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Cover Page Footnote

None.

MODIFYING THE *ESCALERA* CONSENT DECREE: A CASE STUDY ON THE APPLICATION OF THE *RUF0* TEST

Valerie D. White*

Introduction

On March 10, 1994, the New York City Housing Authority Police Department, in conjunction with the Federal Bureau of Alcohol, Tobacco and Fire Arms, uncovered a multi-million dollar drug ring operating out of several New York City Housing Authority (NYCHA) developments.¹ Officers confiscated \$240,000 worth of heroin, 25 guns, and over \$50,000 dollars in cash.² Five of the fourteen federal warrants were executed on NYCHA apartments.³ Two of the drug gang members arrested resided in public housing units, and allegedly manufactured, packaged and distributed the heroin product out of those apartments.⁴ The drug ring, operating throughout an area in upper Manhattan and the Bronx that encompassed eight NYCHA developments, grossed nearly \$100,000 daily.⁵

In a separate incident on March 15, 1994, NYCHA's Board of Directors approved a tenant termination disposition to evict a tenant whose boyfriend, son and nephew had used the tenant's project apartment to manufacture and sell crack cocaine, and to store various firearms and ammunition.⁶ This was the second proceeding brought by NYCHA to evict this tenant.⁷ In the prior proceeding, the tenant agreed to a settlement that allowed her to maintain her tenancy if she would exclude her son from her household.⁸ More

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1. *Uptown Task Force Raids*, NEW YORK CITY HOUSING AUTHORITY PRESS RELEASE, Mar. 10, 1994, at 1.

2. *Id.* at 2, 3. During the firearms phase of the investigation, the police seized an additional 14 firearms and approximately 10,000 rounds of ammunition. *Id.*

3. *Id.* at 2.

4. *See id.* at 2.

5. *Id.* at 1.

6. T.C. 24, Case No. 1104/93, New York City Hous. Auth. Termination of Tenancy Disposition Board Resolution, Week of Mar. 23, 1994.

7. *Id.* at 2.

8. *Id.*

than two years after the settlement, the tenant's son was still in residence and was still using the apartment as a base for drug sales.⁹

These two examples represent a growing trend, not only in New York City Housing Authority developments, but in public housing developments across the country—the use of public housing by residents to facilitate the drug trade.¹⁰ This use of apartments promotes other illegal and dangerous activities, including violent physical assaults, and increased drug dependency. As a result, it is virtually impossible for NYCHA to complete its mission to provide a safe and secure environment for public housing residents.¹¹

For nearly twenty-five years, administrative procedures created pursuant to the *Escalera v. New York City Housing Authority Consent Decree*¹² have governed NYCHA's efforts to evict residents

9. *Id.* at 4.

10. See generally John P. Vitella, Council of Large Public Housing Authorities, Report #92-1, Security, Crime and Drugs in Public Housing: A Review of Programs and Expenditures (1992) (on file with the *Fordham Urban Law Journal*). This report presents an overview of the increase of crime in public housing authorities across the country over the last fifteen years. Public housing authorities have employed different strategies to combat drugs and crime in the developments. See, e.g., David E. B. Smith, *Clean Sweep or Witch Hunt?: Constitutional Issues in Chicago's Public Housing Sweeps*, 69 CHI.-KENT L. REV. 505 (1993) (After a dramatic increase in gun-related violence and persons being killed in the "crossfire", the Chicago Housing Authority instituted "sweep" searches of residents' apartments). There have also been many discussions surrounding the privatization of public housing authorities, primarily because local governments have not successfully managed public housing, with the plague of drugs being one of the primary failures. See, e.g., Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878 (1990) (advocating housing assistance for low-income families in the form of vouchers and housing allowances, and allowing the private housing market to provide the actual housing services). But see Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law that Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681 (1994) (suggesting that public housing programs should not be privatized, but rather corrected to operate more effectively).

11. See Vitella, *supra* note 10, at 5. See also Don Terry, *Project Tenants See Island of Safety Washing Away*, N.Y. TIMES, Feb. 4, 1991, at A1 (discussing the impact of drugs and gun-related assaults and killings on the King Towers NYCHA development in Harlem); Robert Neuwirth, *Duck for Cover in Cypress Hills*, NEWSDAY, June 25, 1991, at 48 (discussing the frequent number of shots fired at the Cypress Hills Houses, a NYCHA development in Brooklyn); Kevin Sack, *The Short Life of 'Little Man' A 14-Year-Old Drug Peddler*, N.Y. TIMES, Nov. 29, 1989, at A1 (discussing an execution style killing of a 14-year old marijuana peddler at the Castle Hill Houses, a NYCHA development in the Bronx).

12. *Consent Decree, Escalera v. New York City Hous. Auth.*, 425 F.2d 853 (2d Cir. 1970), cert. denied, 400 U.S. 853 (1970). A consent decree is a negotiated settlement between the parties that is enforced through the court's power. Traditionally, consent decrees have been treated as having the same characteristics of both a long-term contract and a judicial decree. For a description of consent decrees and their formulation

accused of using their apartments as a base for their drug trade operations. Under the Decree, it can take years for NYCHA to evict tenants who deal drugs from their apartments.¹³ Because of this delay, law-abiding tenants are continually subjected to the dangerous and devastating effects of drugs.¹⁴

In *Rufo v. Inmates of Suffolk County Jail*,¹⁵ the Supreme Court held that defendants in institutional reform cases are subject to a lenient standard of review for consent decree modifications. *Rufo* allows for modifications when they are suitably tailored to a significant change in facts.¹⁶ The defendants in *Escalera* have returned to the court with the hope that *Rufo* allows them to modify the Decree in light of the profound and unforeseen growth of the drug trade in City-controlled apartments.¹⁷ This Note argues that because the modification stems from changed circumstances—the unforeseen boom in drugs—it should be granted.

Modification of the *Escalera* decree is appropriate under *Rufo* and would allow NYCHA to maintain a safe environment for its residents. Part I explains the standard used in modifying a consent decree, pre-and post-*Rufo*, as well as the difficulties in applying the *Rufo* test. Part II traces the history of the *Escalera* Consent Decree. Part III outlines the arguments for and against modification. Part IV applies *Rufo* to the proposed modification of *Escalera*, arguing that modification is appropriate because the facts have changed significantly since the Decree was signed, and the modification sought is appropriately tailored to these changed circumstances.

I. Standards for Modifying Consent Decrees in Institutional Reform Case

A. Pre-*Rufo* Standard

Under Rule 60(b) of the Federal Rules of Civil Procedure, courts have discretion to modify a consent decree under certain circum-

in public law litigation, see Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1299-1302 (1976).

13. For a complete discussion of the eviction process under the decree, see *infra* notes 90-107 and accompanying text.

14. For a discussion of the dangerous effects of drugs in public housing, see *infra* part IV.B.1..

15. 502 U.S. 367 (1992).

16. *Id.* at 393.

17. The Housing Authority's Memorandum of Law In Support of its Motion for an Order Modifying the *Escalera* Decree, *Escalera v. New York City Hous. Auth.*, 67 Civ. 4307 (WRM) (S.D.N.Y. Aug. 2, 1993)[hereinafter Defendant's Brief].

stances.¹⁸ Before *Rufo v. Inmates of Suffolk County Jail*, the Supreme Court had construed Rule 60(b) in light of the strict standard established in *United States v. Swift & Co.*¹⁹ In *Swift*, the defendants, representatives of the meat-packing industry, sought relief from a ten-year old consent decree, resulting from an anti-trust case brought by the government that prevented the meat-packers from manipulating the industry.²⁰ Defendants argued that the industry had transformed so completely that the restraints of the injunction had become useless and oppressive.²¹

Justice Cardozo, writing for the Court, held: "[n]othing less than a clear showing of *grievous wrong* evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."²² The Court denied the defendant's request to modify the decree because industry conditions had not changed enough to remove the potential for the meat-packers to resume violations of antitrust regulations.²³

Since the *Swift* decision, courts traditionally have interpreted the "grievous wrong" language as setting a rigorous standard to evaluate requests for consent decree modification.²⁴ Many commenta-

18. A court may modify a consent decree under certain circumstances including change of law, change of fact, the objective of the decree has been achieved or the decree is no longer equitable. FED. R. CIV. P. 60(b) states:

On motion and upon such terms as are just, the court may relieve a party . . . from final judgement, order or proceeding for the following reasons: (5) . . . it is no longer equitable that the judgement should have prospective application; or (6) any other reason justifying relief from the operation of the judgement.

Id.

19. 286 U.S. 106 (1932).

20. *Id.* at 113.

21. *Id.*

22. *Id.* at 119 (emphasis added). *Swift* set forth two conditions that a moving party must prove before a decree can be modified: (1) a change in circumstances surrounding the decree that is so substantial that the original need for the decree no longer exists; and (2) continued enforcement of the decree will cause undue hardship.

23. *Id.* at 117-19.

24. See, e.g., *Firefighters Local Union v. Stotts*, 467 U.S. 561 (1984) (rejecting modification of a consent decree when the express terms of the decree could have but did not include provisions governing the layoff of minority firefighters hired in compliance with the consent decree.) Yet, in spite of its sweeping language, the *Swift* standard has met some resistance in subsequent circuit court decisions. Before *Rufo*, the United States Court of Appeals for the Second Circuit used the language in *Swift* to achieve flexible results in cases considering modifications of consent decrees. See, e.g., *New York State Assn. for Retarded Children v. Carey*, 706 F.2d 956 (2d Cir. 1983), cert. denied, 465 U.S. 915 (1983). In *Carey*, the court granted the state's request to modify a consent decree that required the state to relocate mentally retarded patients of a government institution into private group homes. The court held that for

tors, however, criticized *Swift's* inflexibility, particularly in cases involving institutional reform.²⁵

Indeed, subsequent Supreme Court cases backed away from *Swift's* grievous wrong standard.²⁶ For example, in *Railway Employees' v. Wright*²⁷, the Court held that a relevant change in law was sufficient to modify a consent decree.²⁸ The Supreme Court stated that a district court's power to modify a decree is inherent,²⁹ and that "[s]ound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen."³⁰ In *United States v. United Shoe Machine Corp.*,³¹ the Supreme Court distinguished the context under which the facts of *Swift* should be read—the existing and

one, the state could not have foreseen the tight real estate market which prevented the location of homes for the patients. *Id.*

25. See, e.g., Timothy Stolfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101 (1986) (suggesting that modification is inevitable in institutional reform cases); Owen Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (stating that remedies based upon the specific circumstances of a violation and the appropriate legal authority must be modified to conform with changes in the legal authority or in circumstances). See also, Chayes, *supra* note 12 (describing the need for a broad, flexible role of the court in institutional reform litigation). For a general comment on appropriate standards for institutional reform litigation and subsequent decree modifications, see Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805 (1990). Professor Sturm's analysis states that:

A broad theory [for institutional reform litigation] requires a greater understanding of the extent to which a particular institutional context presents special demands, limitations, and potential for judicial intervention than presently exists. . . . Prior to evaluating the court's role in institutional reform litigation in general, it is important to understand the factors underlying organizational stasis in a variety of institutional contexts, the parameter of judicial involvement in those contexts, and the dynamic relationship between judicial intervention and organizational change.

Id. at 810.

26. See, e.g., *Railway Employees' v. Wright*, 364 U.S. 642 (1961), *United States v. United Shoe Machine Corp.*, 391 U.S. 244 (1968), *Board of Ed. v. Dowell*, 498 U.S. 237 (1991).

