

THE WAR ON AFFORDABLE HOUSING?: HOW
ANTI-DRUG POLICIES PUT FAMILIES IN FEDERALLY
SUBSIDIZED HOUSING AT RISK OF EVICTION, AND
METHODS FOR MITIGATING THESE COLLATERAL
CONSEQUENCES

Katherine Kuhl

Table of Contents

I.	INTRODUCTION.....	521
II.	LEGAL IMPLICATIONS OF DRUG-RELATED ACTIVITY IN FEDERALLY FUNDED HOUSING.....	528
III.	ADDITIONAL FACTORS INFLUENCING THE INTERSECTION OF DRUG CRIMINALIZATION AND HOUSING POLICY ...	536
IV.	PROPOSAL	541
V.	CONCLUSION	548

I. INTRODUCTION

The War on Drugs and Federal Housing Law

Federal housing laws passed in the 1980s and 1990s vastly impacted housing stability for low-income families throughout the United States, beginning with The Anti-Drug Abuse Act of 1988 (“the Anti-Drug Act”).¹ Four federal laws were passed as part of “The War on Drugs”²

¹ See Ann Cammett, *Confronting Race and Collateral Consequences in Public Housing*, 39 SEATTLE U. L. REV. 1123 (Summer 2016); Lahny R. Silva, *Collateral Damage: A Public Housing Consequence of the “War on Drugs,”* 5 UC IRVINE L. REV. 783 (2015); and Marah A. Curtis, Sarah Garlington, Lisa S. Schottenfeld, *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 CITYSCAPE 37 (2013).

² The War on Drugs refers to federal and state initiatives beginning in the 1970s which aimed to combat drug sales and distribution through (then) new and increased law enforcement practices, as well as enhanced, harsher sentencing practices. HISTORY.com, *War on Drugs*, 2017, at

that require, among other things, the termination of a family's access to federally subsidized housing assistance if any household member or guest is deemed to be involved in drug-based activity.³ The Anti-Drug Act of 1988 amended the United States Housing Act of 1937 by requiring Public Housing Authorities (PHAs) to prohibit tenants, along with their family members and invitees, from engaging in drug-related criminal activity, which can range from personal possession and use to the manufacturing and selling of drugs.⁴ The Cranston-Gonzalez National Affordable Housing Act of 1990 ("Cranston-Gonzalez Act") not only expanded PHAs' "authority and discretion" to terminate household benefits when drug-related crimes were at issue, it also instituted a prohibition of "three years or a reasonable time" during which families could not participate in federal housing programs "if the household was previously evicted from public housing based on 'drug-related criminal activity.'"⁵ The Housing Opportunity Program Extension Act of 1996 "codif[ied] 'One Strike' policies [...] for [public housing] residents who [were involved in drug-related activities] on or off the public housing premises," thus extending the geographic areas over which an infraction might occur that would allow a PHA to terminate a family or individual's access to housing benefits.⁶ The Quality Housing and Work Responsibility Act of 1998 "import[ed] many of the rules that appl[ied] to the public housing program[s] to the Section 8 program," mandated the use of lease provisions "regarding 'drug-related criminal activity,'" and gave PHAs "almost unreviewable discretion without statutorily required parameters," providing residents facing termination of their housing subsidies with little to no recourse through which to avoid eviction.⁷ Finally, the Independent Agencies Appropriations Act of 1999 added an additional drug-related regulation to households in PHAs, barring "households with any member who was convicted of producing methamphetamines in public housing."⁸

<https://www.history.com/topics/the-war-on-drugs> (last visited Mar. 10, 2018).

³ The Anti-Drug Abuse Act of 1988 was written "to prevent the manufacturing, distribution, and use of illegal drugs." Throughout its enforcement, and that of subsequent related laws, such ends have been sought through a punitive stance on drug-related activity, which has been broadly interpreted as the manufacture, sale, possession and/or consumption of illegal drugs. Anti-Drug Abuse Act of 1988 (Drug Kingpin Act). 21 U.S.C.A. § 1501 (West, Westlaw through Pub. L. No. 100-690); Cammett, *supra* note 1; Silva, *supra* note 1; and Curtis et al, *supra* note 1.

⁴ Silva, *supra* note 1, at 789-790 (2015); *See also* Anti-Drug Abuse Act, *supra* note 2; and Anti-Drug Abuse Amendments Act of 1988. 21 U.S.C.A. § 801 (West, Westlaw through Pub. L. No. 100-690).

⁵ Silva, *supra* note 1, at 790 (2015).

⁶ *Id.*

⁷ Silva, *supra* note 1, at 791 (2015); *see* Curtis et al, *supra* note 1.

⁸ John Bae, Margaret diZerega, Jacob Kang-Brown, Ryan Shanahan, and Ram Subramanian, *Coming Home: An Evaluation of the New York City Housing Authority's Family Reentry Pilot Program*, page 8, New York: Vera Institute of Justice, Oct. 2016, at <https://www.vera.org/publications/coming-home-nycha-family-reentry-pilot-program-evaluation>,

State legislators and the federal government lauded these statutes as a means of protecting low-income communities, citing the policy goals of “safety,” stopping “a reign of terror,” and creating “safe environment[s] for children.”⁹ When the Housing Opportunity Program Extension Act of 1996 was signed into law, Andrew Cuomo, the then Secretary of the Department of Housing and Urban Development, championed the bill’s passage and vehemently insisted upon its need, stating:

“Make no mistake about it, in public housing, drugs are public enemy number one. We must have zero tolerance for people who deal drugs. They are the most vicious, who prey on the most vulnerable. They are the jailers, who imprison the elderly. They are the seducers, who tempt the impressionable young. They must be stopped. “One Strike and You’re Out” is doing just that.¹⁰”

In seeming opposition to such assertions, however, the scope of federal laws governing drug-related activity, their interpretation by the Supreme Court, and their subsequent implementation at state-level, have led to federal housing subsidy prohibitions due to drug activity that extend well beyond punishment of individual drug dealers.¹¹ Both social hosts and family members alike, including children and the elderly, are subject to the loss of housing for the drug infractions of their relatives and guests, even when those infractions consist of drug use, not sales.¹²

In 2002, the Supreme Court held in *Department of Housing and Urban Development v. Rucker* “that 42 U.S.C. § 1437(d)(1)(6) unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity

last updated Mar. 2017; citing, Lahny R. Silva, *Criminal Histories in Public Housing*, WISC. L. REV. 5, no. 24, 380-382 (2015).

⁹ Anti-Drug Abuse Act, *supra* note 2; Anti-Drug Abuse Amendments Act, *supra* note 4; and Silva, *supra* note 1, at 808 (2015).

¹⁰ U.S. Dep’t of Hous. & Urban Dev., “Meeting the Challenge: Public Housing Authorities Respond to the ‘One Strike and You’re Out Initiative,’” (1997) at <https://www.ncjrs.gov/pdffiles1/Photocopy/183952NCJRS.pdf>, last visited Dec. 2, 2017, as quoted by Cammett, *supra* note 1, at 1139.

¹¹ See Cammett, *supra* note 1; Silva, *supra* note 1, at 783 (2015); Curtis et al, *supra* note 1; Jennifer J. Chen, *Application of 24 C.F.R. § 982.511 Enumerating Obligations of Participant Family Under Housing Choice Voucher*, 24 A.L.R. Fed. 3d Art 7 (2017); *Chateau Foghorn LP v. Hosford*, No. 73 Sept. Term, 2017 WL 3699643 (Md. Aug. 28, 2017); and *Department of Housing and Urban Development v. Rucker*, 122 S.Ct. 1230 (2002).

¹² As illustrated by Cuomo’s statement, anti-drug laws focused on PHAs were framed as combatting the violence visited upon residents by drug dealers, who were thusly depicted as dangerous. Public support for these laws did not highlight the ills visited upon a community by drug users in the same light, yet, in practice, both drug users and distributors often saw the same consequences in regard to continued access to housing in a PHA. See Cammett, *supra* note 1; Silva, *supra* note 1, at 783; Curtis et al, *supra* note 1; Chen, *supra* note 11, at 7; *Chateau Foghorn LP*, *supra* note 11; and *Rucker*, *supra* note 11.

524 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:3]

of household members and guests, whether or not the tenant knew, or should have known, about the activity.”¹³ Rucker was a response to claims brought by three Oakland Housing Authority tenants who sought to prevent eviction following drug activity of household members and guests; the tenants asserted that their evictions were not required by the terms of their leases or federal statute, and further, were unconstitutional.¹⁴ The Supreme Court held that any individual a tenant permitted in his or her home was deemed “under the tenant’s control,” which thusly authorized PHAs to evict a tenant for another’s drug activity, regardless of whether or not the tenant was aware of such actions.¹⁵ In its holding, the Supreme Court reasoned that because a tenant holds the lease for his or her apartment, it is within his or her “control,” if a tenant “cannot control drug crime[s]” by their invitees, the tenant is “a threat to other residents and the project.”¹⁶

While politicians at the federal and state level championed the regulation of drug-related activity in PHAs as a means of protecting the most vulnerable residents, the actual facts of Rucker highlight just how easily the specific demographics mentioned by Cuomo in his 1996 address stood to suffer under the laws’ enforcement.¹⁷ In *Confronting Race and Collateral Consequences in Public Housing*, Ann Cammett notes that in Rucker, a unanimous Supreme Court “ruled in favor of HUD in a class action suit brought by Oakland Housing Authority tenants, including a grandmother named Pearlie Rucker (whose mentally ill daughter incurred a drug conviction).”¹⁸ Certainly Ms. Rucker would not find herself safer upon eviction resulting from her unwell daughter’s actions.

