l Network to End Domestic Violence et al. at 11, *Rucker* (Nos. 00-1770, 00-1781), 2001 WL 1663790, at *9; Mock, *supra* note 53, at 1517.

221 Brief of the Amici Curiae of the Nat'l Network to End Domestic Violence et al. at 11, *Rucker* (Nos. 00-1770, 00-1781), 2001 WL 1663790, at *9; Mock, *supra* note 53, at 1517.

222 *See, e.g.*, JONES, *supra* note 22, at 24 (explaining how although a domestic violence victim may want her abuser arrested in hope that the arrest will have a deterrent effect upon the abuse, she may avoid prosecution due to her financial dependence upon her partner); Kaye, *supra* note 165, at 5; Barravecchia, *supra* note 176, at 581-82 ("In many battering situations, a victim who calls the police during a physical attack will retract her statements as soon as the police arrive. The reasons why victims retract their statements range from fear, to financial dependence on the abuser.").

223 *See* Kaye, *supra* note 165, at 5; Barravecchia, *supra* note 176, at 582 ("[A]rrests are almost never made when the police leave the decision of whether or not to arrest the abuser up to the victim; and when an arrest is made, it is usually because the abuser is threatening the officers.").

policy, as well as congressional and state efforts to address domestic violence.

## V. THE DISCRIMINATORY EFFECT OF THE STRICT LIABILITY STANDARD

### *A. The Disparate Impact Theory*

It is the policy of the United States to provide for fair housing throughout the nation.[224] However, this goal must be achieved within constitutional limitations.[225] The Fair Housing Act provides that it is unlawful "[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[226] This Act also unequivocally forbids practices that make housing unavailable to persons on a discriminatory basis as well as the use of discriminatory terms and conditions in housing contracts.[227]

The Fair Housing Act provides a standing requirement in the event that a tenant encounters a discriminatory housing practice.[228] An "aggrieved person"[229] need only allege "distinct and palpable injuries that are fairly traceable to the defendants' actions" in order to satisfy this standing requirement.[230]

The disparate impact theory is one of several discrimination claims a tenant can make against a housing practice. A showing that a facially neutral practice actually or predictably imposes a disproportionate burden upon members of the protected class establishes a prima facie case of disparate impact housing discrimination.[231] In other words, a plaintiff must demonstrate that the practice has a discriminatory effect.[232] A disparate impact claim, however, does not require a showing of discriminatory intent on the part of the defendant.[233]

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224 Fair Housing Act of 1968, 42 U.S.C.A. § 3601 (West 1995).

225 *Id.*

226 42 U.S.C.A. § 3604(a) (West 1995 ).

227 42 U.S.C.A. § 3604(b) (stating that it is unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin").

228 42 U.S.C.A. § 3613(a)(1)(A) (West 1995) ("An aggrieved person may commence a civil action in an appropriate United States district court or state court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice . . . .").

229 42 U.S.C.A. § 3602(i)(1) (West 1995) (defining an aggrieved person as an individual that "claims to have been injured by a discriminatory housing practice").

230 *See* Hack v. President and Fellows of Yale Coll., 237 F.3d 81, 87 (2d Cir. 2000) (quoting LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 424 (2d Cir. 1995)).

231 *Id.*; *see also* Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988), *aff'd*, 109 S. Ct. 276 (1988).

232 *See Huntington*, 844 F.2d at 934 (citing United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975)).

233 *See Hack*, 237 F.3d at 99; *Huntington*, 844 F.2d at 934.

Since not every policy that causes a disparate effect is unlawful,[234] the defendant must demonstrate that the discriminating actions "furthered, in theory and in practice, a legitimate, bona fide, governmental interest and that no alternative would serve that interest with less discriminatory effect."[235] If the defendant provides a valid justification for the discriminating practice, the plaintiff will prevail only if he or she can prove that the defendant "unreasonably refused to adopt an alternative housing practice that would serve defendant's legitimate objective with less discriminatory impact."[236] In determining whether a defendant's refusal was reasonable, facts such as cost or other burdens of the proposed policy must be taken into consideration.[237] The proposed alternative housing practice must be feasible, comparatively effective in serving the defendant's goal, and must not significantly exceed the cost or burden of the challenged practice.[238]

### *B. Application of the Disparate Impact Theory to the Strict Liability Evictions of Domestic Violence Victims*

On its surface, the strict liability standard is a neutral practice. It does not target members of any protected group but rather focuses on drug dealers, gangs and violent criminals who threaten the safety and welfare of public housing tenants.[239] However, when applied to victims of domestic violence, this practice does have a discriminatory effect.