27. 364 U.S. 642 (1961).

28. In *Railway v. Wright*, a railroad union organization sought modification of a 1945 consent decree under which employees were not required to join the labor organization. *Id.* at 643. The provision was consistent with the then existing Railway Labor Act. 45 U.S.C. § 152 (1926). A 1951 amendment to the Railway Labor Act, however, permitted union-shop agreements between railroads and labor union.

29. *Wright*, 364 U.S. at 647. ("[P]ower there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." (citing *Swift*, 286 U.S. at 114)).

30. *Id.* at 647.

31. 391 U.S. 244 (1968).

continuing danger of unlawful trade and manipulation in a market which the Court had found still existed.³² In *Board of Education v. Dowell*,³³ the Supreme Court rejected the use of the strict "grievous wrong" standard in an institutional reform case involving a school desegregation consent decree.³⁴ The Court distinguished *Swift*, explaining that the *Swift* decree was intended to operate in perpetuity to prevent unfair and unlawful trade, while the desegregation order was intended to expire upon the substantial completion of its objectives.³⁵

These cases demonstrate that even before *Rufo* explicitly modified *Swift*, the Supreme Court had already eroded the inflexible "grievous wrong" standard to allow for greater judicial discretion in modifying consent decrees.

B. Modification Under *Rufo*

In *Rufo v. Inmates of Suffolk County Jail*,³⁶ the Supreme Court held that the strict standard of "grievous wrong" did not apply in cases where the request to modify a consent decree stemmed from institutional reform litigation.³⁷ The Court held that district courts must exercise flexibility in considering modification of consent decrees when the defendant requesting such modification is a government entity.³⁸

The plaintiffs in *Rufo* were detainees of the Suffolk County, Massachusetts jail who claimed that the county violated their constitutional rights because prison conditions were inadequate to house the number of inmates detained in the facility.³⁹ In 1979, the plaintiffs and the Suffolk County Sheriff's office entered into a consent decree, whereby the Sheriff's office agreed to construct a new facility in which inmates would be confined to single occu-

32. *Id.* at 248. The Court held, however, that a decree may not be modified if the purposes of the litigation as incorporated in the decree have not been fully achieved.

33. 498 U.S. 237 (1991).

34. *Id.* at 240.

35. *Id.* at 247-48. ("From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination.")

36. 502 U.S. 367 (1992).

37. *Id.* For commentary in support of the *Rufo* test, see generally, Kevin E. Hooks, *Case Comment: Rufo v. Inmates of Suffolk County Jail: Modification of Consent Decrees in Institutional Reform Litigation*, 26 GA. L. REV. 1025 (1992) (stating that the Court established a new and workable standard for consent decree modification in institutional reform cases). *But see infra* part I.C. for a discussion suggesting that the standard for review of consent decrees has not actually changed.

38. *Rufo*, 502 U.S. at 393.

39. *Id.* at 372.

pancy rooms.⁴⁰ The defendants violated this and subsequent consent decrees by failing to construct the new facility in a timely fashion.⁴¹ In 1989, when the new facility was finally under construction, the Suffolk County Sheriff's office moved to modify the consent decree to allow for double-bunking male detainees.⁴² The defendant cited an unforeseen growth of the inmate population during the planning phases of the new jail, and sought modification of the decree to accommodate the additional detainees.⁴³

The District Court denied the modification, holding that the Sheriff had not satisfied the "grievous wrong" standard necessary to warrant modification under *Swift*.⁴⁴ The court found that the increased number of pretrial inmates was neither a new nor an unforeseen problem, and that the requirement of single occupancy for the inmates was one of the most important elements of the 1979 decree.⁴⁵

The Supreme Court disagreed. It exempted cases of institutional reform litigation from *Swift*'s "grievous wrong" standard and limited this language to the specific decree in *Swift*.⁴⁶

The Court recognized the substantial increase in institutional reform litigation and reasoned that district courts require discretion to decide whether to modify consent decrees.⁴⁷ The Court acknowledged the potentially long life of consent decrees resulting from institutional reform litigation and the likelihood that significant changes would occur during the life of the decree.⁴⁸ Therefore, the Court held that district courts should be able to modify

40. *Id.* (citing *Inmates of Suffolk County Jail v. Kearney*, Civ. Action No. 71-162-G (Mass., May 7, 1991)).

41. *Id.* at 375.

42. *Id.* at 376. At the time of the decree, it was unclear whether double-bunking was constitutional. One week after the decree, in *Bell v. Wolfish*, 441 U.S. 520 (1979), the Supreme Court made it clear that double-bunking is constitutional.

43. *Rufo*, 502 U.S. at 376.

44. *Id.* at 376-77.

45. *Id.* at 377 (citing *Inmates of County Jail v. Kearney*, 734 F. Supp. 561, 564 (Mass. 1990)).

46. *Id.* at 379 (holding that Justice Cardozo's statements requiring "nothing less than a grievous wrong evoked by new and unforeseen conditions" was meant to apply specifically to the modification of the meat-packers decree, and not to all requests for modification of a consent decree, and has been read out of context since the *Swift* holding).

47. *Id.* at 380.

48. *Rufo*, 502 U.S. at 380: ("The upsurge in institutional reform litigation since *Brown v. Board of Education*, 347 U.S. 483 (1954), has made the ability of a district court to modify a decree in response to changed circumstances all the more important. Because such decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased.").

consent decrees when changes occur that were unforeseen when the agreement was made.⁴⁹

1. *The Rufo Test*

Replacing the *Swift* standard, the Court in *Rufo* established a two part "flexible" test for use in institutional reform cases. The first part asks whether a significant change of law or factual conditions warrants modification of the decree.⁵⁰ The second part asks whether the proposed modification of the decree is suitably tailored to alleviate the problems caused by the changed conditions or change in law.⁵¹

With regard to a change in law, a modification is warranted when there has been a change in federal law either by statute or case ruling.⁵² The change in law must be such that compliance with the decree becomes illegal,⁵³ or the change must be a clarification of a law in existence when the consent agreement was made that presents a situation warranting modification.⁵⁴

The change in fact requirement can be satisfied in one of three situations: (1) compliance with the decree has become substantially more onerous; or (2) the decree proves unworkable because

49. This exercise in discretion does not, however, permit district courts to modify each consent decree involving institutional reform. *Id.* at 383.

50. *Id.* at 384.

51. *Id.* at 383 ("[T]he court should consider whether the proposed modification is suitably tailored to the changed circumstance.").

52. *Id.* at 388.

53. *Rufo*, 502 U.S. at 388 ("A consent decree must be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law."). See, e.g., *Railway Employees'*, 364 U.S. at 650-51.

54. *Rufo*, 502 U.S. at 389-90. The Court stated that clarification in itself does not provide a basis for modifying a decree. However, the court stated that clarification could possibly constitute a change in circumstance if it could be established that both parties misunderstood the governing law and based their agreement on that misunderstanding. The Court reasoned that:

To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation. . . .

While a decision that clarifies the law will not, in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law.

Id. See also *Pasadena City Board of Ed. v. Spangler*, 427 U.S. 424 (1976) (holding that modification of a decree should be granted because the parties misinterpreted the intervening decisional law).

of unforeseen obstacles; or (3) enforcement of the decree without modification would be detrimental to the public interest.⁵⁵

The *Rufo* Court explained that the first “substantially more onerous” situation arises when compliance becomes substantially more burdensome or almost impossible in the face of a continuous good faith attempt to comply with the decree.⁵⁶ To establish that the second “unforeseen obstacle” situation has arisen rendering the decree unworkable, the moving party must establish that changed circumstances were not anticipated at the time the consent decree agreement was made.⁵⁷

The moving party can also merit a modification by establishing that enforcement of the decree without modification would be detrimental to the public interest.⁵⁸ The Court noted the importance of the public interest in institutional reform litigation because these decrees reach beyond the parties in the suit and impact the public’s right to efficient operation of government entities.⁵⁹

Under the second part of the test, the proposed modification is evaluated under three criteria to determine if it is “suitably tailored to the changed circumstance.”⁶⁰ First, the modification must not create or perpetuate a constitutional violation.⁶¹ Second, the modi-

55. *Rufo*, 502 U.S. at 384-85.

56. *See id.* *See also* Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980) (allowing modification of a consent decree setting numerical quotas for welfare reform when the state determined that there were not enough welfare recipients in the system to meet the targeted numbers set forth in the consent decree).

57. *See Rufo*, 502 U.S. at 385. The court distinguishes “unforeseen and unforeseeable,” stating that a standard requiring both:

would provide even less flexibility than the exacting *Swift* test; we decline to adopt it. Litigants are not required to anticipate every exigency that could conceivably arise during the life of a consent decree.

If it is clear that a party anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b).

Id. at 384-85.

58. *Rufo*, 502 U.S. at 384-85 (citing *Duran v. Elrod*, 760 F.2d 756, 759-61 (7th Cir. 1985) (modification allowed to avoid pretrial release of accused violent felons)).

59. *Id.* at 381 (citing *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)). *See also id.* at 392 (“[A] court should surely keep the public interest in mind in ruling on a request to modify based on a change in conditions making it substantially more onerous to abide by the decree.”). *See also* *Patterson v. Newspaper and Mail Deliverers’ Union*, 797 F. Supp. 1174 (S.D.N.Y. 1992), *aff’d*, 13 F.3d 33 (2d Cir. 1993) (extending the flexible standard to private institutions affecting a large number of people in order to vindicate significant public rights).

60. *Rufo*, 502 U.S. at 391.

61. *Id.*

fication must not "rewrite a consent decree so that it conforms to the constitutional floor," but rather it must be tailored to resolve only the problems created by the change in circumstances.⁶² Third, the *Rufo* Court held that district courts should give deference to local government administrators in modifying consent decrees.⁶³ The Court reasoned that local government administrators are most knowledgeable regarding the most effective means of modifying a decree.⁶⁴

2. *Problems with the Rufo Standard*

The *Rufo* Court seemingly provided clear guidelines for district courts to follow when determining if a consent decree should be modified.⁶⁵ Nevertheless, legal scholars express three primary concerns over the guidance that the test set forth in *Rufo* actually provides.

62. *Id.* ("Once a court has determined that changed circumstances warrant a modification of the consent decree, the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances. A court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires."). *But see id.* at 398 (O'Connor, J., concurring) ("It may be that the modification of one term of a decree does not always defeat the purpose of the decree. . . . But it hardly follows that the modification of a single term can never defeat the decree's purpose, especially if the term is the 'most important element' of the decree."). Justice O'Connor argues that *Rufo* places greater limits on the district courts. Under *Rufo*, a district court may not modify a decree to include a provision which one of the parties would not have agreed to in the original decree, but which subsequently becomes equitable and which the court could have formerly approved under its authority in compliance with Rule 60(b)(5). *Id.*

63. *Rufo*, 502 U.S. at 392. The Court found that local government administrators "have the 'primary responsibility for elucidating, assessing, and solving' the problems of institutional reform, to resolve the intricacies of implementing a decree modification." *Id.* (citing *Brown v. Board of Ed.*, 349 U.S. 299 (1955)).

64. *Id.* at 392 n.14. ("To refuse modification of a decree is to bind all future officers of the State, regardless of their view of the necessity of relief from one or more provisions of a decree that might not have been entered had the matter been litigated to its conclusion.").