Collateral Consequences for Individuals and Families

Collateral consequences arise following most criminal convictions.¹⁹ In this context, collateral consequences are “civil penalties

¹³ *Rucker*, *supra* note 11, at 1233.

¹⁴ Tenants argued that their evictions, if statutorily sanctioned, violated the Americans with Disabilities Act, and, most importantly, their 14th Amendment Due Process rights by subjecting them to the loss of a property interest without knowledge of, or participating in, the illegal actions in question. *Rucker v. Davis*, 237 F.3d 1113, 1124 (9th Cir. 2001); *Rucker*, *supra* note 11, at 1232.

¹⁵ *Rucker*, *supra* note 11, at 1234-1235.

¹⁶ *Id.* at 1235, citing 56 Fed. Reg., at 51567.

¹⁷ U.S. Dep’t of Hous. & Urban Dev., *supra* note 10, as quoted by Cammett, *supra* note 1, at 1139.

¹⁸ Cammett, *supra* note 1, at 1140.

¹⁹ Collateral consequences are the limitations faced by individuals who have been convicted of crimes, as well as their families, after the individuals have completed their sentences for said crimes. They refer to activities from which an individual may remain temporarily, or permanently barred, as a result of their prior conviction, such as “exclusion from government-assisted housing,

specifically targeted at individuals convicted, arrested, or suspected of drug use, possession, or distribution” and their family members.²⁰ In housing, the suspicion of drug-related criminal activity, let alone a conviction for it, can put not only the alleged offender but also his or her family at risk of homelessness.²¹ Given the family’s qualification for federally subsidized housing prior to an infraction for which they may face eviction and termination of household benefits, such policies can lead to the eviction of “innocent people who have the least power and economic resources” to advocate for themselves in the process, or mitigate the impact of the loss of a housing subsidy.²² The country is in the midst of an affordable housing crisis, with an existing shortage of 7.4 million affordable rental homes for more than 11.4 million extremely low income families, which means that families who qualify for, and then lose, federally subsidized housing will find themselves faced with the nearly impossible task of finding a new home.²³

The average three-year bar from federal housing programs following a drug-related conviction is particularly detrimental to individuals in the reentry process.²⁴ Adults who “are rejected from public housing [...] are at greater risk of homelessness,” and parents who find themselves facing a lack of housing risk “family disintegration” particularly through the likelihood of “intervention by child welfare agencies” should they be unable to “establish safe and consistent housing.”²⁵

Juveniles barred from housing, either during the reentry process or due to a loss of housing for a drug-related crime for which they were not incarcerated face “even more devastating” consequences.²⁶ Parents may find themselves confronted with the seemingly impossible decision between the loss of federally subsidized housing for the entire family, or the permanent exclusion of their child from the family home.²⁷ In most jurisdictions, families are offered the option to keep their homes if they permanently exclude the offending household member, and the remaining family members agree to undergo unannounced household inspections by PHA personnel for the life of their tenancy, conducted so

ineligibility for employment, ineligibility for public benefits and other forms of governmental assistance, and voter disenfranchisement.” Michael Pinard, *A Reentry-Centered Vision of Criminal Justice*, 20 FED. SENTENCING REPORTER 103 (Dec. 2007).

²⁰ Silva, *supra* note 1, at 784.

²¹ *Id.* at 785.

²² Cammett, *supra* note 1, at 1141.

²³ National Low Income Housing Coalition, *Massive Shortage of Affordable and Available Housing for America’s Lowest Income Households*, Mar. 6, 2017 at <http://nlihc.org/article/massive-shortage-affordable-and-available-housing-america-s-lowest-income-households>.

²⁴ Cammett, *supra* note 1, at 1143.

²⁵ Cammett, *supra* note 1, at 1143-1144.

²⁶ *Id.* at 1144.

²⁷ *Id.*

526 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:3]

as to ensure that the permanently excluded household member has not moved back in, or even entered the premises to visit.²⁸ Such circumstances can cause youth to find themselves at odds with, or isolated from, a familial support network, while simultaneously homeless and ill-equipped to navigate the process of securing reliable housing on their own.²⁹ Both adults and juveniles who are barred from public housing, and potentially alienated from their family network as well, face a heightened risk of recidivism.³⁰ A study of Washington state reentry housing policies found that “periods of homelessness overtime significantly elevated [the] recidivism risk to more than two times the rate of those in stable housing for new convictions and readmissions.”³¹

*New York City’s Creation and Enforcement of Housing Police
Based on Drug Crimes*

The New York City Housing Authority (NYCHA) is the largest housing authority in the country.³² In addition to NYCHA’s administration of all federally subsidized housing in New York state, New York City has its own history of laws barring primarily low-income families from their homes following alleged drug-related activity of a household member outside of public housing.³³ In the 1970s, the Nuisance Abatement Act established the city’s authority to shut down a property “used for illegal purposes.”³⁴ Though initially “created [...] to combat the sex industry in Times Square,” a joint study by ProPublica and the New York Daily News found that, as of 2016, the majority of nuisance abatement actions were filed against residences, primarily for drug-related crimes.³⁵ Through a nuisance abatement action, law enforcement officers were able to obtain a court order barring individuals

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 1143-1144..

³¹ Faith E. Lutze, Jeffrey W. Rosky, and Zachary K. Hamilton, *Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State’s Reentry Housing Program for High Risk Offenders*, 41. 4 *Crim. Just. & Behavior* 471, 483 (Apr. 2014).

³² New York City Housing Authority, *NYCHA 2017 Fact Sheet*, at <https://www1.nyc.gov/assets/nycha/downloads/pdf/factsheet.pdf>, last revised Apr. 13, 2017.

³³ Sarah Ryley, *The NYPD Is Kicking People Out of Their Homes, Even if They Haven’t Committed a Crime*, ProPublica, Feb. 4, 2016 at <https://www.propublica.org/article/nypd-nuisance-abatement-evictions>.

³⁴ N.Y.C., N.Y., Administrative Code, tit. 7, ch. 7, §§ 7-701 to 7-712 (2016); see also *The NYPD Is Kicking People Out of Their Homes*, *supra* note 33.

³⁵ *The NYPD Is Kicking People Out of Their Homes*, *supra* note 33; Sarah Ryley, *New York City Set to Pass Sweeping Nuisance Abatement Reforms*, ProPublica, Feb. 14, 2017 at <https://www.propublica.org/article/new-york-city-set-to-pass-sweeping-nuisance-abatement-reforms>.

from their homes “until the case [was] resolved.”³⁶ Residents were neither informed in advance that they were at risk of a nuisance abatement action nor given the chance to argue their case in court before removal from the family home.³⁷

New York City embraced this use of nuisance abatement as a Broken Windows initiative in the mid-1990s, under William Bratton’s first tenure as the Commissioner of the New York Police Department.³⁸ With the intention of “curb[ing] crime,” by “maintaining order by policing low-level offenses [so as to] prevent more serious crimes,” “Broken Windows Policing” was born of the belief that “disorder (e.g., broken windows),” is “directly linked to serious crime.”³⁹ In 1995, Bratton referred to nuisance abatement evictions as “probably the most powerful civil tool available to the police,”⁴⁰ lauding the importance of the New York Police Department’s authority to commence an action without a conviction or arrest, based only “upon a showing that a public nuisance exists.”⁴¹ Perhaps unsurprisingly, in a study of 516 residential nuisance abatement actions filed between January 1, 2013 and June 30, 2014, ProPublica and the New York Daily News found that “173 of the people who gave up their leases or were barred from their homes were not convicted of a crime,” and “44 never faced criminal prosecution.”⁴² Nuisance abatement actions, which occurred in privately-owned, generally rental properties, resulted in many individuals faced with administrative hearings regarding the possible termination of their Section 8 benefits.⁴³ Drug-related criminal activity sufficient to trigger a nuisance abatement action could also be found to violate NYCHA policies regarding drug activity by participants in the Section 8 program.⁴⁴

The study also found that 90% of the households affected by nuisance abatement actions were comprised of minorities; and of the 215

³⁶ *The NYPD Is Kicking People Out of Their Homes, Even if They Haven’t Committed a Crime*, supra note 33.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Sarah Childress, *The Problem with “Broken Windows” Policing*, Frontline, June 28, 2016 at <https://www.pbs.org/wgbh/frontline/article/the-problem-with-broken-windows-policing/>; Center for Evidence-Based Crime Policy, *Broken Windows Policing*, George Mason University at <http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing/> (last visited January 28, 2018).

⁴⁰ William J. Bratton, *POLICY REVIEW: The New York City Police Department’s Civil Enforcement of Quality-of-Life Crimes*, 3 Brooklyn Law J. L. & Pol’y 447, 452; see also Sarah Ryley, *The NYPD Is Kicking People Out of Their Homes, Even if They Haven’t Committed a Crime*, ProPublica, Feb. 4, 2016 at <https://www.propublica.org/article/nypd-nuisance-abatement-evictions>.