Domestic violence is a crime that primarily affects women.[240] It crosses all socio-economic barriers yet it is found to be more prevalent among low-income women.[241] Since the primary purpose of public housing is to provide decent homes for low-income families,[242] it is logical to conclude that domestic violence occurs at a higher rate amidst these premises. Thus, when no-fault evictions are imposed upon victims of domestic violence, it has a disparate impact upon women. Through such evictions, PHAs are discriminating on the basis of sex in direct conflict with § 3604(a) and (b) of the Fair Housing Act.

PHAs do have a legitimate, bona fide objective in mind in adopting a

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234 *See* Langlois v. Abington Hous. Auth., 207 F.3d 43, 49-50 (1st Cir. 2000); *Hack*, 237 F.3d at 99.

235 *Huntington*, 844 F.2d at 936 (citing Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148-49 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978)); *see also Hack*, 237 F.3d at 102 (stating that the defendant must "demonstrate that the challenged practice is reasonably necessary to achieve a legitimate business objective").

236 *Hack*, 237 F.3d at 101.

237 *Id.*

238 *Id.*

239 Clinton, *supra* note 69, at *8.

240 *See, e.g.*, American Civil Liberties Union, *supra* note 29.

241 *Id.*

242 *See, e.g.*, Mock, *supra* note 53, at 1498.

strict liability standard – combating crime and reinforcing law and order within public housing projects.[243] An argument can be made that strict liability evictions are sacrifices public housing tenants have to take in order to reside in a safe and peaceful environment. However, whether such a standard is reasonably necessary to achieve this objective is open for debate. It is not reasonable to have so many innocent tenants fall prey to no-fault evictions for the sheer sake of combating crime. With respect to battered women, punishing innocent victims for the crimes of their abusers neither deters nor prevents criminal activity. These women are not able to control the conduct of their abusers; rather their abusers control them.[244] Furthermore, the strict liability standard may actually foster the occurrence of domestic violence because battered women may avoid seeking help out of the fear that they will be evicted from their homes.[245]

Regardless of whether strict liability is necessary to combat crime in public housing, a reasonable alternative practice exists that would serve the goal of crime prevention without having a discriminatory effect upon domestic violence victims. Such an alternative requires taking into consideration fault, causal nexus, and other mitigating factors when determining whether to evict a domestic violence victim due to the abusive actions of her partner. The application of a standard that considers the individual merits of the case will avoid penalizing domestic violence victims based on their gender. It will ensure that any eviction of a domestic violence victim from public housing is warranted and imposed under the existence of personal fault.

It is unreasonable and irrational for PHAs to refuse to adopt a totality of the circumstances approach to § 1437d(l)(6) over a per se standard of liability. Such a standard does not significantly exceed the cost of a strict liability standard and is just as effective, if not more so, in serving the goals of crime prevention and reinstating law and order.[246] Additionally, consideration of mitigating circumstances does not drastically burden PHAs. Since this standard entails individualized scrutiny, the adoption of this approach will require more time and effort from PHAs in their eviction determinations. However, such an analysis does not contravene congressional and state efforts to combat domestic violence, and thus can hardly be considered a burden upon PHAs.

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243 *See* Clinton, *supra* note 54, at *1; Clinton, *supra* note 69, at *8.

244 JONES, *supra* note 22, at 89; Lauer, *supra* note 161, at 495.

245 *See* Mock, *supra* note 53, at 1517.

246 *See* discussion *supra* Part IV.