65. *But see* David I. Levine, *The Modification of Equitable Decrees in Institutional Reform Litigation: A Commentary on the Supreme Court's Adoption of the Second Circuit Flexible Test* 58 BROOKLYN L. REV. 1239, 1274 (1993) (stating that the *Rufo* test did not really change the standard of *Swift*, but rather is consistent with the flexible standard allowed within the language used by Justice Cardozo); Stuart A. Kaufman, *Determining the Appropriate Standard for Modification of Consent Decrees Arising from Institutional Reform Litigation - Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct 748 (1992), 26 SUFFOLK U. L. REV. 1133 (1992) (stating that the test established under *Rufo* still harbors potential for hazardous results).

First, the test is thought to be no different than the language of *Swift* as clarified by *United Shoe*.⁶⁶ Both cases allow for modification of a consent decree under appropriate circumstances and showing by the moving party.⁶⁷ By the *Rufo* Court's own admission, the "grievous wrong" language was meant to apply to the facts of *Swift*, and has been interpreted out of context to mean that all requests for consent decree modifications should meet this rigorous standard.⁶⁸ Justice Cardozo specifically stated that courts should look carefully at the decree to determine if changed law or circumstances justify changing the decree.⁶⁹ These additional guidelines, which some argue do not clarify the previous guidelines, may cause further confusion and uncertainty among the courts.⁷⁰ In her concurring opinion, Justice O'Connor stated that the Court would have better served the district courts by reviewing and analyzing the discretion afforded lower courts.⁷¹

66. See *Rufo*, 502 U.S. at 394 (O'Connor, J., concurring) (stating that the majority's ruling does not express any clearer guidelines than the language in the Fed. Rule Civ. Proc. 60(b)(5)). See also, Levine, *supra* note 65, at 1274 ("The *Rufo* opinion also makes it clear that *Swift* is still valid. The test adopted in *Rufo* is consistent with the structure Justice Cardozo established in *Swift*.").

67. See also *Railway Employees v. Wright*, 364 U.S. 642 (1961); *Board of Ed. v. Dowell*, 498 U.S. 237 (1991).

68. *Rufo*, 502 U.S. at 379 ("Read out of context, this language suggests a 'hardening' of the traditional flexible standard for modification of consent decrees. . . . But that conclusion does not follow when the standard is read in context.") (citations omitted). See also *Swift*, 286 U.S. 114-15. In the *Swift* opinion, Justice Cardozo distinguished the facts of the case from one which would warrant modification as follows:

The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative . . . The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be . . .

Id.

69. *Swift*, 286 U.S. at 114-15 ("[A] court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."). See Levine, *supra* note 65, at 1274.

70. See *Rufo*, 502 U.S. at 394 (O'Connor, J. concurring). See also Kaufman, *supra* note 65, at 1141 ("A continuation of past uncertainty regarding the applicable modification standard will breed the possibility that future use of [the *Rufo* test] may diminish.").

71. See *Rufo*, 502 U.S. at 394-95 (O'Connor, J. concurring). Justice O'Connor's concurrence stated that the District Court unnecessarily limited the extent of their review under the *Swift* test:

[A]n appellate court should examine primarily the method in which the District Court exercises its discretion, not the substantive outcome the District Court reaches. If the District Court takes into account the relevant consid-

Second, the *Rufo* Court's deference to local government administrators has caused some concern. District courts should avoid being "too deferential" to the judgments of government defendants⁷² because consent decrees represent a contract between two parties. Allowing one party to alter that decree may be inequitable.⁷³

Finally, an overly broad or flexible standard could open the floodgates to motions to modify consent decrees. Some defendants may try to use the flexible approach under *Rufo* as an excuse to either delay or avoid compliance with consent decrees.⁷⁴ Easy modification would make compliance with consent decrees less meaningful to plaintiffs.

While it is too soon to determine how courts will interpret the flexible standard set forth in *Rufo*, the proposed modification of the *Escalera* decree provides an interesting case to analyze how courts may apply the *Rufo* test.

II. The *Escalera* Consent Decree

In 1967, New York City Housing Authority tenants filed a class action challenging NYCHA's eviction procedures.⁷⁵ The plaintiff

erations . . . and accommodates them in a reasonable way, then the District Court's judgement will not be an abuse of its discretion, regardless of whether an appellate court would have reached the same outcome in the first instance

I think we would offer more guidance to the District Court here . . . if we would simply review the District Court's exercise of its discretion and specify any shortcomings we might find in the method by which the court reached its conclusion.

Id.

72. *Id.* at 398-99 (O'Connor, J., concurring); see also Levine, *supra* note 65, at 1277 ("[T]here is concern that the district court will be too deferential to the professional judgement of the [government] defendant.").

73. *Rufo*, 502 U.S. at 398-99 (O'Connor, J., concurring) ("Deference to one of the parties to a law suit is usually not the surest path to equity . . ."). See also Kaufman, *supra* note 65, at 1140 ("The nature of equitable decisions requires that courts afford equal consideration to the viewpoints of all parties concerned. A modification standard predicated on deference to the party will likely prejudice the rights of the other party.").

74. Levine, *supra* note 65, at 1277 n.213.

75. Prior to this action, NYCHA and its tenants had automatic month-to-month leases, which was terminable by either party given one month notice. When seeking lease terminations for "non-desirability", the project manager met with the tenant to discuss the undesirable acts and the manager's recommendation for lease termination, and to allow the tenant an opportunity to discuss the charge. If the project manager decided to proceed with the termination recommendation, s/he forwarded the tenant's folder, or record of the tenancy, to NYCHA's eight member Tenant Review Board (TRB). The TRB reviewed both the manager's recommendation and the tenant folder. If the TRB determined that the tenant's lease should be terminated based on the charge and the information in the folder, TRB forwarded a one-sentence no-

class in *Escalera v. New York City Housing Authority*⁷⁶ sought to ensure that eviction proceedings used by NYCHA afforded “non-desirable” tenants⁷⁷ due process under the Fourteenth Amendment.⁷⁸ The Second Circuit found that NYCHA procedures violated the tenants’ due process rights and remanded the case for trial, noting that class plaintiffs could establish a prima facie case by proving that NYCHA’s procedures conformed to the allegations set out in the complaint.⁷⁹

The court held that tenants must receive notice, before a hearing, of the charges against them so that they can properly prepare to rebut those charges.⁸⁰ The pre-*Escalera* notice inadequately described alleged violations; moreover the initial conference with the project manager did not cure the lack of notice.⁸¹ Further, the

tice of charges to the tenant. The tenant had ten days to request a hearing before a panel of two or three board members. At the hearing, the TRB panel read a summary of the entries in the tenant’s folder. NYCHA presented no witnesses to substantiate the charge or the other information in the folder. The tenant was permitted to respond to the entries in the folder, but was not permitted to review the folder’s contents. Further, the tenant was never informed of or given access to the rules and regulations governing the TRB. Transcripts of the hearings were never produced or maintained. When initiating lease termination proceedings for breach of rules and regulations, the project manager held a meeting with the tenant, at which time he informed the tenant of the alleged violation, and allowed the tenant to present his/her version of the story. If the project manager decided to pursue termination after the meeting, s/he forwarded the termination recommendation, tenant folder and report on the meeting to NYCHA’s Central Office. If Central Office approved of the termination NYCHA sent the tenant a thirty day notice to vacate. NYCHA filed holdover proceedings when the tenant did not vacate after 30 days. See *Escalera v. New York City Hous. Auth.*, 425 F.2d 853, 857-59 (2d Cir. 1970), cert. denied, 400 U.S. 853 (1970).

76. *Escalera*, 425 F.2d 853.

77. Non-desirability was defined as “[A] detriment to health, safety or morals of [a family’s] neighbors to the community; an adverse influence upon sound family and community life; a source of danger or cause of damage to the property of the Authority; a source of danger to the peaceful occupation of other tenants; or a nuisance.” *Id.* at 857 (citing NEW YORK CITY HOUSING AUTHORITY TENANT REVIEW HANDBOOK, Ch. VII, I, App. B at 4).

78. *Id.* The Fourteenth Amendment to the U.S. Constitution states, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of laws . . .” U.S. CONST. AMEND. XIV, § 1. NYCHA moved to dismiss the complaint under for failure to state a claim. The lower court denied NYCHA’s motion, and appealed.

79. *Escalera*, 425 F.2d at 862.

80. *Id.*

81. *Id.* The court expressed concern with this procedure because of the potential for both the project manager and the TRB to consider information not related to the present violation and not discussed in the initial meeting, but present in the tenant’s folder, in their decision to terminate the lease.

court held that tenants were denied due process because they had no opportunity to review the tenant folder prior to the hearing.⁸² In addition, the court held that the tenants should have an opportunity to confront and cross-examine individuals providing the information relied upon in the termination hearing.⁸³ The court also remanded the case for consideration of the propriety of NYCHA's failure to provide the Tenant Review Board (TRB) with termination hearing rules and regulations.⁸⁴

Finally, the court held that tenants should have the opportunity to present their cases to an impartial hearing officer.⁸⁵ Although, under the administrative procedures, tenants could request a hearing to rebut the termination recommendation, such hearings were not held until after the TRB had determined that the lease should be terminated.⁸⁶ The court found that the TRB was likely to be biased against the plaintiff by the time of the hearing.⁸⁷

The parties to the case entered into a consent decree prior to trial. The decree established specific guidelines for NYCHA's tenancy termination process. It required complete disclosure of the charges against the tenant, access to the tenant's folder and related records, and a full evidentiary hearing in front of an impartial hearing officer.⁸⁸ The consent decree specifically stated that the decree could be modified or adjusted in light of a number of changing circumstances, provided that the modification satisfied due process requirements.⁸⁹

82. *Id.* at 862. ("[D]enying tenants access to the material in the folder, when the entire folder is considered by the TRB in its determination of eligibility, deprives the tenants of due process.")

83. *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970)). ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.")

84. *Id.* at 863. NYCHA argued that the regulations amounted to no more than mere "internal procedural guidelines" and were, therefore, not vital to the plaintiff's ability to prepare. The plaintiffs argued, however, that knowledge of TRB regulations was necessary for tenants to prepare for the hearing. *Id.*

85. *Escalera*, 425 F.2d at 863.

86. *Id.* at 863 n.7.

87. *Id.*

88. Consent Decree at Exhibit A, § 1, *Escalera* (67 Civ. 4307).

89. *Id.* at Exhibit A, § 12. The parties negotiated a clause that would allow latitude in modifying or amending the agreement:

The foregoing is intended to be a general outline of the procedures to be followed in the immediate future in processing proposed termination cases, in compliance with the Court decree. They may be hereafter amended, supplemented, modified or adjusted in the light of experience, the volume of the case load involved, economic considerations, and the needs of the Authority

Pursuant to the consent decree, NYCHA implemented new procedures entitled "New York City Housing Authority Termination Tenancy Procedures."⁹⁰ The new procedures consist of nine major components that must be completed before a tenant is evicted. The eviction process typically takes two years to complete.⁹¹

Prior to making a recommendation for termination, a project manager must "call-in" the tenant.⁹² If the project manager is unable to resolve the issue through the "call-in," the tenant folder goes to NYCHA's Law Department for a hearing.⁹³ The Law Department then sends a "Notice of Charges" to the tenant at least 15 days prior to the scheduled hearing.⁹⁴ This notice details the charges against the tenant, describing the incident giving rise to the hearing, when it took place, and how it violates the rules and regulations as set forth by the lease.⁹⁵ This notice also informs the tenant of his right to representation at the hearing.