⁴¹ *Id.* at 453.

⁴² *The NYPD Is Kicking People Out of Their Homes*, supra note 33.

⁴³ *Id.*

⁴⁴ *Id.*

individuals who were barred from their homes during the period studied, and whose race could be determined, only “five were white.”⁴⁵ At the time of the study’s publication, individuals facing nuisance abatement actions had no right to an attorney; often they did not actually see judges while in court; they frequently believed that the NYPD lawyers were there to represent them; and, for individuals whose preferred language was not English, interpreters were rarely, if ever, provided.⁴⁶ The ramifications of nuisance abatement actions for low-income families eventually prompted legislative action by the New York City Council, which will be discussed in greater depth later.⁴⁷

II. LEGAL IMPLICATIONS OF DRUG-RELATED ACTIVITY IN FEDERALLY FUNDED HOUSING

Federal Regulation of Public Housing Authorities

Public housing programs are governed at the intersection of federal and state law, with federal statutes defining the underlying requirements for participation in such programs, and significant discretion left to state legislation and administrative regulations for the implementation of such requirements into policy/law.⁴⁸ The federal public housing program (which funds PHAs), the Housing Choice Voucher Program, and Section 8 project-based rental assistance programs require new applicants and existing tenants to remain in compliance with “federal alcohol, drug, and criminal activity restrictions.”⁴⁹ While the obligations of tenants to prevent drug activity by their family members and guests, as well as the possible consequences for failure to do so, are enumerated in The Anti-Drug Abuse Act of 1988, The Cranston-Gonzalez National Affordable Housing Act of 1990, The Housing Opportunity Program Extension Act of 1996, and The Quality Housing and Work Responsibility Act of 1998, the federal government grants PHAs considerable discretion in the enforcement and implementation of these policies and choice of penalties and additional regulations.⁵⁰ The Supreme Court’s holding in *Rucker* clarified the reach of these acts, and *Rucker* remains good law.⁵¹

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *supra* pp. 22-26; New York City Council, Nuisance Abatement Fairness Act, at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2862674&GUID=6DE83438-F8AC-4D23-B5A7-7F9CBD449924>, last accessed Sept. 13, 2017; *New York City Set to Pass*, *supra* note 35.

⁴⁸ See Curtis et al, *supra* note 1.

⁴⁹ *Id.*

⁵⁰ *Id.* at 38-39.

⁵¹ See *Rucker*, *supra* note 11, at. 1230.

Subsequent lower court rulings at both the federal and state level provide guidance regarding how and when alcohol, drug and criminal activity restrictions should be interpreted when determining a tenant's potential removal from his or her home and/or housing subsidy program.⁵² These holdings also highlight growing tensions between potentially conflicting federal and state laws.⁵³

Review of Case Law Post-Rucker: Lower Court Rulings

Under 24 C.F.R. § 982.551(5), lower courts have held that individuals' Section 8 benefits had been properly terminated for a wide range of drug-related infractions.⁵⁴ The Supreme Court's holding in *Rucker* specifically addressed public housing tenants, but it was soon extended to the Section 8 program, with the "obligations of participant,"⁵⁵ noting that "the members of the household may not engage in drug-related criminal activity or violent criminal activity, or other criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises."⁵⁶

In a 2013 unreported opinion, the First Circuit ruled in *Nalubega v. Cambridge Housing Authority* that it was appropriate to terminate the tenancy of a woman who permitted her boyfriend to "live in her apartment and to engage in drug dealing from the apartment."⁵⁷ Under the statutes in effect at the time, the Cambridge Housing Authority (CHA) had the discretion to terminate a tenant's Section 8 voucher only for allowing someone to reside in her home who was not a family member formally included on her lease, and the CHA was empowered to terminate an individual's tenancy if a member of the household engaged in drug-related criminal activity on the premises.⁵⁸ Although the CHA "did not specify when a participant's guest became an occupant for the purposes of Section 8," the Court found that various factors indicated that *Nalubega's* boyfriend resided in her home: there was an arrest warrant for him at her apartment, a number of his papers and personal effects were

⁵² Chen, *supra* note 11.

⁵³ *Id.*, see also *Chateau Foghorn LP*, *supra* note 11; *Rucker*, *supra* note 11, at 1230.

⁵⁴ Chen, *supra* note 11.

⁵⁵ "Obligations of Participant" are the federal requirements for individuals who participate in the Section 8 program to retain their benefits. Failure to comply meet these obligations can result in a loss of Section 8 benefits, which would effectively evict individuals from their homes, as the portion of their rent covered by Section 8 would become their full responsibility. Obligations of Participant, 24 C.F.R. § 982.511 (2016)

⁵⁶ Obligations of Participant, 24 C.F.R. § 982.511 (2016); Chen, *supra* note 11.

⁵⁷ Chen, *supra* note 11; *Nalubega v. Cambridge Housing Authority*, 2013 WL 550738 (D. Mass. 2013) (unreported opinion).

⁵⁸ *Nalubega*, *supra* note 57.

530 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:3]

recovered from the apartment during his arrest, including mail showing Nalubega's boyfriend's name and her address, and a large quantity of drugs were also found.⁵⁹ The Court held that it was thus plausible that Nalubega's boyfriend resided in her home, and that her claim of ignorance regarding his drug-related activity in her apartment was implausible.⁶⁰

A few years earlier, the Second Circuit held that a PHA has the discretion to terminate the tenancy of an individual if the tenant was found guilty of a drug offense within the prior three years, despite the fact that the offense may have occurred while the individual resided in Section 8 housing in a different town and managed by a separate agency.⁶¹ The Court noted that the federal government grants broad discretion to PHAs to set their own mandates in compliance with the exclusion of household members who have engaged in drug-related criminal activity, and the decision to exclude an individual for such infractions prior to their present tenancy falls squarely within the local agency's jurisdiction.⁶²

While prior court holdings focused on cases in which a conviction occurred, in 2010, the Tenth Circuit held that a conviction was not necessary for the termination of tenancy due to drug activity.⁶³ In *Kelly v. Topeka Housing Authority*, a resident's tenancy was terminated based on his son's drug activity, despite the fact that his son was not convicted of drug charges, but was instead placed in a diversion program.⁶⁴

In the Southern District of New York, the Court held in 2010 that an individual's tenancy could be terminated for drug activity at the discretion of the PHA, even if the hearing officer who administered the tenant's hearing regarding the potential loss of benefits ruled that the tenant's Section 8 voucher should not be rescinded.⁶⁵ In *Tinnin v. Section 8 Program of City of White Plains*, a tenant faced removal from his housing following a conviction for cocaine possession.⁶⁶ An administrative hearing was held to determine whether the PHA correctly terminated the tenant's housing in light of his conviction, and the hearing officer in charge of the hearing ruled that though the tenant's housing had been properly terminated, it should be reinstated.⁶⁷ In spite of this ruling,

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Laurence v. Town of Brookhaven Dept. of Housing, Community Development and Intergovernmental Affairs*, 393 Fed. Appx. 791, 793 (2d. Cir. 2010); *see also* Chen, *supra* note 11.

⁶² *Laurence*, *supra* note 11, at 793; *see also* Chen, *supra* note 11.

⁶³ *Kelly v. Topeka Housing Authority*, 147 Fed. Appx. 723, 725 (10th Cir. 2005); *see also* Chen, *supra* note 11.

⁶⁴ *Kelly*, *supra* note 63, at 725; *see also* Chen, *supra* note 11.

⁶⁵ *Tinnin v. Section 8 Program of City of White Plains*, 706 F. Supp. 2d 401, 403; *see also* Chen, *supra* note 11.

⁶⁶ *Tinnin*, note 65, at 403; *see also* Chen, *supra* note 11.

⁶⁷ *Id.*

the Section 8 Program of the City of White Plains terminated the tenant's residency, and the Court upheld this decision, stating that, under 24 C.F.R. § 982.555(f), the discretionary power of PHAs exceeds that of administrative actors such as hearing officers.⁶⁸

State courts have also issued decisions that have limited a PHA's power to make the determination to remove a tenant from a federally subsidized housing program.⁶⁹ In 2007, the Court of Appeals of Wisconsin ruled that it was improper to deny an otherwise qualified applicant for Section 8 on the grounds that a guest of the applicant "had engaged in illegal drug activity."⁷⁰ In *Williams v. Integrated Community Services*, the Pennsylvania Commonwealth Court was asked to determine whether the petitioner was appropriately denied Section 8 benefits due to the drug-related conduct of a guest.⁷¹ The Court declared that conduct consisting of "illegal drug activity" was appropriate grounds for exclusion but ultimately held "that the conduct that may form a basis for denial [...] is only that of a household member and not that of a guest."⁷²

In 2013, the Commonwealth Court of Pennsylvania in the case of *Degelman v. Housing Authority of City of Pittsburgh* addressed possession of drug paraphernalia, as opposed to drug possession or use.⁷³ In *Degelman*, the Court held that neither the federal government nor the local PHA's prohibition of drug-related activity merited evicting a tenant based on the discovery of drug paraphernalia alone.⁷⁴ Citing *Romagna v. Housing Authority of Indiana County*, the Court asserted that "paraphernalia is 'not drug-related criminal activity,'" and noted that, in *Degelman*, the petitioner had previously reported break-ins and requested that the lock to her back door be replaced shortly before the time at which "six empty heroin stamp bags, a rubber tie band, nine cotton balls, two crack pipes, and used hypodermic needles" were discovered in her home.⁷⁵ Petitioner insisted that intruders left the contraband in her home, and a maintenance employee of the building, who had gone to the premises to fix the lock on the back door, testified to hearing voices in petitioner's home while she had been at work.⁷⁶

Most recently, the Court of Appeals of Maryland addressed a policy of deference to state drug laws, as opposed to federal, when it held in *Chateau Foghorn LP v. Hosford*, that, under the "historic police powers

⁶⁸ *Id.*

⁶⁹ Chen, *supra* note 11.