## VI. A COMPARISON OF STRICT LIABILITY EVICTIONS TO THE STRICT LIABILITY REMOVAL OF CHILDREN FROM DOMESTIC VIOLENCE VICTIMS

Domestic violence victims are not only subjected to further victimization with respect to their residence in public housing,[247] but also with regard to the custody of their children.[248] Child protective services and the courts remove children from the care of battered women based on their "failure to protect" children from domestic violence.[249] Traditionally such removals occurred only in situations where the child was actually abused.[250] However, a trend has developed that has the effect of making battered mothers strictly liable for exposing their children to domestic violence.[251] As a result, prompt removal occurs in situations where the children have not actually suffered any physical abuse but rather witness their mothers endure abuse.[252] In many instances, removal is not necessary[253] or even the most effective way of protecting the child.[254] Furthermore, child protective agencies remove these children absent a court hearing[255] and any attempt to offer preventative services or safety plans for the mother and children.[256]

The strict liability trend of promptly removing children from the care of their mothers "implies that they are neglecting their children" for not leaving the abusive relationship.[257] It has the effect of placing blame upon

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247 *See e.g.*, United States v. C.B.M. Group, Inc., No. 01-857-PA (D. Or., filed July 10, 2001) (domestic violence victim evicted from public housing due to the actions of her abuser).

248 *See* Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 HARV. WOMEN'S L.J. 205 (1997) ("[L]egal response to violence in the home has been to victimize abused women further by holding them accountable for their children's exposure to this violence."); Trepiccione, *supra* note 170, at 1516 ("'What is difficult is that you're victimizing them twice . . . [o]n the other hand, you have the notion of protecting the children.'") (quoting Richardson, J.).

249 *See* The "Failure to Protect" Working Group, *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849 (2000); Trepiccione, *supra* note 170, at 1488.

250 *See* Trepiccione, *supra* note 170, at 1490.

251 *See id.*; The "Failure to Protect" Working Group, *supra* note 249, at 854.

252 *See* The "Failure to Protect" Working Group, *supra* note 249, at 849 ("Their children are removed from them, and the only allegation is based upon their child's exposure to domestic violence."); Trepiccione, *supra* note 170, at 1491 ("In many jurisdictions, child protective services and family courts presume that witnessing abuse harms children and places them at risk for experiencing abuse.").

253 *See* Lois A. Weithorn, *Protecting Children From Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 29 (2001).

254 *See* Christine A. O'Riley & Judge Cindy S. Lederman, *Co-Occurring Child Maltreatment and Domestic Violence*, 75 FLA. BAR J. 40, 41 (2001).

255 *See* Trepiccione, *supra* note 170, at 1515.

256 *See* The "Failure to Protect" Working Group, *supra* note 249, at 855; Weithorn, *supra* note 253, at 29.

257 The "Failure to Protect" Working Group, *supra* note 249, at 849; *see also* Stone, *supra* note 248, at 205 ("Courts that separate victim mothers from their children reinforce the negative social stereotype of blaming battered women for not escaping abusive situations. More disturbingly, by blaming the battered victim, courts, as well as society at large, may disregard the legitimate efforts of these women to protect their children.").

battered women for the violent conduct of their abusers.[258] Accountability is shifted from the perpetrator to the victim[259] because she did not prevent the violence.[260] As a result, battered mothers not only have to endure the consequences of domestic violence,[261] but are also held responsible for their own victimization.[262]

A battered mother has a fundamental right to the "care, custody and control of [her] children"[263] that is protected by the Due Process Clause of the Fourteenth Amendment.[264] "The interest of children in preserving family integrity is also constitutionally protected."[265] In addition, states have a recognized interest in protecting the wellbeing of children.[266] Thus, absent a compelling state interest, the removal of children from their battered mothers can amount to a constitutional violation.[267] Such a compelling interest involves protecting children from imminent physical or mental danger.[268] However, despite the existence of a compelling interest, a state's tactics in removing children from the care of their battered mothers still warrants constitutional scrutiny.[269] Removal must be the only practical means of advancing the state's interest considering the circumstances of the case.[270]

The practice of removing children from their battered mothers has been challenged in New York State, the head proponent of charging domestic violence victims with neglect if their children witness domestic abuse.[271] *Nicholson v. Williams*[272] involved a class action suit brought by battered women who had their children removed from their care due to no

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258 *See* The "Failure to Protect" Working Group, *supra* note 249, at 849; *see also* Stone, *supra* note 248, at 205; Weithorn, *supra* note 253, at 29.