At the first hearing date, the project manager holds another conference with the tenant and offers the tenant the opportunity to settle the case through a probationary agreement or permanent ex-

and its tenants; provided that, any such changes are consistent with, and do not contravene due process of law.

Id. See also Note, Robert R. Zitko, *The Appealability of Conditional Consent Judgments*, 1994 U. ILL. L. REV. 241 (1994). (discussing the standards by which conditional consent decrees are modified). Although the *Escalera* decree was not a conditional consent decree, this last clause did leave room for future changes in the decree.

90. Consent Decree at Exhibit B, *Escalera* (67 Civ. 4307); New York City Housing Authority Tenant Termination Procedure 040.302 SC (Rev. 3/89)[hereinafter NYCHA 040.302 SC].

91. See Defendant's Brief, *Escalera* (67 Civ. 4307).

92. NYCHA 040.302 SC at 1, § 2. At the "call-in," the project manager discusses the alleged violation with the tenant, allows the tenant to explain the situation, and informs the tenant that the situation may lead to termination of tenancy. *Id.*

93. *Id.* Prior to going to the Law Department, the case is reviewed by the Tenancy Administrator, who also serves as the Director of Resident Review and Counseling. NYCHA 040.302 SC at 1, § 3; Defendant's Brief at 4, *Escalera* (67 Civ. 4307). The Tenancy Administrator reviews the folder and determines whether an intervention would help avoid an eviction action. NYCHA 040.302 SC at 1, § 3. NYCHA assigns tenants Social Workers to determine if an "intervention" would cure the non-desirable action or breaches of rules and regulations. Interventions consist of a review by the Social Worker, and referrals to various social services programs including drug treatment, mental health treatment, foster care, domestic violence counseling, family counseling, etc. Telephone Interview with Kevin Kearney, Assistant Director, Dept. of Research, New York City Housing Authority (Jan. 31, 1996). If the Tenancy Administrator determines that a basis exists to proceed with eviction, or if an intervention has not been successful, s/he forwards the tenant folder to the NYCHA's Law Department. NYCHA 040.302 SC at 1, § 3.

94. NYCHA 040.302 SC at 1, § 4.

95. *Id.*

clusion of an offending household member.⁹⁶ If the case cannot be resolved through an agreement, NYCHA sets a second date for a hearing to proceed before an impartial hearing officer.⁹⁷

The hearing is a full evidentiary proceeding with oral and written testimony presented by both parties.⁹⁸ Once the hearing is completed, the hearing officer prepares a written decision recommending either termination, probation, permanent exclusion or a finding of eligibility.⁹⁹

The hearing officer forwards his written decision to NYCHA's Board of Commissioners (the Board), which meets weekly to take formal action on the Tenant Hearings decisions.¹⁰⁰ The hearing officer's decision is binding on the Board, unless the Board finds that the decision does not comply with applicable law.¹⁰¹

If, after the Board upholds an eviction, the tenant has not yet voluntarily vacated the residence, the project manager will serve a "Notice to Vacate," or an order from the court allowing the tenant 30 days following the end of the month in which the notice is served to vacate the apartment.¹⁰² If the tenant has not vacated within the 30 days allotted, the manager serves upon the tenant a holdover petition for Housing Court.¹⁰³

Under New York State law, tenants may file an appeal to have their case reviewed by the State Supreme Court.¹⁰⁴ Tenants gener-

96. New York City Housing Authority Revised Tenant Termination Proceedings at 1, § 4, (Revised Mar. 1994)[hereinafter Revised Tenant Termination Proceedings]. See also *Tyson and Randolph Consent Decrees*, *Tyson v. New York City Hous. Auth.*, 369 F. Supp 513 (S.D.N.Y. 1974), discussed *infra* note 123.

97. Revised Tenant Termination Proceedings at 1, § 4. The impartial hearing officer is appointed through a civil service examination process. Although the hearing officer is on the NYCHA payroll, s/he operates as an independent party in adjudicating tenant hearings. The procedure directs hearing officers to be liberal in rescheduling hearings for tenants. NYCHA 040.302 SC at 2, § 5. In cases of default, or when the tenant does not show up for the hearing, flexibility will be afforded in favor of the tenants to reopen the case and reschedule the hearing. *Id.* at 2, § 8.

98. NYCHA 040.302 SC at 2, § 6(a-c).

99. *Id.* at 2, § 9, 10. See also *Randolph Consent Decree* at § 2(b), *Randolph v. New York City Hous. Auth.*, 74 C. 1856 (CMM) (S.D.N.Y. Dec. 18, 1975) "Finding of Eligibility" means that the tenant was vindicated of the charges against him/her, and can remain in residence without sanction. NYCHA 040-302 SC at 2-3, § 10.

100. Revised Tenant Termination Proceedings at 1, § 5.

101. *Id.* The Board reviews the decision for compliance with all relevant federal, state and local laws that govern the subject matter of the charges against the tenant. Consent Decree at 4, § 2(a), *Randolph* (74 C. 1856).

102. *Id.* at 1, § 7.

103. *Id.* at 1, § 8.

104. *Id.* at 1, § 6, N.Y. CIV. PRAC. L. & R. §§ 7801-7806 (McKinney 1982).

ally apply for and are granted a stay against eviction until the court renders a ruling.¹⁰⁵

The housing court judge will review the case, not to determine the merits of the eviction, but to ensure that NYCHA adhered to all the required procedures.¹⁰⁶ If the court issues a judgment in the NYCHA's favor, the City Marshal, under warrant, serves a 72 hour "Notice to Evict" on the tenant.¹⁰⁷

III. Arguments For and Against Modification of the *Escalera* Consent Decree

A. Defendant NYCHA's Motion to Modify the Consent Decree

On August 2, 1993, NYCHA moved to modify the *Escalera* Decree in federal court.¹⁰⁸ NYCHA would like to use the New York State "Bawdy House Laws"¹⁰⁹ to bypass the administrative hearing process imposed by *Escalera* and file summary eviction proceedings against tenants who use their residence for illegal commercial gain.¹¹⁰ Under summary eviction proceedings, the tenant is served with a notice of petition issued by an attorney, judge or clerk of the court specifying the time and place of the eviction hearing.¹¹¹ Is-

105. Revised Tenant Termination Proceedings at 1, § 6.

106. *Id.* at 1, § 8

107. *Id.* at 2, § 9. If the household includes an disabled or elderly member, the Marshall is required to give a thirty day notice to the New York City Human Resources Administration, the governmental agency charged with providing social services to the elderly, disabled and public assistance recipients. *Id.*

108. Defendant's Motion to Modify the *Escalera* Decree, *Escalera v. New York City Hous. Auth.*, 67 Civ. 4307 (WRM) (S.D.N.Y. Aug. 2, 1993). NYCHA moved to first clarify the decree to allow use of the Bawdy House laws discussed *infra*, note 109. NYCHA maintains that there is no language in the decree which forbids NYCHA from using any means available under state law that governs tenancy termination actions. Defendant's Brief at 13-18, *Escalera* (67 Civ. 4307). This Note, however, focuses on the application of the *Rufo* standard to the *Escalera* consent decree, and therefore will not address this question.

109. N.Y. REAL PROP. ACTS. §§ 711(5), 715 (McKinney 1979). Under § 711(5), a landlord can bring summary eviction proceedings against a tenant who uses or occupies the premise as a "bawdy house", or a place of assignment for lewd persons, or for any illegal trade or manufacture, or any other illegal business. Section 715 permits local law enforcement agencies to file summary eviction proceedings against the tenant when the landlord, having been served a notice to apply for summary eviction proceedings against the tenant, has not done so or made a good effort to do so within the 5 days prescribed by the statute. The enforcement agency may bring the summary eviction proceeding against the tenant of record, and name the landlord and any other perceived "wrongdoers" involved in the illegal trade as respondents in the suit. N.Y. REAL PROP. ACTS. § 715 (1).

110. Defendant's Brief at 2, *Escalera* (67 Civ. 4307).

111. N.Y. REAL PROP. ACTS. § 731(1).

sues of fact are heard at a trial before a housing court judge.¹¹² The tenant has the right to demand a jury trial.¹¹³ At the time of the trial, the tenant may also request an adjournment, if necessary, for no more than ten days, to prepare for the trial or obtain legal counsel.¹¹⁴

Under the "Bawdy House" proceedings, NYCHA would be able to evict tenants who use an apartment for illegal activity in as little as 40 days.¹¹⁵ NYCHA is willing to limit its use of the "Bawdy House" laws to cases in which the apartment has been used to facilitate illegal drug trade.¹¹⁶ NYCHA maintains that the decree should be modified pursuant to *Rufo* based on the substantial changes in the law since the *Escalera* agreement was made. First, NYCHA argues that the change of law standard is satisfied because local prosecuting offices and neighborhood residents have recently and successfully applied the "Bawdy House" laws in eviction proceedings against local crack houses.¹¹⁷ As a landlord and owner

112. *Id.* § 745(1).

113. *Id.*

114. *See id.*

115. *Id.* at 23. Under the "Bawdy House" law, owners of residential property can bring an immediate action to evict tenants who use residential property in connection with illegal trade or business. This action can be brought by other neighborhood residents, or the local District Attorney's office. *Id.* In 1986, a group of neighborhood residents filed suit under this law to close down a local crack house. *See Kellner v. Cappellini*, 135 Misc. 2d 759 (Civ. Ct., N.Y. County 1986). In 1988, local District Attorney's Offices began to use "Bawdy House" proceedings to close down the local crack houses under the city's Drug Eviction Program initiative. *See Ken Fireman, Tenants Turn into 'Drugbusters'*, *NEWSDAY*, June 13, 1988, at 7 (discussing the burden of crack and the new initiative to use the "Bawdy House" laws). The District Attorney's Office serves notice on the landlord to bring eviction proceedings against the offending tenant. If the landlord fails to bring such action within 5 days, the District Attorney names the landlord a respondent in the action for eviction, along with the person in possession of the property. *See N.Y. REAL PROP. ACTS. § 715 (1)*. In effect, the constraints of the *Escalera* decree impedes NYCHA from complying with the notice served by the District Attorneys' offices, thereby making NYCHA respondents in an action that NYCHA wants to bring in the first place.

116. *N.Y. REAL PROP. ACTS. §§ 711(5), § 715*. The statute states that proof of the "ill repute" shall constitute the presumptive evidence of unlawful use, and must be stated in the petition. *N.Y. REAL PROP. ACTS. § 715*. *See also Kings County District Attorney's Office v. Freshley*, *N.Y. L.J.*, Jan. 24, 1994 at 30 (Civ. Ct., Kings County). The standard for burden of proof in "Bawdy House" cases is met when "given the quantity of drugs and related paraphernalia found throughout a premises, mere denials of knowledge by an occupant are largely incredible." *Id.* at 31. *See also New York County District Attorney's Office v. Pizaro*, *N.Y. L.J.*, June 24, 1993, at 24, (Civ. Ct., N.Y. County), *Levites v. Francisco*, *N.Y. L.J.*, Jan. 15, 1993, at 21, (Civ. Ct., N.Y. County). NYCHA also contends that institution of "Bawdy House" proceedings will not violate tenants due process rights.