⁷⁰ *Williams v. Integrated Community Services*, 736 N.W. 2d 226, 228 (Wis.App. 2007).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Degelman v. Housing Authority of City of Pittsburgh*, 67 A. 3d 1287 (Pa. Commw. Ct. 2013); *see also* Chen, *supra* note 11.

⁷⁴ *Id.*

⁷⁵ *Degelman*, *supra* note 73, at 1287.

⁷⁶ *Id.* at 1288.

532 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:3]

of the States,” state law pertaining to the process by which an individual may be removed from their federally subsidized housing cannot be preempted by federal statutes nor the local PHA’s interpretation of said regulations.⁷⁷ The Court held that “landlord-tenant law is an area traditionally within the domain of the states,” and that the Maryland “Court of Special Appeals was correct to hold that the presumption against preemption is not overcome as to RP § 8-402.1,” a Maryland statute that required a court to find “that a breach of a lease is ‘substantial and warrants an eviction’ before granting judgment for possession of the leased premises.”⁷⁸ This holding was considered particularly salient, as the respondent, Hosford, had attempted to challenge his eviction from a Section 8 housing unit following the discovery of a marijuana plant in his bathtub.⁷⁹ Chateau Foghorn LP insisted that federal law superseded the jurisdiction of the local PHA and the state, and that under federal law, “marijuana remain[ed] a Schedule 1 controlled substance,” such that a “state cour[t could] not be given discretion to overrule the landlord’s exercise of discretion, only federal courts” could do as such.⁸⁰ Mr. Hosford, however, was able to prove that he was acting in compliance with Maryland’s decriminalization of medical marijuana by providing affidavits regarding his medical use of the marijuana to treat debilitating back spasms.⁸¹ By finding the state’s jurisdictional powers to exceed those of the federal government, the Maryland Court of Appeals’ August 2017 ruling potentially sets the course for states that have decriminalized marijuana to carve out protections for local residents of federal housing programs that are consistent with state law. On November 22, 2017, Chateau Foghorn, LP filed a motion for a writ of certiorari from the Supreme Court regarding whether federal drug and housing laws supersede Maryland’s interpretation of the role of state police powers in regards to drug-related activity in federally subsidized housing.⁸² Chateau Foghorn LP specifically asked the Supreme Court to consider “whether 42 U.S.C. § 1437f(d)(1)(B)(iii) and its implementing regulations preempt statutory elements of Maryland law that authorize a judge or jury to supersede a landlord’s federally authorized discretion to evict a HUD-assisted project based housing tenant who has engaged in drug related criminal activity on or near the housing project.”⁸³ On March 5, 2018, the Supreme Court denied the writ of certiorari without opinion, leaving the question open to the interpretation of individual states for the time

⁷⁷ *Chateau Foghorn LP*, *supra* note 11, at 468-469.

⁷⁸ *Id.* at 468, 482.

⁷⁹ *Id.* at 470.

⁸⁰ *Id.* at 476.

⁸¹ *Id.* at 473-474.

⁸² *Chateau Foghorn LP v. Hosford*, Petition for Writ of Certiorari, No. 17-782, 2017 WL 5899157, page i (Nov. 22, 2017).

⁸³ *Id.*

being.⁸⁴

Variations and Outcomes by Local Public Housing Authority

Under The Anti-Drug Abuse Act of 1988, PHAs were “required [...] to construct lease clauses allowing for the eviction of tenants who engaged in drug use or other behaviors that could threaten the safety of other tenants.”⁸⁵ As case law clearly illustrates, PHAs have wide discretion in determining how to enforce exclusions for drug activity.⁸⁶ This discretion extends not only to potential removal from tenancy at the time of an infraction, but also to a ban from the PHA post-conviction and release for individuals who are convicted of drug crimes.⁸⁷ The average ban from public housing following a drug infraction is three years, but a 2010 study of “post-incarceration policies for those with criminal drug convictions” showed that “for those who have been convicted of a drug felony, bans on access to housing assistance often surpass [...] three year[s].”⁸⁸ In fact, a survey of 40 PHAs’ bans for drug-related activities that involved arrests, warrants, pending charges and/or prior eviction from public and private housing found that individuals are most commonly banned from PHAs for drug-related criminal activity for three to five years, though PHAs also employ bans that range between six and ten years and lifetime, depending upon the nature of the infraction.⁸⁹ As time spent in prison typically does not count towards the amount of time during which a banned tenant must refrain from residing in the family home, individuals who complete prison sentences for felony drug crimes and who wish to live in PHA housing with their families are likely to be barred from doing so upon release from incarceration.⁹⁰

New York State Applications

As the largest public housing authority in the country, NYCHA provides a unique illustration of how federal restrictions for local agencies are carried out on at state level.⁹¹ NYCHA operates pursuant to

⁸⁴ *Chateau Foghorn LP v. Hosford*, Denial of Petition for Writ of Certiorari, Np. 17-782, 2018 WL 1143837 (Mar. 5, 2018).

⁸⁵ Curtis et al, *supra* note 1, at 38; Anti-Drug Abuse Act, *supra* note 2; Anti-Drug Abuse Amendments Act, *supra* note 4; Chen, *supra* note 11.

⁸⁶ Curtis et al, *supra* note 11, at 38; *see also* Chen, *supra* note 11.

⁸⁷ *Id.*

⁸⁸ Curtis et al, *supra* note 1, at 40.

⁸⁹ *Id.* at 43.

⁹⁰ *Id.*

⁹¹ *2017 Fact Sheet*, *supra* note 32.

variety of regulations regarding the consequences for drug-related activity both for offenders (alleged and convicted), and their family members. NYCHA issues an order in the form of a “Trespass Notice” to felony drug arrestees, informing them that they must leave immediately, and not return to, any NYCHA property.⁹² Per NYCHA, a Felony Drug Arrestee is any “person who has been arrested for a Felony Drug Offense committed on NYCHA Property, or on property immediately adjacent to NYCHA property [...] and [who] is at least sixteen (16) years of age at the time of arrest.”⁹³ The Trespass Notice can be issued to the arrestee by the arresting officer, NYCHA employees, or any other party authorized to do so by NYCHA.⁹⁴ The individual’s exclusion from all NYCHA properties is effective immediately, and he or she must remain out of all NYCHA properties.⁹⁵ An individual may apply for a Residence Exception, which provides permission to remain within their home pending resolution of their arrest.⁹⁶

Individuals who have been served with NYCHA Trespass Notices may apply for a Termination of Exclusion if they are able to prove that either their felony drug offense and related crimes were dismissed and will not be prosecuted further, or if their sentence and probation have been served and they show significant progress and growth away from any future involvement in drug crimes.⁹⁷ Individuals may also be considered for a Termination of Exclusion, provided their sentence and probation have been served and they have incurred “no further convictions of any offense specified in Penal Law Articles 220 and 221” for between three and six years, depending on the nature of their original infraction.⁹⁸ To qualify to have their exclusion terminated, individuals who have faced Class A, B, and C felony convictions must show that they have gone six years (excluding time served) without further infractions; individuals who were convicted of Class D and E felonies must show that they have gone five years post-incarceration without facing similar charges; individuals convicted of Class A misdemeanors must demonstrate four years post-conviction without additional drug charges; and individuals with Class B misdemeanors must prove that they have gone three years post-incarceration without further drug infractions.⁹⁹ As

⁹² New York City Housing Authority, *Trespass Policy for Felony Drug Arrests*, at https://www1.nyc.gov/assets/nycha/downloads/pdf/trespass_policy.pdf, last visited October 19, 2017.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Class A through E felonies, and Class A and B misdemeanors, are differentiated by the severity of the drug-related crime at hand, and are used to denote the maximum sentencing for

such, the minimum NYCHA ban for drug crimes closely tracks the minimum average PHA ban.¹⁰⁰

However, as NYCHA has the discretion to terminate a family's lease for drug infractions committed by one household member, the Permanent Exclusion policy can allow family members to retain their home if they agree to permanently exclude from their home the individual alleged to have violated drug activity regulations.¹⁰¹ A Permanent Exclusion may be recommended by NYCHA following a finding that "a NYCHA tenant [engaged in] dangerous conduct that violates the tenant's lease," whether committed by "a member of the household or someone else under the tenant's control."¹⁰² A Permanent Exclusion is intended to last for the duration of the household's lease.¹⁰³ Between 2007 and 2014, "4,698 individuals were permanently excluded from [NYCHA] for criminal activity."¹⁰⁴ Unlike the Trespass Notice, a Permanent Exclusion can only be lifted if the Tenant of Record for the apartment submits an application asking to have the exclusion lifted, and said application is subsequently approved.¹⁰⁵

The Tenant of Record's application to lift the Permanent Exclusion must either demonstrate evidence of a positive change sufficient to prove that the individual who has been permanently excluded from the household has so significantly changed his or her circumstances that there is a marked reduction in risk of further issues; or that a significant amount of time has passed during which the individual committed no further

individuals facing such charges. For example, an individual convicted of a Class A misdemeanor cannot be sentenced to less than 15 days or more than a year in prison for their offense, while felonies carry longer sentences. *See generally* William C. Donnino, § 55.00 *Applicability of article: Practice Commentary*, McKinney's Penal Law; *see also* *Trespass Policy*, *supra* note 92.