259 *See* Stone, *supra* note 248, at 206; The "Failure to Protect" Working Group, *supra* note 249, at 850; Weithorn, *supra* note 253, at 29.

260 The "Failure to Protect" Working Group, *supra* note 249, at 850.

261 *See* Stone, *supra* note 248, at 205.

262 *See* Weithorn, *supra* note 253, at 29.

263 *In re* Nicholson, 181 F. Supp. 2d 182, 185 (E.D.N.Y. 2002).

264 *See* Trepiccione, *supra* note 170, at 1509; *see also In re* Nicholson, 181 F. Supp. 2d at 185.

265 *In re* Nicholson, 181 F. Supp. 2d at 185.

266 *See* Trepiccione, *supra* note 170, at 1513, 1515.

> The Supreme Court has made clear that the State, in its role as parens patriae, may encroach upon parental rights to protect the well-being of a child . . . . In the failure to protect context, the State's interest in protecting children from physical and mental impairment motivates the governmental action of removal from the battered mother's care.

*Id.*

267 *See, e.g., id.* at 1514.

268 *See id.*

269 *See id.*

270 *See id.*

271 *See* Trepiccione, *supra* note 170, at 1491.

272 203 F. Supp. 2d 153 (E.D.N.Y. 2002) (memorandum providing further explanation for the January 3, 2002 preliminary injunction); *see In re* Nicholson, 181 F. Supp. 2d 182.

fault of their own.[273] Senior District Judge Weinstein found that the Administration for Children's Services ("ACS") "systematically and repeatedly removed children of battered mothers for the reason mothers 'engaged in' domestic violence by being victims of such violence."[274] ACS' practice "circumvent[s] the procedural protections to which mothers and children are constitutionally entitled."[275] Judge Weinstein noted that prompt removal absent judicial authorization requires "an objectively reasonable basis"[276] for the belief that the child is threatened with imminent harm.[277] Unnecessary removals have an adverse effect on the state's interest in protecting children.[278] Furthermore, "[i]t desecrates fundamental precepts of justice to blame a crime on the victims."[279] Judge Weinstein ultimately affirmed[280] the preliminary injunction against ACS,[281] which was ordered, in part, to guarantee that "battered mothers who are fit to retain custody of their children do not face prosecution or removal of their children solely because [they] are battered."[282] Judge Weinstein also noted that there was a "clear and convincing"[283] likelihood that the battered mothers would succeed on the merits of the case.[284]

*Nicholson* provides further support for rejecting a strict liability interpretation of § 1437d(l)(6) and adopting a totality of the circumstances approach in its place. Strict liability evictions from public housing and prompt removal of children both possess underlying common denominators – they punish domestic violence victims for not leaving the abusive relationship and for being victims in the first place, as well as have an adverse effect upon governmental interests. Judge Weinstein's preliminary injunction demonstrates that the circumstances surrounding domestic violence should not be disregarded no matter how compelling a government interest may be. Therefore, despite how bona fide PHAs' interest in crime

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273 *In re* Nicholson, 181 F. Supp. 2d at 182.

274 *Id.* at 184; *see Nicholson*, 203 F. Supp. 2d at 250.

275 *Nicholson*, 203 F. Supp. 2d at 251; *see In re* Nicholson, 181 F. Supp. 2d at 185.

276 *Nicholson*, 203 F. Supp. 2d at 237.

277 *See id.*; *In re* Nicholson, 181 F. Supp. 2d at 185 (citing Tenenbaum v. Williams, 193 F.3d 581, 596 (2d Cir. 1999)).

278 *Nicholson*, 203 F. Supp. 2d at 252. Judge Weinstein relied upon evidence showing that strict liability removals cause more harm to children than protection. *Id.* at 253. "The children suffer the trauma of being separated from both parents, blame themselves for the abuse of their mothers, confront an unfamiliar and often dangerous foster care system, while all the time their mother could likely be giving them care and comfort if only ACS . . . would carry the government's own burden of protecting her from violence." *Id.*

279 *Id.* at 252.