117. New York State enacted this law in 1868, and it was primarily enforced against houses of "ill-repute"—to deter prostitution, illegal alcohol manufacture and sale,

of residential property, NYCHA argues that application of "Bawdy House" laws now extends to NYCHA as well.¹¹⁸

Second, NYCHA contends that the change is justified by recent amendments to the United States Department of Housing and Urban Development (HUD) regulations that allow public housing authorities to forego administrative hearings in an eviction involving any criminal activity that threatens the health or safety of other tenants.¹¹⁹ Virtually all large public housing authorities in the United States bypass administrative hearings in eviction cases that involve drug-related charges and proceed directly to their particular jurisdiction's judicial proceeding.¹²⁰ As the nation's largest public housing authority, NYCHA would like to exercise this provision in the HUD regulations and proceed to housing court under "Bawdy House" laws.

NYCHA also argues that *Escalera* should be modified under the change in fact standard established in *Rufo*. NYCHA asserts that the dramatic increase in drug trade in public housing was unforeseen when the consent agreement was made, and that as a result, tenants are at great risk. NYCHA argues that the public interest

and bookmaking. Defendant's Brief at 25, *Escalera* (67 Civ. 4307) ("The 'Bawdy House Law' derives from statutes adopted in 1868 to combat prohibition and gambling.").

118. N.Y. REAL PROP. ACTS. § 711 (5) permits landlords to bring summary eviction proceedings against tenants using their residence for illegal commercial gain. Since neighbors and law enforcement agencies have exercised their right to evict drug dealers under § 715(1) then it follows that landlords such as NYCHA should also be able to exercise that right.

119. See 42 U.S.C. § 1437d(k) (1983). This amendment to the United States Housing Act of 1937 requires all public housing authorities to establish and implement administrative grievance procedure. Defendant's Brief at 26, *Escalera* (67 Civ. 4307). The amendment also permits public housing authorities to forego administrative proceedings in favor of judicial proceedings, as long as HUD determines that the judicial eviction proceedings guarantee basic due process elements under the law. *Id.* See also CRANSTON-GONZALEZ NATIONAL AFFORDABLE HOUSING ACT, PUB. L. NO. 101-625 (1990), which narrowed the scope of the HUD Hearing Exclusion rule. The Act states that the HUD Administrative Hearing Exclusion rule applies to:

any grievance concerning an eviction or termination of tenancy that involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any drug-related activity on or near such premises.

Id. at § 503(a). The HUD Administrative Hearing Exclusion regulations were promulgated in 1991. 56 C.F.R. § 51.560 (1991). In 1991, HUD issued a formal determination that "New York's judicial proceedings guaranteed due process." Defendant's Brief at 27, *Escalera* (67 Civ. 4307). See also *id.* at 27-28 (citing Letter from Secretary Jack Kemp, United States Department of Housing and Urban Development, to Honorable Mario M. Cuomo, Governor of the State of New York (Dec. 3, 1991)).

120. Defendant's Brief at 28, *Escalera* (67 Civ. 4307).

calls for modification of the decree because the presence of drug businesses in NYCHA developments has resulted in a hazardous condition that is detrimental to the public.¹²¹

The Interim Counsel of Presidents (ICOP) for New York City Housing Authority developments has intervened in the case on the side of the defendant.¹²² ICOP seeks to modify the *Escalera* decree, and asks the court to review other consent decrees that may impede on NYCHA's ability to evict speedily drug dealing tenants.¹²³

121. See *id.* at 19-25.

122. Motion to Intervene, *Escalera v. New York City Hous. Auth.* 67 Civ. 4307 (LAP) (S.D.N.Y. Aug. 1994).

123. *Id.* See *Tyson v. New York City Hous. Auth.*, 369 F. Supp. 513 (S.D.N.Y. 1974). *Tyson* and *Randolph* were part of a four party consolidated action. These cases led to a partial settlement stipulation, which was entitled the *Tyson* Consent Decree in 1975. The final settlement, entitled the *Randolph* Consent Decree, was agreed upon one year later. Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Modify the *Escalera* Consent Decree, at 10 n.4, *Escalera v. New York City Hous. Auth.*, 67 Civ. 4307 (LAP) (Apr. 11, 1994)[hereinafter Plaintiff's Brief]. These two decrees established remedial options for cases decided pursuant to *Escalera*.

In *Tyson*, the class challenged lease termination on the ground of non-desirability when adult children who no longer reside in the development commit the offending acts. *Tyson*, 369 F. Supp. at 517. The federal district court held that it was unconstitutional for NYCHA to evict an entire family on the basis of the undesirable acts of one family member who was not part of the household. *Id.* at 518. Imposing sanctions on tenants based on their children's conduct violates the tenants' First Amendment right of freedom of association. *Id.* at 519. The court held: "[t]here must be some causal nexus between the imposition of the sanction of eviction and the plaintiffs' own conduct. [The simple] existence of the parent-child relationship [is not enough]. . . . [D]eclaring these tenants ineligible for continued occupancy on the basis of their children's acts . . . would run afoul of the First Amendment which guarantees to every person the right to freely associate with others, including members of his family, without interference from the state." *Id.* at 519-20.

Under the *Tyson* decree, NYCHA cannot evict tenants and instead must place them on probation in cases when the offending member is absent from the household. Consent Decree at § 1, *Tyson* (73 C. 859). Absent from the household is defined as confinement in jail, away in the Armed Services, participating in drug programs, etc. Additionally, the decree allows the hearing officers discretion to place tenants on probation if it appears unlikely that the non-desirable conduct will reoccur, if the non-desirable situation has been cured, or if steps are taken to correct or cure offending action. Consent Decree at 5 § 2(b), *Randolph* (74 C.1856). While the tenants cannot be evicted solely due to the acts of their adult children, the tenant can be evicted if the offending party continues to reside in the household and the tenant of record does not agree to remove that party.

The two latter decrees were negotiated in order to protect the rights of tenants who have not been accused of non-desirable conduct. *Tyson* and *Randolph* addressed constitutional issues regarding tenants being evicted for the acts of adult children no longer living in their residence, or situations where the offending family member could be permanently excluded from the residence, as opposed to *Escalera*, where the issue is the tenant of record being accessed of the undesirable act occurring in the

As tenants and representatives of the resident population, ICOP has expressed a desire to modify *Escalera* to permit the use of the "Bawdy House" laws for expeditious removal of tenants involved in drug-related activity. ICOP claims that the developments have become a danger zone, and that the most effective way to combat the negative effects of drugs in the projects would be to evict those residents who either sell or permit the sale of drugs in their apartments.¹²⁴

B. Plaintiffs' Argument Against the Modification

The plaintiff class, represented by the Legal Aid Society, asserts that modification of the decree would strip innocent tenants of important legal rights.¹²⁵ Representatives of the plaintiff class moved to uphold the *Escalera* consent decree on three grounds. First, the class asserts that there has not been a substantial, unforeseen change in fact as required for modification of a consent decree under *Rufo*.¹²⁶ The class argues that the "drug epidemic" is exaggerated, and that, in fact, the amount of drugs present now was already present in NYCHA developments twenty years ago when the consent decree agreement was made.¹²⁷

apartment. A modification to the *Escalera* decree will not interfere with the application of either the *Tyson* or *Randolph* decrees.

124. Complaint of Intervenors-Plaintiffs at §§ 11, 15 *Escalera v. New York City Hous. Auth.*, 67 Civ. 4307 (LAP) (S.D.N.Y. July 14, 1994)[hereinafter Intervenors' Complaint]. ICOP contends that "[t]he quality of life in NYCHA housing has deteriorated significantly since the *Escalera* decree was entered into in 1971. The sense of security and well-being for many NYCHA residents has been destroyed. Many fear to leave their apartments except for essential errands or to allow their children to play outside close supervision." *Id.* at § 11. Under HUD regulations, the peaceful use and enjoyment is a fundamental provision that each public housing authority must afford their residents. *See supra*, note 119.

125. *See* Plaintiff's Brief at 5-6, *Escalera* (67 Civ. 4307). *See also* Deborah Pines, *The City Takes Aim at Long-standing Consent Decrees*, N.Y. L.J., Feb. 1, 1996, at 1 ("Scott A. Rosenberg, director of the Civil Appeal and Law Reform Unit of the Legal Aid Society, however, argues that the proposed change threatens the rights of innocent tenants wrongly accused of drug-dealing, such as a grandmother whose grandson stores drugs in her apartment without her knowledge.").

126. Plaintiff's Brief at 37, *Escalera* (67 Civ. 4307).

127. *Id.* at 4, 38-39. Plaintiffs also contend that an increased police presence beginning in the early 1990s has resulted in steady reduction in crime in NYCHA developments over the last five years. *Id.* at 41. In fact, the plaintiffs have submitted affidavits from several experts asserting that the impact of the drug trade has not changed significantly since the *Escalera* Consent Decree, in contrast to the affidavits submitted by NYCHA's experts, which assert that the influx of drugs has increased dramatically. Because they contain directly contradicting assertions, the District Court admitted these affidavits as direct evidence, and held an evidentiary hearing in January, 1996, during which the parties cross-examined each other's experts.

Second, the plaintiffs contend that even if there has been a change of fact, NYCHA could impose more narrowly tailored means that would effectuate expeditious removal of tenants who trade drugs in NYCHA apartments.¹²⁸ The class also argues that through its internal procedures, NYCHA controls the length of time it takes for eviction in drug-related cases. Plaintiffs believe that NYCHA can easily modify the existing administrative process rather than eliminate that process in all drug-related cases.¹²⁹

Third, the class argues that NYCHA has not demonstrated the change in law required by *Rufo*. NYCHA entered into the consent decree with full knowledge of the "Bawdy House Laws," which have been in existence for over 100 years.¹³⁰ The class contends that NYCHA willingly included drug-related evictions in the consent decree, and was free to negotiate the exclusion of such cases when the agreement was reached twenty-four years ago.¹³¹ The plaintiffs argue that NYCHA could have bargained to exempt "Bawdy House" cases from the consent decree.¹³² Further, the class argues that the amended HUD rules which exclude some cases from the hearing requirement do not satisfy the change in law standard, since there was no administrative hearing requirement in effect at the time the consent decree agreement was made.¹³³

128. *Id.* at 2, 4. For example, the plaintiffs argue that NYCHA should employ a change in policing strategies to alleviate drug activity and associated crimes. Changing police strategies include increasing the police force, increase or doubling patrols, community and tenant patrols, etc. *Id.*

129. *Id.* at 4, 50-54, *Escalera* (67 Civ. 4307). Plaintiffs state that NYCHA can, as a matter of internal policy, expedite or prioritize those cases which would otherwise fall under the "Bawdy House" proceedings by scheduling hearings for those cases first. *See id.* at 51.

130. Plaintiff's Brief at 46, *Escalera* (67 Civ. 4307).

131. *See id.* at 23-24, *Escalera* (67 Civ. 4307).

132. *Id.*

133. *Id.* at 47-48. The plaintiffs also maintain that the proposed modification will violate the *Tyson* and *Randolph* decrees. *Tyson* would be violated, plaintiffs contend, if innocent tenants unaware of their family member's drug activity were subject to speedy eviction proceedings under the modification. *Id.* at 26. Similarly, plaintiffs contend that *Randolph* is endangered because "Bawdy House" proceedings do not allow tenants of record to remain in NYCHA developments upon agreeing to a probationary period by permanently excluding the offending household member from the apartment. *Id.* at 25-26. However, consideration of these two decrees as they relate to *Escalera* will not be analyzed in this Note.