¹⁰⁰ *Trespass Policy*, *supra* note 92; *see also* Curtis et al, *supra* note 1, at 40.

¹⁰¹ This exclusion may include family members charged with, but not yet convicted of, a drug-related crime. New York City Housing Authority, *Permanent Exclusion - Frequently Asked Questions*, at <http://www1.nyc.gov/site/nycha/residents/permanent-exclusion-faq.page>, last accessed Sept. 28, 2017.

¹⁰² *Permanent Exclusion*, *supra* note 101.

¹⁰³ *Id.* In 2016, the Court held *In re Rachel Hernandez v. N.Y. City Housing Authority*, that the petitioner's tenancy was appropriately terminated following the discovery in her home of an individual whom she agreed to permanently exclude from her apartment. *In re Rachel Hernandez*, 135 A.D.3d 643-644 (N.Y. App. Div. 2016). The Court specified that even though the infraction only occurred on one occasion, that was sufficient for the termination of Rachel Hernandez's tenancy. *Id.* at 644. Other termination determinations made by NYCHA have been reversed by the courts [*see In the Matter of Matos v. Hernandez*, 79 A.D.3d 466 (N.Y. App. Div. 2010)], wherein the Court reversed the permanent exclusion of the petitioner's son based on the finding that he was convicted of two misdemeanors, but had no other criminal history, was not a threat to the community, and, significantly, was the sole caregiver for the petitioner and her granddaughter, both of whom were chronically ill. *Matos v. Hernandez*, 466-467. Holdings such as the Court's in *Hernandez* illustrate the high stakes faced by family members when they agreed to permanently exclude an individual from their apartment, and are likely a cause of the distrust many residents have for NYCHA administrators. *See infra*, note 160.

¹⁰⁴ Cammett, *supra* note 1, at 1144.

¹⁰⁵ *Permanent Exclusion*, *supra* note 101.

536 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:3]

excludable offenses.¹⁰⁶ If the application to lift the exclusion is granted, the individual may only visit the family home, not reside there.¹⁰⁷ Permission to once again reside in the family home is contingent upon first having the exclusion lifted, and then the approval of a written request for Temporary or Permanent Permission to reside in the apartment submitted by the Tenant of Record.¹⁰⁸ As such, individuals who have been permanently excluded from NYCHA due to drug-related activity are faced with the difficult task of meeting the requirements to qualify for Temporary or Permanent Permission to return to their families' homes, and may also need to maintain sufficiently strong familial ties while barred from the family home (and potentially incarcerated) so as to encourage their families to apply for such allowances.

III. ADDITIONAL FACTORS INFLUENCING THE INTERSECTION OF DRUG CRIMINALIZATION AND HOUSING POLICY

The Affordable Housing Crisis

In addition to the present national affordable housing crisis, New York City is faced with a particularly dire lack of affordable housing.¹⁰⁹ Nationally, there is a shortage of 7.4 million affordable rental homes for the more than 11.4 million families defined as “extremely low-income.”¹¹⁰ As of 2011, there were 979,142 low or extremely low-income households in New York City, yet only 424,949 affordable rental units for this population.¹¹¹ Furthermore, in the three decades leading up to 2016, New York City saw a loss of 250,000 affordable rental units due to changing rent control laws.¹¹² In 2013, NYCHA announced that there were more people (270,000) on NYCHA’s waiting list than there were “total [...] public housing units in New York City [178,900].”¹¹³ As of

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See City of New York, *A Five Borough, Ten Year Plan*, at <https://www1.nyc.gov/office-of-the-mayor/news/199-14/mayor-de-blasio-housing-new-york—five-borough-10-year-housing-plan-protect-and#0> (2017), last visited January 2, 2019; National Low Income Housing Coalition, *Massive Shortage of Affordable and Available Housing for America’s Lowest Income Households*, Mar. 6, 2017 at <http://nlihc.org/article/massive-shortage-affordable-and-available-housing-america-s-lowest-income-households>.

¹¹⁰ National Low Income, *supra* note 109.

¹¹¹ *A Five Borough, Ten Year Plan*, *supra* note 109.

¹¹² Jim Zarroli, *As More People Move In New York Suffers Affordable Housing Crisis*, National Public Radio, Mar. 8, 2016 at <http://www.npr.org/2016/03/08/469692197/as-more-people-move-in-new-york-city-suffers-affordable-housing-crisis>, last visited October 19, 2017.

¹¹³ Max Rivin-Nadler, *Number of People Waiting for Public Housing Now Exceeds Total Amount of Public Housing In NYC*, at

March 6, 2017, there were “257,143 families [...] on the waiting list for public housing,” but there was only a “0.7 percent vacancy rate of apartments available for occupancy,” and, additionally, there were “146,808 families [...] on the waiting list for Section 8 housing in New York.”¹¹⁴

Presently, a household of two people qualifies for Section 8 housing in New York if the combined income of both individuals is between \$21,800 and \$68,875; a household of the same size would qualify for NYCHA if they earn a combined annual household income of \$61,050 or less.¹¹⁵ As of March 2017, the average rent for a one-bedroom apartment in New York City was \$3,680.¹¹⁶ While the actual monthly rent for a one bedroom varies within neighborhoods and boroughs, the combination of a stark shortage of available affordable housing units in New York City, the enormous waiting list for NYCHA and Section 8 eligibility, and overall high rental rates means that individuals and families who face eviction or the termination of their federal housing benefits find themselves in a vulnerable position, with few options to secure sustainable housing in New York City if they lose their present dwelling.¹¹⁷

*Impact of Changing Drug Laws and Policies on Federally
Subsidized Housing Eligibility*

The growing trend of decriminalization of marijuana at the state level is at the heart of *Chateau Foghorn LP v. Hosford*. While Chateau Foghorn’s holding cannot necessarily be extended to other states, the Maryland Court of Appeals’ holding that state police powers supersede federal anti-drug policies seems to reflect the evolving views of many citizens, as well as state and local legislatures. Although federal laws regarding the criminalization and prosecution of drug-related crimes have changed little in recent years, the majority of Americans support the legalization of marijuana, and nearly half of the states in the country have decriminalized it in some capacity.¹¹⁸ Marijuana is the leading cause of

http://gothamist.com/2013/07/24/amount_of_people_waiting_for_public.php (Jul. 24, 2013).

¹¹⁴ *NYCHA 2017 Fact Sheet*, *supra* note 32.

¹¹⁵ New York City Housing Preservation & Development, *Section 8 Eligibility*, at <http://www1.nyc.gov/site/hpd/section-8/applicants-eligibility.page> (Apr. 1, 2016); New York City Housing Authority, New York City Housing Authority, *Eligibility*, at <http://www1.nyc.gov/site/nycha/eligibility/eligibility.page> (last visited Dec. 4, 2017).

¹¹⁶ Kathleen Elkins, *How much it costs to rent a 1 bedroom in 30 cities around the world*, at <https://www.cnbc.com/2017/03/24/how-much-it-costs-to-rent-a-1-bedroom-in-30-cities-around-the-world.html> (Mar. 26, 2017).

¹¹⁷ See generally *NYCHA 2017 Fact Sheet*, *supra* note 32; *Section 8 Eligibility*, *supra* note 115; *Eligibility*, *supra* note 115.

¹¹⁸ National Conference of State Legislatures, *Marijuana Overview: Legalization*, Aug. 30,

drug-related arrests nationally.¹¹⁹ State-based marijuana decriminalization efforts do not supersede federal statutes regarding intrastate crimes and convictions, and the potential for tension between federal laws that govern PHAs and states that have decriminalized certain drug infractions has arisen at the state level.¹²⁰ In *Chateau Foghorn LP*, the Maryland Court of Appeals explicitly held that state law supersedes federal law when access to federally subsidized housing is threatened by drug-related activity, and that, as the tenant's possession and medical use of marijuana did not violate Maryland criminal law, it was not proper to evict him.¹²¹

The Supreme Court denied the writ of certiorari sought by Chateau Foghorn LP, thus leaving open the question of a state's legislative power to prevent a tenant's eviction from federally subsidized housing due to drug-related activity that is legal at the state level, yet illegal under federal law.¹²² In the interim, states such as Colorado, where marijuana has been more broadly decriminalized, have reported arrest rates for Black and Latino teenagers that are significantly higher than those prior to decriminalization, with the arrest rates for teenagers in these demographics rising between 20% (for Latino teenagers) and 50% (for Black teenagers) between 2012 and 2014.¹²³ Conversely, the marijuana arrest rate for white teenagers decreased by roughly 10% during the same time period.¹²⁴ As the potential impacts of decriminalization on sustained access to federally subsidized housing are determined by courts and/or legislatures, it is important to bear in mind the heightened burden faced by individuals, in particular minors, who may be excluded from the family home following such a conviction.¹²⁵ While all individuals barred from federally subsidized housing for drug-related activity face housing insecurity in the midst of an affordable housing crisis, juveniles barred from the home are particularly unlikely to have the ability to secure stable housing without the assistance of their families.¹²⁶

*Recent Legislation in New York City Offers Additional Protections
and Resources for Tenants*

2017 at <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

¹¹⁹ Bureau of Justice Statistics, Drug and Crime Facts, at <https://www.bjs.gov/content/dcf/enforce.cfm>, last revised Sept. 29, 2017.