280 *Id.* at 258.

281 *In re* Nicholson, 181 F. Supp. 2d at 183, 185.

282 *Id.* at 185.

283 *Nicholson*, 203 F. Supp. 2d at 260.

284 *Id.*; *In re* Nicholson, 181 F. Supp. 2d at 185.

prevention may be, it does not warrant evictions of domestic violence victims without first taking into consideration all of the factors that make it so difficult for these women to foresee, prevent or remove themselves from the violent conduct of their abusers.

## VII. THE NEED FOR CONGRESSIONAL ACTION

It is likely that Congress, when it enacted § 1437d(l)(6), never contemplated that the provision would be applied to victims of domestic violence. This proposition is logical, considering congressional efforts to aid domestic violence victims through VAWA, as well as other statutory provisions addressing gender-related and family violence.[285] Strict liability evictions clearly contravene the purpose of these enactments.[286] Because it is irrational that Congress would enact legislation that defeats its considerable efforts to address this pervasive social epidemic, the strict liability standard should not be enforced.

Congressional action is required in order to avoid any further injustice associated with the strict liability evictions of domestic violence victims. There are two approaches available to Congress. One approach entails amending § 1437d(l)(6) to incorporate a standard of liability that requires consideration of the totality of the circumstances prior to making an eviction determination. As a result of such an amendment, eviction will no longer be inevitable but rather a possibility depending on whether the circumstances require it. Innocent evictions will only occur when found to be absolutely necessary for the furtherance of crime prevention. Furthermore, such an amendment will produce nationwide uniformity among PHAs in their enforcement of § 1437d(l)(6) lease provisions.

Another approach Congress can take is to create an exception mandating that § 1437d(l)(6) eviction determinations involving domestic violence victims be made on an ad hoc basis. Under this approach, as well as the aforementioned one, all circumstances surrounding the battered woman's situation will be taken into consideration. Such considerations include, but are not limited to, the pervasiveness and extent of the domestic violence, whether the victim has taken measures to alleviate her abusive situation, and whether it is feasible to evict only the perpetrator from the premises. The requirement of such a standard of liability will not only honor § 1437d(l)(6)'s goal of crime prevention, but will also guarantee that any evictions of domestic violence victims are justified.

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[285] *See generally* Family Violence Prevention Services Act, Pub. L. No. 98-457, 98 Stat. 1757 (1984) (codified as amended at 42 U.S.C. §§ 10401 et seq. (1994 and Supp. V 1999)).

[286] *See* Brief of the Amici Curiae of the Nat'l Network to End Domestic Violence et al. at 23, *Rucker* (Nos. 00-1770, 00-1781), 2001 WL 1663790, at *23.

## CONCLUSION

Evicting domestic violence victims from public housing based on a strict liability interpretation of § 1437d(l)(6) is irrational and unjustified. By not taking into consideration the circumstances of domestic violence, a strict liability interpretation only serves to further victimize battered women. It attributes equal accountability to domestic violence victims for the criminal conduct of their abusers and penalizes them for their status as victims. The strict liability standard also has an adverse effect upon the crime prevention goals of § 1437d(l)(6) and the "one-strike and you're out" policy, as well as efforts made to address domestic violence. Furthermore, the application of a per se standard of liability has a disparate impact upon domestic violence victims because it discriminates against them on the basis of their gender.

Congress should adopt a totality of the circumstances approach to §1437d(l)(6). Such a standard avoids violating "fundamental precepts of justice"[287] by not blaming domestic violence victims for the crimes of their abusers. It takes into account the circumstances of domestic violence and recognizes the difficulty battered women have adhering to lease provisions. A totality of the circumstances approach also avoids placing unreasonable burdens upon PHAs when making eviction determinations. Lastly, such a standard receives further support from judicial developments regarding the practice of removing children from battered women based upon their status as victims.

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[287] *Nicholson*, 203 F. Supp. 2d at 252.