IV. The Proposed Modification of *Escalera* Meets the Standards Set Forth under *Rufo*

Rufo allows modification when: (1) there is a demonstrated change of law or fact, and (2) the proposed modification is suitably tailored to such changed circumstances.¹³⁴ Although NYCHA has failed to demonstrate a change in law which calls for modification of the *Escalera* Decree, it has met the change in fact standard under *Rufo*. NYCHA has also shown that the proposed modification is suitably tailored to deal with problems caused by the drug epidemic. The *Escalera* Decree, therefore, should be modified to allow NYCHA use of "Bawdy House" proceedings to evict drug-dealing tenants.

A. The Change in Law Does Not Satisfy *Rufo*'s Test

The change in law asserted by NYCHA fails to meet either one of the two elements under which the change in law requirement can be satisfied—that continued compliance with the decree without modification would be illegal, or that both parties based the agreement on a misinterpretation of the law. NYCHA argues the first element of the change in law standard.¹³⁵

The movant must establish that there has been a change in federal law by statute or case ruling in order to satisfy the change of law requirement under the first element. Neither of the two changes cited by NYCHA pass this prong of the test. "Bawdy House" regulations existed at the time the *Escalera* agreement was made.¹³⁶ Further, compliance with the *Escalera* decree does not violate the "Bawdy House" provisions. The law states that the landlord *may* bring eviction proceedings in the prescribed circumstances.¹³⁷ The law does not require the landlord to bring such proceedings.¹³⁸

134. *Rufo v. Inmates of Suffolk County*, 502 U.S. 367, 383 (1992).

135. NYCHA does not assert the existence of any misinterpretation of the law when the consent decree agreement was made, and there is no evidence that would support such an argument.

136. Plaintiff's Brief at 15, *Escalera* (67 Civ. 4307) ("The 'Bawdy House' law had been in effect for over 100 years when the consent decree was entered into.").

137. N.Y. REAL PROP. ACTS. § 711.

138. *Id.* The law does allow others to bring an action to evict the tenant, and name the landlord as a respondent. NYCHA is named respondent in cases in which the District Attorney brings "Bawdy House" proceedings. However, given the large number of public housing apartments qualifying for "Bawdy House" eviction proceedings, the District Attorney's offices can only institute proceedings in a fraction of these situations.

Similarly, while the amendments to HUD regulations can be classified as changes in law, these changes do not make continued compliance with the decree illegal. Continued compliance with the *Escalera* decree does not violate HUD regulations because the regulations merely permit exclusions from the administrative hearing process; they do not require public housing authorities to by-pass administrative hearing proceedings in drug-related case.¹³⁹ In addition, HUD regulations are only minimal guidelines for public housing authorities to follow.¹⁴⁰

B. The Changes in Fact Satisfy the *Rufo* Standard

One of three situation can satisfy the change in fact requirement: (1) when compliance with the decree has become substantially more onerous; (2) when the decree proves unworkable because of unforeseen obstacles, or; (3) when enforcement of the decree without modification would be detrimental to the public interest.¹⁴¹

1. Dangers Caused by the Drug Trade Make Compliance with the Escalera Consent Decree Substantially More Onerous

The enormous increase in illegal drug operations in NYCHA developments satisfies the first situation described in *Rufo*. Over the last decade, the crack epidemic has had a staggering effect on the quality of life in public housing projects, both in New York City and around the country.¹⁴² Crime has become a major public concern among neighborhood residents as well as among the tenants in public housing.¹⁴³ NYCHA developments have experienced significant increases in crime and violence.¹⁴⁴ These increases directly

139. See *supra* note 119 for a discussion of the HUD Administrative Hearing Exclusion regulations.

140. See *Escalera*, 925 F.2d at 861.

141. *Rufo*, 502 U.S. at 384.

142. See Vitella, *supra* note 10, at 35-37; see also Tony Marcano, *Going Home*, N.Y. TIMES, May 7, 1995, § 13, at 1 (comparing the working class and safe community of the James Monroe Houses in the Bronx from 1961-1981 to the current drug-infested conditions that exist in the very same development) ("During the 80's. . . crack had taken over the projects and a drug lord took control. There were turf wars. Crack left victims everywhere."); Karen Springen, *Gun Sweeps and Civil Liberties*, NEWSWEEK, Apr. 18, 1994, at 27 (discussing the "Operation Sweeps" program instituted by the Chicago Housing Authority to decrease the number of "gang-related" shootings).

143. See Smith, *supra* note 10, at 505. ("Describing life in America's public housing projects as 'hell' or 'Beruit U.S.A.' trivializes a desperately tragic situation. Random gunfire and violent death are part of each child's education." (citations omitted)).

144. Compare N.Y. CITY HOUS. AUTH., HOUSING POLICE STATISTICS-INCIDENT REPORT (Year-end 1971)[hereinafter HOUSING POLICE STATISTICS] with HOUSING POLICE STATISTICS (Years-end 1992-1994) (copies of reports for all years cited herein

coincide with the onset of crack cocaine use in NYCHA developments.

During the 1980s, NYCHA experienced consistent and extreme increases of drug-related crime. Between 1980 and 1989, reported drug-related offenses grew from 971 to 6,849 per year—an increase of 605%.¹⁴⁵ Further, 1994 drug-related crimes reached a dangerous high of 12,706.¹⁴⁶

Violent crimes against individuals have increased dramatically since the implementation of the *Escalera* decree, climbing from 503 incidents in 1971 to 8,734 incidents in 1994.¹⁴⁷ Also in 1994, there were 258 incidents of gun assaults and 100 reported incidents of shots fired.¹⁴⁸

These statistics demonstrate a drastic change in the quality of life in the developments.¹⁴⁹ NYCHA attributes these changes to the increased presence of drugs, particularly crack cocaine.¹⁵⁰ Because it is easy and inexpensive to manufacture and profitable to sell,

are on file with the *Fordham Urban Law Journal*). These statistics are collected and maintained under standards set by the Federal Bureau of Investigation (“FBI”). Law enforcement agencies across the country collect and maintain crime statistics uniformly in accordance with these standards for national comparison studies.

145. HOUSING POLICE STATISTICS (Year-end 1980 and Year-end 1989). “Drug related crimes” include possession or sale of marijuana, opium, cocaine, synthetic narcotics, or “other dangerous drugs.”

146. HOUSING POLICE STATISTICS (Year-end 1994).

147. HOUSING POLICE STATISTICS (Years-end 1971 and 1994). “Violent Crimes” include murder, manslaughter, rape, attempted rape, assault, robbery, sexual abuse and sodomy.

148. HOUSING POLICE STATISTICS (Year-end 1994).

149. See also Complaint of Intervenor-Plaintiffs at 4-5, *Escalera* (67 Civ. 4307). The parties supplying affidavits in support of the motion to intervene have been residents for an average of over 20 years. All attest to the increased presence of drugs in public housing, and the impact lengthy administrative procedures have had on removing drug-dealing tenants. For instance, Ronald Ward, ICOP Board Member from Brooklyn East, states that his son was murdered by drug dealers in 1985, during the height of the crack epidemic. Affidavit of Ronald Ward in Support of Motion to Modify and Intervene at 4, *Escalera* (67 Civ. 4307). See also Marcano, *supra* note 142; Ian Fisher, *Promise and Despair Share Project*, N.Y. TIMES, Apr. 11, 1993, at § 1, 23 (describing the effect of the significant drug trade at the Gowanus Houses in Brooklyn on the other residents in the development) (“At Gowanus, the early, upwardly mobile promise of public housing exists side by side with its later scourges: drugs, hopeless poverty and gunfire.”). See also *id.* (“The drive to improve Gowanus has come at a cost to Mitsy Andino, the head of the all-but-ignored tenant association. In December 1991, she was washing dishes when she heard a blast and a glass to her left shattered. Someone, still unknown, had fired a bullet through her peephole . . . After the shooting, which she is convinced was a result of her work with the tenant association, Mrs. Andino thought she would give up—if not for her own sake, then for the safety of her children.”).

150. Defendant’s Brief at 8, *Escalera* (67 Civ. 4307).

crack has become a major source of income for some tenants.¹⁵¹ This ease of production and sale has increased the influence of drugs in NYCHA developments all the more.¹⁵²

The negative effects of the drug trade in NYCHA developments are numerous and devastating. First, the crime associated with the drug business presents a severe danger to the other residents of public housing.¹⁵³ Specifically, most drug dealers carry guns and often engage in "shoot-outs" on NYCHA grounds.¹⁵⁴ As a result, numerous innocent people have been killed.¹⁵⁵

Second, the drug trade operation cause a public hazard and nuisance to the other tenants and employees of NYCHA. Customers

151. See Affidavit of DeForrest W. Taylor at ¶8, *Escalera* (67 Civ. 4307). See also Peter Archer, *MPs Warn of National Crack 'Epidemic'*, PRESS ASSOCIATION LIMITED, July 27, 1989 (stating that crack is easily manufactured and easily available wherever cocaine is available); Terry, *supra* note 11 (describing teen life at the Martin Luther King Jr. Towers in Harlem, where some young residents gather at a corner adjacent to the project to sell drugs).

152. See generally, Marcano, *supra* note 142 ("During the 80's . . . crack took over); Fisher, *supra* note 149 ("Hand-in-hand, the boys [ages five and nine years, on their way to school] stepped past countless crack vials, syringes and an empty 9-millimeter shell . . ."); see also *id.* ("Slowly . . . and most recently with the crack epidemic, the bonds of community and family began to strain.").

153. See Ward Affidavit at ¶30, *Escalera* (67 Civ. 4307). Dangers include violence in the form of "wars" between competing operations. See Dennis Duggan, *On the Street, the Monsters Are in Charge*, NEWSDAY, Dec. 22, 1994, at 4 (describing the influence of drugs and guns in the Red Hook Houses, where a local junior high school principal was shot and killed in the cross-fire of a shoot-out between teenagers in rival gangs); Marcano, *supra* note 142. ("[O]ne reason the drug wars ended was that most of the combatants killed each other off or ended up in prison. The casualties were not only drug dealers, but residents who, while they survived in body, were dead in spirit.")

154. See Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 577 (1995) ("Guns are essential to carrying on the drug trade, since drug dealers must enforce their own contracts and provide their own protection from predators.").