¹²⁰ See *Chateau Foghorn LP v. Hosford*, *supra* note 11.

¹²¹ *Chateau Foghorn LP*, *supra* note 11, at 468-469, 473-474.

¹²² Petition for Writ of Certiorari, *supra* note 84.

¹²³ Ben Markus, *As Adults Legally Smoke Pot in Colorado More Minority Kids Arrested For It*, *National Public Radio*, June 29, 2016 at <http://www.npr.org/2016/06/29/483954157/as-adults-legally-smoke-pot-in-colorado-more-minority-kids-arrested-for-it>, last visited Sept. 18, 2017.

¹²⁴ *Id.*

¹²⁵ Cammett, *supra* note 1, at 1144.

¹²⁶ *Id.*

To address citywide concerns regarding the affordable housing crisis, the collateral consequences on families, and the importance of stable housing, in 2017, the New York City Council passed two pieces of legislation: The Right to Counsel and The Nuisance Abatement Fairness Act.¹²⁷ In response to ProPublica and the New York Daily News' findings regarding applications of the Nuisance Abatement Act, in October of 2016, "13 bills called the Nuisance Abatement Fairness Act" were introduced and subsequently passed, in February 2017, by the City Council.¹²⁸ The new ordinances marked "the first time the [Nuisance Abatement] law ha[d] been amended to add protections for the accused."¹²⁹ Key provisions of the bills include a new limitation that only permits a home to be closed without notice¹³⁰ if the criminal activities alleged to be conducted from within the dwelling "pose a significant risk of 'physical harm' to the public."¹³¹ Significantly, the City Council included this amendment to address the possibility of bodily harm posed by extensive building code violations, as opposed to potential harm from drug-related activity, thus offering an understanding of "physical harm" as that posed by the actual danger of a structurally unsound building to residents, as opposed to the more dubious harm tenants were alleged to encounter due to drug-related activity.¹³²

Most striking, perhaps, are the provisions of The Nuisance Abatement Fairness Act which redefine the circumstances under which law enforcement may pursue a nuisance abatement action against a family in their home.¹³³ The new Act prohibits actions against individuals who are charged with, or convicted of, misdemeanor drug charges, and/or marijuana possession.¹³⁴ Additionally, law enforcement officers are barred from pursuing a housing case for any family (in non-federally subsidized housing) if a confidential informant provides the only witness evidence to the alleged drug-related crime – there must now be at least one sworn officer on record as a firsthand witness to pursue a drug-related

¹²⁷ See generally *New York City Set to Pass*, *supra* note 35; and City of New York, Office of the Mayor, *Mayor de Blasio Signs Legislation to Provide Low-Income New Yorkers with Access to Counsel for Wrongful Evictions*, Aug. 11, 2017, at <http://www1.nyc.gov/office-of-the-mayor/news/547-17/mayor-de-blasio-signs-legislation-provide-low-income-new-yorkers-access-counsel-for/#/0> (last visited Feb. 1, 2018).

¹²⁸ See generally *New York City Set to Pass*, *supra* note 35.

¹²⁹ *Id.*

¹³⁰ Closure of the home refers to the practice of barring the family from entering the household until the matter is fully adjudicated, and potentially preventing them from ever regaining the ability to reside therein. See generally *New York City Set to Pass*, *supra* note 35.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See generally *Id.*

case before any evidence from a confidential informant can be considered.¹³⁵ When nuisance abatement housing actions are pursued, families can no longer be required to bar a family member from their residence for more than one year, except under “unique circumstances,” which permit the removal of an individual from the family home for up to three years.¹³⁶ Finally, “the city [can] no longer [...] deprive any person of property rights if they were unaware of the nuisance,” which is a considerable departure from the prior practice of removing entire families from their homes for the drug-related activities of another family member, even if they were unaware of their relative’s actions.¹³⁷ Under The Nuisance Abatement Fairness Act, families in privately owned, non-federally funded housing are no longer at risk of eviction for the actual or alleged illegal activities of individual household members of which they are unaware, nor will they face a choice between loss of the family home or excluding a family member from the household for life.¹³⁸

To assist New Yorkers in ensuring their rights as tenants are upheld in eviction proceedings, in August 2017, New York City became “the first city in the country to ensure anyone facing an eviction case can access legal assistance” when The Right to Counsel bill was signed into law.¹³⁹ Right to Counsel, as set forth in Intro. 214-B, provides funding and administrative oversight to guarantee legal counsel to individuals whose income amounts to up to 200% of the poverty line for the duration of any eviction proceedings they may face, and also provides initial legal assistance to New Yorkers of all financial backgrounds facing such legal action.¹⁴⁰ The bill was designed to roll out over the course of five years, and most key provisions have already gone into effect.¹⁴¹ Notably, while The Nuisance Abatement Fairness Act addresses a housing issue governed separately from NYCHA and Section 8 policies regarding criminal activity of household members, The Right to Counsel provides legal services for NYCHA tenants during administrative hearings regarding the possible termination of benefits.¹⁴² On average, there are 3,200 such cases each year.¹⁴³ Right to Counsel will be fully implemented by 2022 and is expected to serve 400,000 New York City residents.¹⁴⁴

The Nuisance Abatement Fairness and Right to Counsel Acts both

¹³⁵ *Id.*

¹³⁶ The bill does not define “unique circumstances,” and further definition has yet to be provided from the first year of the law’s enforcement. *See generally Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Office of the Mayor, *supra* note 127.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

highlight the ability of municipal governments to take action to increase the housing protections afforded to individuals and families. Notably, while New York City does not have the power to alter how PHAs respond to criminal activity by their tenants or their tenants' guests, the City's guarantee of legal support for PHA residents facing administrative hearings is a clear illustration of the means by which local government can help protect its residents from a loss of housing. In addition to providing representation to tenants during administrative hearings, PHAs also have the ability to play a role in the reunification of families following a household member's return home from prison, which can result in a decreased chance of the individual's recidivism, thereby reducing any future risk of housing infractions for his or her family. PHAs across the country have begun working to stem the collateral consequences of criminal convictions through their own programmatic partnerships with families, community based organizations and governmental entities to revisit the terms under which individuals may be permitted to return to their family home upon reentry from prison.¹⁴⁵

IV. PROPOSAL

Public Housing Authorities Can Exercise Discretion to Minimize Collateral Consequences and Support Individuals and Families Through Reentry

PHAs have wide discretion in determining how or whether or not to restrict an individual's future ability to remain in their federally-subsidized housing following a criminal conviction.¹⁴⁶ Though this discretion has traditionally been applied in the adoption of policies stricter than those implemented by the federal government, a growing number of PHAs have begun enacting policies and programs that use their discretionary power so as to better support individuals who are prospective PHA residents, prior PHA residents, and/or are related to current PHA residents if these individuals are in the midst of reentry and might otherwise be barred from residing with their family, or on their own, in the PHA.¹⁴⁷

¹⁴⁵ See generally *Coming Home*, *supra* note 8; and John Bae, Kate Finley, Margaret diZerega, and Sharon Kim, *Opening Doors: How to develop reentry programs using examples from public housing authorities*, New York: Vera Institute of Justice, Sept. 2017, at <https://www.vera.org/publications/opening-doors-public-housing-reentry-guide>.

¹⁴⁶ The exception to the discretion afforded PHAs is the requirement to permanently ban of registered sex offenders and individuals who have been convicted of producing methamphetamines in public housing. *Coming Home*, *supra* note 8, at 7, citing Lahny R. Silva, *Criminal Histories in Public Housing*, WISC. L. REV 5, no. 24, 375-397 (2015).

¹⁴⁷ See generally *Coming Home*, *supra* note 8; and *Opening Doors*, *supra* note 145.

The Creation of New York City Housing Authority's Family Re-entry Pilot Program

In November 2013, NYCHA launched the Family Re-entry Pilot Program (FRPP), a collaboration with the Vera Institute of Justice, the New York City Department of Homeless Services, and the Corporation for Supportive Housing.¹⁴⁸ The creation of the FRPP was prompted by the fact that:

“[F]ormerly incarcerated people who wish to be reunited with their families in public housing and have no other housing options have a difficult choice to make: ask their families to move, which is often an unrealistic request; return home in violation of most public housing authorities’ regulations and put their families at risk of eviction; seek alternate housing in the few under-resourced shelters or halfway homes that have open beds; or live in the streets.¹⁴⁹”

The program’s goals were “to show that formerly incarcerated people can [...] successfully reunite with family members; stay drug-free, secure employment, and keep from returning to crime; and be as compliant with lease regulations as households where there is no member with a criminal record.”¹⁵⁰ The Family Re-entry Pilot Program allows formerly incarcerated individuals who have been out of prison for up to three years to apply to live in a PHA apartment already held by their families.¹⁵¹ Prior to the program’s founding, NYCHA had a “pre-existing [policy of offering] temporary permission to join a household [...] which allow[ed] a tenant to ask permission from the property manager for a family member (regardless of their criminal history) to live in his or her apartment for up to one year.”¹⁵² NYCHA was thus able to extend this temporary period to two years, and to link the two-year allowance to the FRPP’s admission criteria so as to launch the program.¹⁵³

Successful FRPP applicants must be at least 16 years of age; demonstrate their willingness “to make a positive change in [their] life;”

¹⁴⁸ *Coming Home*, *supra* note 8, at 12; New York City Housing Authority, *Family Re-entry Pilot Program Frequently Asked Questions*, last revised Dec. 12, 2014, at <https://www1.nyc.gov/assets/nycha/downloads/pdf/family-reentry-pilot-faqs-revised-english-12-12-14.pdf> (last visited Jan. 30, 2018).

¹⁴⁹ *Coming Home*, *supra* note 8, at 7.

¹⁵⁰ Vera Institute of Justice, *New HUD Funding Enables Review of Pilot Program to Help Families Reunite in Public Housing*, Oct. 21, 2014, at <https://www.vera.org/newsroom/press-releases/new-hud-funding-enables-review-of-pilot-program-to-help-families-reunite-in-public-housing> (last visited Jan. 18, 2018).

¹⁵¹ *Coming Home*, *supra* note 8, at 7; *Family Re-Entry Pilot Program*, at <https://www1.nyc.gov/assets/nycha/downloads/pdf/re-entry-brochure-20151109-en.pdf> (last visited Jan. 27, 2018).

¹⁵² *Coming Home*, *supra* note 8, at 10.

¹⁵³ *Id.*

“participate in intensive case management services [which can include such activities as counseling, job training, and other re-entry support] for 6-12 months;” and cannot be a sex offender or have a conviction for producing methamphetamine in a PHA.¹⁵⁴ Although potential participants were initially identified by referral to NYCHA from select community based organizations, individuals now have the option to apply directly for the program.¹⁵⁵ Upon successful completion of two years in the program, an FRPP participant’s family may request that the participant be permanently added to their family’s NYCHA lease.¹⁵⁶

Assessment and Success of The Family Re-entry Pilot Program

In 2014, NYCHA and Vera Institute of Justice received a \$100,000 grant from the Department of Housing and Urban Development to study the FRPP.¹⁵⁷ The study was designed to include “focus groups and interviews with pilot participants, their families, pilot staff, and service providers.”¹⁵⁸ In 2016, researchers from the Vera Institute of Justice published their findings in *Coming Home, An Evaluation of the New York City Housing Authority’s Family Reentry Pilot Program*, which included largely favorable outcomes for program participants, as well as feedback regarding the program’s strengths, and recommendations for improvement.¹⁵⁹

The FRPP was initially intended to have 150 participants, and one of the study’s key findings was that only 85 individuals ultimately participated in the program, driven in large part by the distrust of community members of NYCHA’s actual intentions regarding the collecting of information from tenants about family members with criminal records.¹⁶⁰ Prospective applicants and their families expressed concerns that NYCHA would use their information to evict their households, and that, even if the applicants were permitted to return to their family’s homes, NYCHA would use this allowance as a premise for frequent, unannounced household inspections, with the prospect of eventual eviction.¹⁶¹ These concerns illustrate the vulnerable position in which many low-income families find themselves resulting from the

¹⁵⁴ *Coming Home*, *supra* note 8, at 7; *Family Re-Entry Pilot Program*, *supra* note 151.

¹⁵⁵ *Coming Home*, *supra* note 8, at 13; *Family Re-Entry Pilot Program*, *supra* note 151; New York Housing Authority, *NYCHA Family Partnerships Department*, at <http://www1.nyc.gov/site/nycha/residents/family-services.page> (last visited Jan. 30, 2018).

¹⁵⁶ *Family Re-Entry Pilot Program*, *supra* note 151.

¹⁵⁷ *HUD Funding Enables Review*, *supra* note 150.

¹⁵⁸ *Id.*

¹⁵⁹ *See generally Coming Home*, *supra* note 8.

¹⁶⁰ *Coming Home*, *supra* note 8, at 13.

¹⁶¹ *Id.*

punitive treatment of their communities throughout the War on Drugs, as well as the uncertainty posed to families facing a potential loss of their home in the current housing market.

Of the 85 pilot participants, only one individual “was convicted of a new charge while in the program.”¹⁶² “Four participants were arrested for new offenses and four committed technical violations of their parole.”¹⁶³ Whether the recidivism rate for pilot program participants is assessed based on the infractions of one (1.18%) or nine (10.59%) individuals, it was well below The Marshall Project’s 2014 report that between “1996 and 2010, [...] about 40 percent of former inmates [in New York] return[ed] to prison within three years of release,” and “[b]etween 2008 and 2010, the recidivism rate even inched slightly upward.”¹⁶⁴ Participants reported that they “were able to get jobs, attend job training, go to school, and/or receive substance-use treatment.”¹⁶⁵ Consequently, participants and family members reported that they were happy with, and relieved by, the support they received from the program, as the support services helped counteract many of [the] barriers” that they faced upon reentry.¹⁶⁶ Participants highlighted the importance of family reunification, especially in their ability to reconnect with children, and the sense of fulfillment they felt in their ability to contribute to the household, particularly when they felt that they were able to “return the support” family members had provided during incarceration.¹⁶⁷ Participants who were “less enthusiastic about their current living situation” generally expressed that they wanted to be more independent, or felt there was stigma associated with living in a PHA.¹⁶⁸ Even these participants still expressed positive feelings regarding the overall support and services they received from the FRPP.¹⁶⁹ When asked about alternative housing options, “almost half of the interviewed participants stated that they would be homeless, living in a shelter, or in transitional housing, such as a halfway house or three-quarter house had they not been accepted in the FRPP.”¹⁷⁰ Of the six participants who completed their two year program by the time of the assessment, three were formally added to their families’ NYCHA leases, and the other three had moved into their

¹⁶² *Coming Home*, *supra* note 8, at 21.

¹⁶³ *Id.*

¹⁶⁴ Dana Goldstein, *The Misleading Math of “Recidivism,”* The Marshall Project, Dec. 4, 2014, at <https://www.themarshallproject.org/2014/12/04/the-misleading-math-of-recidivism> (last visited Feb. 1, 2018).

¹⁶⁵ *Coming Home*, *supra* note 8, at 13.

¹⁶⁶ *Id.* at 21.

¹⁶⁷ *Id.* at 23-25.

¹⁶⁸ *Id.* at 22.

¹⁶⁹ *Id.* at 22.

¹⁷⁰ *Id.*

own, stable, private housing.¹⁷¹ While the pilot program has ended, NYCHA's Family Partnerships Department continues to administer the program.¹⁷²

Lessons from PHA Re-Entry Programs Nationwide

In addition to its partnership with NYCHA, the Vera Institute of Justice also conducted a study of reentry programs run by public housing authorities throughout the country.¹⁷³ As “there are about 3,300 public housing authorities (PHAs) serving more than one million households” nationally, there is significant opportunity for individuals to receive crucial support during the reentry process if PHAs opt to provide applicable support services.¹⁷⁴ Assessing reentry programs administered by eleven PHAs nationwide,¹⁷⁵ researchers found that “[t]he most successful reentry programs allow housing authorities to do what they do best – provid[e] housing – while relying on partners to provide services beyond the scope of the PHA’s mandate and resources.”¹⁷⁶ Programs found success when PHAs collaborated with organizations that could provide participants with services including, but not limited to, “behavioral or mental health counseling, case management services, family counseling, domestic violence or trauma counseling, legal representation, substance abuse treatment, education programs, or vocational/workforce training.”¹⁷⁷ In addition, program partners offered crucial support in the areas of funding, referrals, and community engagement.¹⁷⁸ While most of the programs focused specifically on PHAs, some included partnerships with private landlords, who may not always participate in the Section 8 program.¹⁷⁹

In all of the programs assessed, access to subsidized housing was provided to individuals going through reentry, with the stipulation that

¹⁷¹ *Id.* at 20.

¹⁷² *NYCHA Family Partnerships*, *supra* note 155.

¹⁷³ *Opening Doors*, *supra* note 145.

¹⁷⁴ *Id.* at 7, *citing* Council of Large Public Housing Authorities, *Facts about Public Housing*, at <https://perma.cc/92M4-F7S6>.