155. See Intervenor's Complaint at 5, *Escalera* (67 Civ. 4307). See, e.g., Marcano, *supra* note 142 ("On Christmas Night, 1987. . . [a] 4-year-old boy, playing with his Christmas presents, was killed by a random shot that crashed through his family's apartment window . . . [in] one of the buildings at Monroe [NYCHA development]."); David Kocieniewski & Curtis L. Taylor, *The Project*, NEWSDAY, Dec. 20, 1992, at 4. (In December, 1992, Patrick Daly, principal of the local junior high school was killed while searching for a student in Brooklyn's Red Hook Housing Project. Daly walked into the middle of a "turf war" between two drug-dealing teens who were in a shoot-out for control of the cocaine trade business). See also Joseph P. Fried, *2 Found Dead After Relative Testifies*, N.Y. TIMES, Apr. 9, 1991, at B1 (A witness testified in a major drug-related murder trial against Gerald (Prince) Miller, whom police have termed the head of a major violent crack-trafficking ring. The day after the witness testified, his father-in-law and sister-in-law were found slain in their Baisley Park Houses NYCHA apartment in Queens. Police strongly believed that they were killed because of the witness's cooperation with the prosecution).

of these establishments use the drugs they purchase in the hallways and stairhalls of the development.¹⁵⁶ This causes loitering in the buildings, which often leads to vandalism and destruction of property and increased maintenance costs for NYCHA.¹⁵⁷ Additionally, this presents a safety hazard to other tenants who want access to the public areas because many of the drug users either assault, rob or threaten tenants as they move through the hallways.¹⁵⁸

Third, almost half of NYCHA's population is under age 21.¹⁵⁹ NYCHA has an obligation to these youths to provide safe conditions for their personal development and growth.¹⁶⁰ Drug dealers have a negative influence on the impressionable minds of already financially and socially challenged youngsters. This influence can lead to false glorification of the drug business¹⁶¹ and ultimately many of these youngsters make poor choices. Some are recruited into the drug trade at young ages.¹⁶² Once in, all the hope for a future through education and other respectable means are lost.¹⁶³

Fourth, NYCHA is forced to spend millions of dollars annually on security to protect tenants from the influence of illegal drug trade in the developments. Since 1990, NYCHA has spent over \$50 million dollars through the Public Housing Drug Elimination

156. See Comment, Michelle J. Stahl, *Oscar v. University Students Cooperative Ass'n: Can Citizens Use RICO to Rid Neighborhoods of Drug Houses*, 67 NOTRE DAME L. REV. 799, 800 (1992) ("Many [public housing residents] said that crime and drugs have become so bad in their buildings that they have become virtual hostages in their own homes. In many high-rise public housing developments, the streets have come indoors and hallways and stairwells have taken on the look of the worst avenues and alleys.").

157. See generally Stahl, *supra* note 156, at 800.

158. *Id.*

159. NEW YORK CITY HOUSING AUTHORITY, DEPT. OF RESEARCH & POLICY DEVELOPMENT, SPECIAL TABULATION OF TENANT CHARACTERISTICS (as of Jan. 1, 1995) (copy on file with the *Fordham Urban Law Journal*)[hereinafter NYCHA TENANT CHARACTERISTICS].

160. For a discussion of the effect of crime on children, see *New Campaigns Helps Children Prevent Violent Crime*, CATALYST (National Crime Prevention Council, Washington D.C.), Mar. 1993. Statistics show that eight out of ten kids will be victims of violent crime at least once in their lives, and nearly half a million admit they have carried a weapon for protection. *Id.* at 3.

161. See Duke, *supra* note 154, at 577 ("Due in large part to its association with the glamorous drug trade, packing a gun, like fancy clothing or costly jewelry, has become a status symbol among many adolescents.").

162. Intervenor's Complaint at 5, ¶13, *Escalera* (67 Civ. 4307). See also Sack, *supra* note 11 ("Little Man" began selling marijuana, along with several other boys, at age thirteen. They all worked for the same man. "Little Man" was executed in the courtyard of the Castle Hill Houses in the Bronx at age fourteen. His family and friends "believe he was killed because he threatened to break with his marijuana supplier and set up a competing operation.").

163. See generally Sack, *supra* note 11.

Program, in order to provide services such as drug treatment for tenants, increased police presence, alternative activity and education services for youths, and a host of other programs specifically targeted to eliminate drugs in public housing.¹⁶⁴ However, the *Escalera* decree has not permitted NYCHA to do the one thing that would have the most immediate impact on removing the influence of drugs in public housing—speedily evict persons who deal drugs out of their apartments.

2. *The Explosion in Drug Traffic is an Unforeseen Obstacle Making the Decree Unworkable*

The second element of the *Rufo* standard requires NYCHA to demonstrate that unforeseen changes have made the decree unworkable. NYCHA could not possibly have predicted the extent to which its residential property would be used for illegal commercial gain today.¹⁶⁵ The number and nature of violations taking place at the time the Decree was entered into did not rise to the level of illegal conduct taking place in NYCHA developments today.¹⁶⁶

Plaintiffs are incorrect in asserting that the drug epidemic is exaggerated, or that there is just as much violence related to drugs today as there was in 1972.¹⁶⁷ The increase of drug-related violent

164. See generally NEW YORK CITY HOUSING AUTHORITY PUBLIC HOUSING DRUG ELIMINATION PROGRAM APPLICATIONS (1990 through 1995). To combat drugs in public housing authorities, HUD established a grant program under the Anti Drug Abuse Act of 1988 for the Public Housing Drug Elimination Program. 42 U.S.C. 11903 (1988). Public housing authorities apply for grants for various activities that help alleviate the negative impact of drugs in public housing developments. NYCHA has consistently been awarded the largest grant amounts each year, and their Drug Elimination Program serves as a nation-wide model. See also Vitella, *supra* note 10, at 9-12.

165. Under *Rufo*, that standard is "unforeseen" obstacles, not "unforeseeable" obstacles. *Rufo*, 502 U.S. at 385. The Court, however, did state that a movant should not be granted a modification if he relied on events that were anticipated at the time of the agreement, and then later rendered the consent decree unworkable. *Id.* See *supra* note 57 and accompanying text.

166. See *Escalera*, 425 F.2d at 858, 859 (The violations committed by the appellants in *Escalera* included: keeping a dog in the apartment; statutory rape of a tenant's daughter by another tenant's child; and drug possession where the offending child of the resident was arrested several miles from the development).

167. See RHA Drug Elimination Grants I, II, III, IV (Overview) (1994) (citing WHITE HOUSE CONFERENCE FOR A DRUG FREE AMERICA (1989) (C. Everett Koop, former Surgeon General of the United States, declared that, "It is impossible to overstate the danger drug use poses to our country and our citizens.")). But see Plaintiff's Brief at 38-42, *Escalera* (67 Civ. 4307). Plaintiffs contend that both heroin and cocaine were readily available in the 1970s, and related violence was a major part of the drug trade business at that time. *Id.* Expert affidavits in favor of the plaintiffs state

crime is well-documented throughout the country.¹⁶⁸ As no other entity in the nation has been able to predict and combat the influx of drugs and crime, neither could NYCHA have foreseen the impending drug epidemic when entering into the *Escalera* decree.

In 1971, NYCHA residents were largely working class families who sought residences in the developments as a viable and respectable housing option.¹⁶⁹ Many of the residents went on to purchase their own homes after leaving the projects.¹⁷⁰ Today, many residents look to public housing as "a housing of last resort."¹⁷¹ NYCHA applicants and new tenants are now either formerly homeless, receiving public assistance, or facing some of the other societal problems that challenge urban areas.¹⁷² Some residents turn to the drug trade to earn a regular income because it is so easy to enter the business. This recent change in the social structure of housing developments could not have been foreseen when the *Escalera* agreement was made.¹⁷³

that the negative impact of drugs and related violence has changed little over the last twenty-five years. See Plaintiff's Motion at 38-42, *Escalera* (67 Civ. 4307) (citing Hamid Affidavit, ¶20, Goldstein Affidavit, ¶¶5, 8, 10, Morgan Affidavit ¶¶5-8).

168. See Vitella, *supra* note 10, at Attachment A, 35-37. This appendix presents the change in crime in the 25 most populated cities in the country from 1975-1990, and from 1985-1990 in two areas—crimes against both persons and property.

169. When NYCHA was created in 1934, the premise was to provide affordable and sanitary housing for the working poor. In the 1970s, NYCHA asserted its intention to keep its population at 33% working poor, 33% elderly, and 33% public assistance recipients. The percentage of public assistance recipients, however, did not go above 27% until 1990. Now, public assistance recipients comprise over 30% of NYCHA's population, with the number of applicants and new tenant receiving public assistance at well over 60%. NYCHA TENANT CHARACTERISTICS (as of Jan. 1, 1970 and Jan. 1, 1990). See also Ruben Franco, *From Welfare to Work in New York City Public Housing*, 22 FORDHAM URB. L. J. 1197, 1197 (1995).

170. Franco, *supra* note 169, at 1198 (According to Franco, public housing "served as an important way-station on the road to the middle-class and a bridge to the dazzling possibilities of the greater world outside public housing.").

171. *Id.* at 1199.

172. In 1988, the NYCHA made an agreement with the City of New York to house a quota of homeless families who were referred from the City shelter system. Initially, the impact was small, comprising of less than 1,000 of the 8,000 new tenants each year. However, the City increasingly referred more homeless people, many of whom suffer severe social and family problems and are on public assistance. With the increase of public assistance recipients who are on the NYCHA's waiting list through the normal application process, (not homeless referrals) the pool of welfare families have increased in NYCHA developments. Telephone Interview with Kevin Kearney, Assistant Director, Dept. of Research, New York City Housing Authority, (Jan. 31, 1996).

173. In fact, public housing authorities across the country have suffered dire impacts on the quality of life in their developments due to the impact of drugs. The societal changes attributed to the presence of drugs in public housing have been severe and were totally unforeseen. See generally Vitella, *supra* note 10.

3. *Continued Enforcement of the Decree without Modification is Detrimental to the Safety of the Public*

Under *Rufo*, a court may also consider the public's interest in modifying a consent decree in cases of institutional reform.¹⁷⁴ These cases effect not only the parties bringing suit, but also the entire population served by the governmental institution.¹⁷⁵ The court must determine how the change in circumstances will effect the population at large, in order to determine whether the circumstances are severe enough to warrant modification of the decree.¹⁷⁶ If the changed conditions have created a situation that is not in the best interest of the public, the court is likely to approve a modification that will address those changes appropriately without violating the rights of the plaintiff class.

The dangers associated with prolonged occupancy of public housing apartments by drug-dealing tenants create a hazard not only to the residents of public housing, but also to the communities surrounding these developments.¹⁷⁷ Despite plaintiff's arguments to the contrary, the court will likely recognize the increase in drug-related incidents over the last twenty-five years, and find it in the public's best interest to evict speedily drug businesses in public housing.¹⁷⁸

174. *Rufo*, 502 U.S. at 384.

175. *See id.* at 384-85 (citing cases where modification decisions were influenced by the State's ability to accommodate a particular population).

176. *Id.* (holding "modification is appropriate . . . when enforcement of the decree without modification would be detrimental to the public interest . . ."); *see also supra* note 55 and surrounding accompanying text.

177. *See supra* notes 147-149 and accompanying text.

178. The court also will view the motion to intervene by the ICOP in NYCHA's favor. In this instance, the "public" is the residents of public housing. If the public's safety is threatened, and the public is denied its guaranteed right of use and enjoyment of NYCHA property, the court will likely balance the right of all NYCHA residents against the rights of the drug dealing tenants, whose constitutional rights will also be protected under the modified consent decree. The public wants to modify the *Escalera* decree and the modification is necessary for the public's safety. The irony will not be lost on the court that the members of the class that the plaintiff represents have moved to intervene on behalf of the defendant. Plaintiffs are arguing to protect the class, who in turn want the modification as proposed by the defendant. Under *Rufo*, the court must take into account the public's interest. Therefore, the court will likely modify the decree in NYCHA's favor.

C. The Proposed Modification of the *Escalera* Decree is Suitably Tailored to Solve the Problems Associated with the Significant “Change in Fact” under *Rufo*

Once it is determined that changed factual circumstances warrant a modification of the *Escalera* consent decree, the court must review the proposed modification to evaluate if it is substantially tailored to the changes. Under this requirement, the proposed modification (1) must not create a constitutional violation, (2) must be tailored to resolve the problems created by the changed circumstances, and (3) should give deference to local government agencies.¹⁷⁹

1. The Proposed Modification Does Not Create a Constitutional Violation

The proposed modification, using “Bawdy House” proceedings, does not create a constitutional violation, but in fact provides the very same constitutional elements of due process sought in the original complaint.