¹⁷⁵ The study focused on programs run by Akron Metropolitan Housing Authority, Ohio; Burlington Housing Authority, Vermont; Chicago Housing Authority, Illinois; Cook County Housing Authority, Illinois; Housing Authority of the City of Los Angeles, California; Housing Authority of the County of Union, Pennsylvania; Housing Authority of New Orleans, Louisiana; New York City Housing Authority, New York; Oakland Housing Authority, California; San Antonio Housing Authority, Texas; and Syracuse Housing Authority, New York. *See* John Bae, Kate Finley, Margaret diZerega, and Sharon Kim, *Id.* at 5.

¹⁷⁶ *Id.* at 11; *citing* U.S. Department of Housing and Urban Development, *It Starts with Housing* (Washington, DC: HUD, 2016).

¹⁷⁷ *Id.* at 10.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 14.

they comply with other requirements for the duration of the program, which included compliance with the terms of participants' probation or parole; receipt of case management services for at least six months to a year; the definition of individual goals for reentry; and participation in programming through case management geared towards meeting the participant's goals.¹⁸⁰ When PHAs partnered with organizations and municipal offices to provide participants with the support services necessary to meet the requirements of the program, participants were able to "be reliable tenants, engaged parents, and successful members of the workforce."¹⁸¹

PHAs received funding from a variety of sources to support their programming, including state Departments of Corrections, private foundations, local Departments of Homeless Services, state commissions, the PHAs' own budgets, and the budgets of the community based organizations with which they partnered, from which some of the organizations fully funded the case management and other support services they provided.¹⁸² Many of the PHAs also relied upon applicant referrals from community partners, in addition to direct referrals from courts, parole officers, and local sheriffs' offices.¹⁸³ Critically, partner organizations provided support in engaging local communities to foster awareness of the programs and, most importantly, trust on the part of neighbors regarding the close supervision provided to participants, and trust by families that this supervision was intended to assist, not harm them.¹⁸⁴

As researchers noted the issue of community distrust of NYCHA when studying the FRPP, they also found that potential applicants nationwide expressed concerns about how applying to or participating in a PHA's reentry program might impact their families' ongoing access to housing, as concern regarding malicious intent of PHAs was largely universal.¹⁸⁵ In addition to the concerns of potential applicants, PHAs also encountered residents who were upset about the danger individuals leaving prison might pose to their community, and who also expressed frustration with the idea that people who committed crimes would now be given permission to "jum[p] the waitlist" and secure housing assignments ahead of law-abiding citizens.¹⁸⁶ Researchers found that concerns from both potential participants and the communities at large were best addressed prior to the start of the program, through means

¹⁸⁰ *Id.* at 14-15.

¹⁸¹ *Id.* at 26.

¹⁸² *Id.* at 19-20.

¹⁸³ *Id.* at 18.

¹⁸⁴ *Id.* at 20.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 22.

including the dissemination of written materials prepared in a “cautiou[s], [...] sensitive” manner; a focus on public safety benefits; the engagement of journalists who could help residents understand the importance of such programs, while also humanizing participants; and the engagement of local officials and community groups in promoting the programs to community members.¹⁸⁷ For example, NYCHA engaged with New York City elected officials, Youth Represent;¹⁸⁸ and Theater of the Oppressed NYC, which wrote and performed plays about the FRPP “to address public housing and reentry concerns and to introduce the Family Reentry Program as a safe and viable housing option for formerly incarcerated people.”¹⁸⁹

Finally, researchers from the Vera Institute for Justice “recommend developing a deliberate staff engagement process to inform [PHA] employees about the program’s purpose and grounding in research.”¹⁹⁰ In addition to “communicat[ion] and collaborat[ion] across agencies” and “engag[ment with] the local police department,” thorough training for PHA employees, especially “line staff” helped ensure that community members, participants, and prospective applicants had access to clear, thorough information regarding the programs and what is required of them at each step in the program’s implementation.¹⁹¹ If PHAs interested in launching programs of their own are able to ensure that community members and prospective applicants have a clear understanding of the program and the services it will require and provide, they stand to simultaneously boost community support for, and trust in, the program, thus potentially growing the program’s enrollment and reach. This could reduce the risks faced by individuals going through the reentry process by fostering family reunification and access to secure, supportive housing.

Legal Organizations Can Provide Vital Reentry Support

In 2016, the U.S. Department of Housing and Urban development awarded eighteen Juvenile Reentry Assistance Program grants nationwide, with the goal of “alleviat[ing] collateral consequences associated with a juvenile or criminal record by assisting youth up to age

¹⁸⁷ *Id* at 20-22.

¹⁸⁸ Youth Represent is a legal organization in New York City that provides “comprehensive representation” to young people who have been involved in the criminal justice system. Youth Represent, *History, Mission, Values*, at <http://youthrepresent.org/history-mission-values/> (last visited Feb. 1, 2018).

¹⁸⁹ Youth Represent, *History, Mission, Values*, at <http://youthrepresent.org/history-mission-values/> (last visited Feb. 1, 2018); *Opening Doors*, *supra* note 145, at 21.

¹⁹⁰ *Opening Doors*, *supra* note 145, at 24.

¹⁹¹ *Id* at 24-25.

548 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:3]

24 residing in public housing, or who would be residing in public housing but for their criminal record.”¹⁹² In New York City, Youth Represent and NYCHA were each awarded a \$100,000 grant to support The Youth Reentry Project, a collaboration meant to serve NYCHA residents aged 24 and under.¹⁹³

Youth Represent was able to provide “staff on-site” at six PHAs throughout New York City as part of the Youth Reentry Project.¹⁹⁴ In this capacity, Youth Represent employees apply their community-lawyering model to provide young people with immediate access to “direct legal representation, Know Your Rights workshops, and capacity building” services where they live.¹⁹⁵ Services offered to participants include “reinstating revoked or suspended drivers’ licenses, counseling regarding legal rights and obligations in searching for employment, [...] guidance for readmission to school, [and] creating or modifying child support orders and other family services.”¹⁹⁶ The provision of accessible, comprehensive reentry services is intended to help “young people [...] minimize legal barriers to reentry.”¹⁹⁷

V. CONCLUSION

Many of the initiatives discussed herein were funded, at least in part, by the federal government.¹⁹⁸ While renewed federal funding for such initiatives seems unlikely in the current political climate, New York City’s Right to Counsel and Nuisance Abatement Fairness Act; the implementation of reentry programs at PHAs nationwide, and community-based legal support services like the Youth Reentry Project provide a model for reentry services that can be engaged in collaboratively through local initiatives. For example, the manner in which NYCHA slightly adjusted its existing policy of offering temporary permission for leaseholders to request that a family member return to the

¹⁹² Youth Represent, *Youth Represent Recognized with National Reentry Grant*, Apr. 26, 2016, at <http://youthrepresent.org/news-blog/2017/3/20/youth-represent-recognized-with-national-reentry-grant> (last visited Jan. 20, 2018); New York City Housing Authority, *NYCHA Receives \$100,000 Federal Grant for Youth Reentry Services*, May 18, 2016, at <http://www1.nyc.gov/site/nycha/about/press/pr-2016/NYCHA-Receives-100K-Federal-Grant-for-Youth-Reentry-Services.20160518.page>, *linking to* <https://gallery.mailchimp.com/5184f04a6d9f88d259ccfc971/files/HUDJRAPAwardAnnouncement.pdf> (last visited Jan. 19, 2018).

¹⁹³ *NYCHA Receives \$100,000*, *supra* note 192.

¹⁹⁴ Youth Represent, *Special Projects: Juvenile Reentry Assistance Program*, at <http://youthrepresent.org/special-projects/> (last visited Jan. 20, 2018).

¹⁹⁵ *Id.*; Youth Represent, *Youth Represent Recognized*, *supra* note 192.

¹⁹⁶ *Youth Represent Recognized*, *supra* note 192.

¹⁹⁷ *Special Projects*, *supra* note 194.

¹⁹⁸ *See Youth Represent Recognized*, *supra* note 192; *HUD Funding Enables*, *supra* note 150.

household for a year, so as to allow for the two year Family Reentry Program, is a clear illustration of the manner in which other PHAs might allow individuals who would be otherwise barred from housing to return to the family home during reentry, without creating entirely new programming or policy.¹⁹⁹ Many of the community-based organizations that partner with PHAs on existing reentry programs are providing program participants with their standardly offered services.²⁰⁰ Furthermore, states and municipalities have the ability to allocate funding from their own budgets to tenant support initiatives, as New York City has done with The Right to Counsel program, without requesting or accessing related federal funds.²⁰¹

Clear changes in federal enforcement of War on Drugs policies seem unlikely to occur in the immediate future. However, the changing national opinions regarding the criminalization of certain drugs, coupled with community-led initiatives for new laws and programmatic efforts to protect low-income families' housing, have already resulted in solid evidence of the potential for formerly incarcerated individuals to successfully reenter society, and for families to remain intact and in stable housing, when provided with the appropriate services and support.²⁰² In the absence of federal action, it is apparent that local PHAs and legislative bodies both can and should apply the experiences of their counterparts throughout the country to develop programs of their own intended mitigate the collateral consequences of drug-related infractions on access to federally subsidized housing.

¹⁹⁹ *Coming Home*, *supra* note 8, at 10.

²⁰⁰ *Opening Doors*, *supra* note 145, at 19-20.

²⁰¹ Office of the Mayor, *supra* note 127.

²⁰² *Coming Home*, *supra* note 8, at 13, 21-25.