The purpose of the decree is to ensure that tenants facing termination proceedings are afforded appropriate due process rights.¹⁸⁰ This can be achieved effectively in housing court. NYCHA is merely seeking to by-pass administrative hearings and proceed directly to housing court in those extreme cases that fit within the “Bawdy House” specifications, where it can be reasonably determined that the tenant of record either used or permitted others to use the apartment for illegal drug trade.

In cases where the District Attorney’s offices have brought “Bawdy House” proceedings against NYCHA tenants, the courts have held that the assurance of due process required by *Escalera* is satisfied by “Bawdy House” laws. In *New York County District Attorney’s Office v. Oquendo*,¹⁸¹ for example, the District Attorney brought a “Bawdy House” action against a public housing resident.

179. *Rufo*, 502 U.S. at 391-92.

180. This is evidenced in the original *Escalera* complaint, which prayed that “[T]enants [first be] afforded an opportunity to contest the reasons for the termination of the tenancy upon which the summary proceeding is based at a fair hearing, whether before the agency or a court which complies with the minimal elements of due process of laws . . . lease[s] may be terminated for cause only and only after the tenant has been afforded an opportunity to be heard at a hearing, judicial or administrative.” Complaint at 9-10, *Escalera v. New York City Hous. Auth.*, 67 Civ. 4307, (S.D.N.Y., Filed 1967). See *supra*, part II.A for a discussion of the construction of the consent decree.

181. 553 N.Y.S.2d. 973 (Civ. Ct., N.Y. County 1990).

The court held that NYCHA residents hold no constitutional right to an administrative hearing if due process can be afforded under another proceeding.¹⁸² The court reasoned that "Bawdy House" proceedings afford the minimal procedural safeguard provided for under *Escalera*.¹⁸³

Application of the "Bawdy House" laws affords significant due process rights, both under constitutional law and within the scheme of the *Escalera* decree. In fact, "Bawdy House" proceedings offer tenants more procedural safeguards than the *Escalera* administrative hearing process.¹⁸⁴ The proceedings are held in court in front of a judge. The judge hears the case in an evidentiary setting at which both parties present written and oral testimony.¹⁸⁵ The tenant will be able to confront and cross-examine his "accuser."¹⁸⁶ The proceedings even provide respondents the opportunity for a jury trial.¹⁸⁷

Under "Bawdy House" provisions, the court reviews the case to determine if the tenant should be evicted, as opposed to the *Escalera* process, under which the court reviews the case only to assess if NYCHA followed the proper administrative proceedings. As such, in "Bawdy House" cases tenants may have the case decided by the housing court judge, or opt to have the case presented before a jury. This option is not available under the *Escalera* decree, which only provides for the tenant to have his case heard by an impartial hearing officer who is employed by NYCHA. The fact that "Bawdy House" proceedings are held in court as opposed to

182. *Id.* at 975. See also *New York County District Attorney's Office v. McDaniels*, N.Y. L.J., May 24, 1991, at 22 (Civ. Ct., N.Y. County); *Bronx County District Attorney's Office v. Mulrain*, N.Y. L.J. Apr. 13, 1992, at 30 (Civ. Ct., Bronx County) (administrative hearing unnecessary in housing forfeiture).

183. *Oquendo*, 553 N.Y.S.2d at 976. The court found that the *Escalera* decree does not require an administrative hearing in "Bawdy House" cases.

There is no requirement that the Housing Authority must be the forum in which the tenant is afforded procedural protections prior to being evicted. All procedural guarantees such as proper notice, access to information upon which any decision is based, the right to confront and cross-examine witnesses, and the opportunity to represent evidence can and will be afforded to [residents] in the hearing before [the] court [under the "Bawdy House" Law].

Id.

184. See *supra* notes 111-114 and accompanying text.

185. N.Y. REAL PROP. ACTS § 745(1).

186. *Id.*

187. *Id.*

an administrative forum is not relevant to the tenant being afforded due process rights.¹⁸⁸

The plaintiff class expresses concern that NYCHA will abuse the modification and by-pass cases in which the facts are not consistent with "Bawdy House" proceedings. Certain elements of proof must be present, however, in order for tenants to face summary eviction proceedings under the "Bawdy House" laws. The application of "Bawdy House" proceedings are governed by high standards for determining that the party used the residence to facilitate the drug trade. In previous cases brought by the District Attorney's offices, police actually arrested tenants either in or directly adjacent to the apartment, and recovered a substantial amount of contraband indicating drug trade.¹⁸⁹ The law has clearly established circumstances under which the "Bawdy House" rules apply. The terms of the modified decree will, therefore, be governed by the law with little opportunity for abuse of the "Bawdy House" process.

2. *The Proposed Modification is Tailored to Resolve the Problems Created by the Changed Circumstances*

Second, the proposed modification is tailored directly to the problems that have been created due to the increase of drugs in public housing. The court will consider that NYCHA has attempted other means to alleviate the negative impact of drugs in public housing developments.¹⁹⁰ Despite the efforts, the presence of drugs in the developments continues to be prevalent and to pose a significant danger to the community.¹⁹¹

188. *Oquendo*, 553 N.Y.S. 2d at 976.

189. *Id.* at 977. Residents were arrested inside their NYCHA apartment. Police seized 73 tinfoil packets of cocaine, plastic bags containing heroin and cocaine, 212 heroin filled glassine envelopes, a .32 caliber semiautomatic pistol, live ammunition, alleged drug records, and almost \$4,500 in cash.

190. *Compare Halderman v. Pennhurst*, 784 F. Supp 215 (E.D.Penn. 1992), *aff'd*, 977 F.2d 568 (3d Cir. 1992). The court denied the Commonwealth of Pennsylvania's motion to modify a consent decree under *Rufo* that required the state to relocate residents in the Pennhurst state facility for retarded persons to community living arrangements. The court found that the state had not fully complied with the decree, and stated that "this motion is yet another attempt by the Commonwealth to avoid, or at least delay, full compliance with the legal obligations the Commonwealth knowingly and willingly assumed . . ." *Id.* at 216. In *Escalera*, NYCHA has fully complied with the terms of the agreement for almost 25 years, and in fact attempted numerous alternative methods to alleviate the problems associated with the change conditions. For a discussion of NYCHA's efforts, see *infra* notes 192-194 and accompanying text. Modification of the decree is the only alternative left for NYCHA to eliminate the impact of drugs by speedy removal of drug-dealing tenants from NYCHA developments.

191. See *supra* notes 145-148 and accompanying text.

NYCHA has not merely relied on a modification of *Escalera* to attempt to resolve the problems associated with the increase of drugs in public housing developments. It has taken numerous initiatives to combat the overwhelming increase of criminal activity in public housing. For instance, in 1993, NYCHA introduced the New York City Housing Authority Security Pact Program.¹⁹² Under the new Security Pact program, increased and brighter lighting, electro-magnetic (unbreakable) locks and more secure intercoms have been or will be installed by the end of 1996.¹⁹³ Additionally, NYCHA has increased high-impact police services, including more patrol officers, special anti-narcotic strike forces, community relations officers and increased tenant patrols radio-linked to the police.¹⁹⁴ Nevertheless, NYCHA has been severely hampered in its efforts because it is unable to remove expeditiously drug-dealing tenants from public housing.

Plaintiffs contend that NYCHA has a more narrowly tailored means to deal with these problem presented by the increase of drugs in NYCHA developments, and therefore deference should not be granted.¹⁹⁵ Plaintiffs believe that NYCHA can shorten, streamline, or internally expedite drug eviction cases through the existing administrative process.¹⁹⁶

Under *Rufo*, however, NYCHA is not obligated to find the least intrusive means to address the problems; it must show only that the proposed modification does not violate constitutional law and it does not substantially change the decree for the modification to be deemed "suitably tailored."¹⁹⁷ In this case, NYCHA has demonstrated that "Bawdy House" proceedings afford even more due process rights than the *Escalera* procedures offer.¹⁹⁸ Additionally, modification will not substantially change the decree; the purpose

192. See NEW YORK CITY HOUSING AUTHORITY, SECURITY PACT PROGRAM BROCHURE (1993)[hereinafter SECURITY PACT BROCHURE]. See also *supra* note 164, and accompanying text, for an explanation of the New York City Housing Authority Public Housing Drug Elimination Program.

193. See SECURITY PACT BROCHURE.

194. *Id.*

195. Plaintiff's Brief at 18, *Escalera* (67 Civ. 4307) (arguing "that the administrative process is relatively efficient and can be made more so—it is unnecessary to abolish administrative hearings entirely in order to cure delays in the administrative process.").

196. *Id.*

197. See *Rufo*, 502 U.S. at 392.

198. See *supra* notes 183-187 and accompanying text.

of the decree is to ensure tenants due process in lease termination procedures, and this will be achieved under the modification.¹⁹⁹

Also, the Decree has a provision that allows for amendment or modification so long as due process rights are protected.²⁰⁰ Because those rights are protected under "Bawdy House" laws, NYCHA is under no obligation to tailor the administrative process any further before seeking a modification.

3. *The Court Must Defer to the Local Government Agency in Determining Whether to Modify an Institutional Reform Decree*

NYCHA presents a compelling case for modification, including a substantial change in circumstances since the consent decree agreement was reached. *Rufo* permits district courts to consider the judgment of local government officials in deciding on the propriety of a modification. This is particularly important in institutional reform cases, where old consent decrees impede the ability of the government defendant to provide quality service to the public.²⁰¹

NYCHA has complied with the terms of the decree for twenty-four years. The changed conditions now demonstrate that the *Escalera* administrative process is no longer effective in evicting tenants who use their apartments for drug trade. The court should, therefore, defer to NYCHA's judgment that the modification is the most expeditious way to remove drug-dealing tenants from public housing.

Conclusion

Rufo v. Inmates of Suffolk County Jail permits flexibility in modifying consent decrees resulting from institutional reform litigation. *Rufo*'s flexibility has the specific purpose of allowing government defendants the ability to alter or change untimely, onerous and difficult decrees that impede on their ability to effectively serve the public.

The presence of drugs in New York City Housing Authority developments has had a severe and detrimental effect on the quality

199. See *supra* note 180 and accompanying text.

200. See *supra* note 89 and accompanying text.

201. See *Rufo*, 502 U.S. 201 at 392. ("To refuse modification of a decree is to bind all future officers of the State, regardless of their view of the necessity of relief from one or more provisions of a decree . . ."). The Court stated that government officials should be given deference because they are responsible for solving the problems of institutional reform, of implementing a decree modification, and of the modification's effect on the public that they serve.

of life for all residents. NYCHA has taken drastic steps to address these problems, but they are not enough. Only expeditious removal of persons conducting drug-trade operations in NYCHA apartments provides immediate relief from criminal activity faced by NYCHA management and other public housing residents. Use of the "Bawdy House" proceedings under a modified *Escalera* Consent Decree is essential to addressing the drug boom in New York City public housing.

As New York City government begins to challenge other long-standing consent decrees,²⁰² the outcome of this case will set an important precedent governing the City's ability to modify decrees which impede on its ability to provide quality services to the public.

202. See Pines, *supra* note 125, at 1 ("The first legal battles are taking shape in the Giuliani Administration's war on decades-old consent decrees that commit the city to expensive services for such groups as prisoners, the homeless and disabled.").