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VINDICATING THE MATRIARCH: A FAIR HOUSING ACT CHALLENGE TO FEDERAL NO-FAULT EVICTIONS FROM PUBLIC HOUSING

*Melissa A. Cohen**

> *For the poor, the shortage of livable, low-priced housing is especially acute. Tenants—and especially their minor children—who are evicted are likely to become homeless, with whatever stability their lives afforded seriously jeopardized. . . the owner of the defendant leasehold is entitled to retain her home. Her children, grandchildren and great-grandchildren, who look to her for shelter as the family's matriarch, may not be dispossessed because one of them has sold drugs from their apartment.*
>
> —Judge Jack B. Weinstein
> of the Eastern District of New York[1]

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1. United States v. 121 Nostrand Ave., 760 F. Supp. 1015, 1018 (E.D.N.Y. 1991) (finding, in a pre-*Rucker* decision, that a leaseholder's lack of knowledge of a family member's drug activity allowed her to escape eviction from public housing).

I. INTRODUCTION

Pearlie Rucker, sixty-three years old, had been living in public housing in Oakland, California for thirteen years. Ms. Rucker lived with her mentally disabled adult daughter, Gelinda, as well as two grandchildren and one great-grandchild. Ms. Rucker regularly searched Gelinda's room for signs of drugs, and had warned Gelinda that any drug activity on the premises could result in eviction. Nevertheless, Gelinda was caught with drugs three blocks from the apartment. Despite the fact that Ms. Rucker had no knowledge of Gelinda's drug activity, and in fact had been carefully monitoring what happened in her apartment, the Oakland Housing Authority (OHA) took steps to evict Ms. Rucker.[2]

Ms. Rucker and others brought suit in Federal District Court to challenge the actions of the OHA and the Department of Housing and Urban Development (HUD). Eventually, the Supreme Court of the United States, in the 2002 case *Department of Housing and Urban Development v. Rucker*, held that the Anti-Drug Abuse Act of 1988[3] requires lease terms that give public housing authorities (PHAs) the discretion to evict tenants for the drug-related activity of any household members and guests.[4] The Court held that PHAs have the power to evict regardless of whether a tenant knew or should have known about the drug-related activity.[5] This one-strike policy has been widely criticized as unfair to public housing leaseholders, since it has the potential to devastate them, even if they have not engaged in any drug activity, and even if they had no knowledge of the drug activity of household members and guests. The *Rucker* decision has also prompted significant discussion among lawyers and academics about ways to alter or challenge the policy to ensure that tenants are not treated in an unfair and draconian way.[6]

Given the statistics and social science research indicating that low and very low income households are often female-headed,[7] it is very likely that the *Rucker* decision weighs most heavily on poor and minority women. These women probably constitute a large majority of the leaseholders who find themselves evicted from public housing under its rule. If the statistics prove this to be true, it may be possible to invalidate the applicable portion of the Anti-Drug Abuse Act, along with the

2. Rucker v. Davis, No. C 98-00781 CRB, 1998 WL 345403, at *2 (N.D. Cal. June 19, 1998).
3. 42 U.S.C. § 1437d(l)(6) (2006).
4. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002).
5. *Rucker*, 535 U.S. at 130.
6. *See infra* text accompanying notes 21–38.
7. *See infra* text accompanying notes 52–53.

HUD regulations that enforce it,[8] based on sex discrimination under the Fair Housing Act (FHA).[9] Alternatively, for PHAs that evict a disproportionate number of female leaseholders, FHA lawsuits could force those authorities to be fairer and more measured in their application of the policy.

II. The Law

In the late 1980s, Congress was concerned that drug abuse and drug-related activities were contributing to high crime rates in public housing, creating unsafe conditions for residents and a management nightmare for PHAs.[10] As a result, Congress included in the Anti-Drug Abuse Act of 1988 the following provision:

> Each public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.[11]

HUD has issued regulations administering this Act that closely track the language of the statute:

> The lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy. In addition, the lease must provide that a PHA may evict a family when the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of

8. 24 C.F.R. § 966.4(l)(5)(i)(B) (2008).
9. Fair Housing Act, 42 U.S.C. § 3601 (2006).
10. Paul Stinson, *Restoring Justice: How Congress Can Amend the One-Strike Laws in Federally-Subsidized Public Housing to Ensure Due Process, Avoid Inequity, and Combat Crime*, 11 Geo. J. on Poverty L. & Pol'y 435, 436–37 (2004) (citing Anti-Abuse Drug Act of 1988, Pub. L. No. 100-690, sec. 5122, 102 Stat. 4181, 4301 (1988) (codified as amended at 42 U.S.C. § 11901 (2006))).
11. 42 U.S.C. § 1437d(l)(6) (2006).

> illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.[12]

The HUD regulations give PHAs faced with a violation of such a lease term the option to consider all the circumstances of a case. These circumstances include:

> the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.[13]

HUD further grants PHAs the discretion to consider, if they choose, options other than eviction to remedy any perceived problems with drugs. These options include excluding the culpable household member and facilitating rehabilitation for the culpable household member.[14]

Prior to the Supreme Court's consideration of the issue in *Rucker* in 2002, courts had disagreed about whether an evicted leaseholder must have had knowledge of the drug activity in question in order for the eviction to be valid. A number of courts had held that due process required a showing that the tenant did in fact have such knowledge.[15] Despite this, the Supreme Court unanimously held in *Rucker* that a tenant's knowledge of the drug activity at issue was not required.[16] The Court dismissed the idea that there might be a due process violation inherent in these no-fault evictions, and insisted that the government merely acts as a landlord, not as a "sovereign," when it evicts tenants and deprives them of property.[17] The Court went on to state that no "absurd" (or, presumably, unfair) results would come from its reading of the statute, since that reading does not *require* eviction when third-party drug activity is discovered, but instead gives PHAs the discretion to decide whether eviction is appropriate.[18] In spite of the Court's emphasis on discretion and HUD's specific allowance for alternatives to eviction,

12. 24 C.F.R. § 966.4(l)(5)(i)(B) (2008).
13. § 966.4(l)(5)(vii)(B).
14. § 966.4(l)(5)(vii)(C)–(D).
15. Caroline Castle, *You Call That A Strike? A Post-Rucker Examination of Eviction From Public Housing Due to Drug-Related Criminal Activity of a Third Party*, 37 GA. L. REV. 1435, 1437–38 (2003).
16. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002).
17. *Rucker*, 535 U.S. at 135.
18. *Rucker*, 535 U.S. at 133–34.

no-fault eviction cases in which innocent tenants are unfairly forced out of their homes still occur. Further, courts generally uphold the decisions of PHAs because the law allows the authorities to *choose* whether to consider factors that might counsel against evicting an entire family.[19] A PHA's choice not to consider mitigating factors is entirely legal and does not invalidate an eviction.

III. CRITICISMS OF THE *RUCKER* DECISION

The *Rucker* decision has been widely criticized as unfair and unrealistic. One major problem with the decision is that, while the Court emphasizes the discretion of PHAs (and in fact relies heavily on that discretion to support its decision[20]), it by no means requires any actual exercise of discretion.[21] As a result, there is no safety valve in place to ensure that evictions under *Rucker* are fairly executed. Further, there are actually incentives in place that encourage PHAs to automatically evict tenants who violate the terms of their leases. PHAs are assessed, scored, and punished[22] by HUD based partly on their implementation of "tough . . . resident eviction policies and procedures" and documentation that they "appropriately evict" residents who violate the drug and criminal activity lease provisions.[23] PHAs may interpret this "appropriate eviction" portion of the HUD regulations to require eviction of tenants in violation of their leases. Even if PHAs interpret it to mean that they retain discretion, they will likely prefer to evict where there is a violation rather than to risk a lower assessment score.[24]

Another criticism is that the *Rucker* Court adopted HUD's definition that a person is under a tenant's control when the tenant has permitted that person access to the premises.[25] Thus, an entire household could be evicted because a one-time visitor, whom the tenant

19. Castle, *supra* note 15, at 1440.
20. *Rucker*, 535 U.S. at 133–34 (explaining that the statute does not create absurd results, since it does not require PHAs to evict tenants, but rather entrusts the decision to the individual PHA, which is in the best position to take account of the entire situation).
21. *Rucker*, 535 U.S. at 133–34.
22. PHAs that do not score well on assessments will continue to receive federal oversight and may fail to qualify for certain forms of funding. Nelson H. Mock, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 TEX. L. REV. 1495, 1503 (1998).
23. Castle, *supra* note 15, at 1452–53 (citing 24 C.F.R. § 901.45 (2002)).
24. *Id.*
25. *See Rucker*, 535 U.S. at 131.

barely knew, went home and used drugs.[26] In fact, the *Rucker* decision made clear that mere association with drug users can be sufficient grounds to evict a tenant from her home. Given the near universal proximity of public housing to drug activity, it can be very difficult for a tenant to avoid violating her lease in this way at some point during her occupancy.[27]

In addition, the effects of no-fault evictions are stark, as leaseholders are not permitted to re-enter public housing for three years after an eviction occurs.[28] Evicted tenants cannot afford market-rate housing, and, without the safety net of public housing, they are usually forced into homelessness.[29] Various authors have argued that, given the severity of this consequence, the complete lack of due process afforded to leaseholders facing eviction is particularly egregious.[30] Equally problematic is the fact that, in order to evict, a PHA need only "determine" that there has been a drug-related violation of the terms of a lease. The person who engaged in the drug activity at issue need not have been arrested or convicted based on the alleged events, and the standard of proof required for a criminal conviction need not be met.[31] In fact, HUD's Public Housing Occupancy Guidebook states only that "[s]ome sort of evidence is required."[32]

There has also been significant criticism that the HUD policy regarding drug-related evictions, along with the *Rucker* decision, is particularly unfair to women, both because single mothers are probably affected most often by the policy and also because deeply embedded stereotypes affect PHAs' treatment of female tenants. "Chief among those adversely impacted by the campaign have been poor single minority female heads of household, often senior citizens, who are living with their actual or adopted offspring, one or more of whom, usually an ado-

26. Stinson, *supra* note 10, at 448.

27. *Id.* at 445.

28. Screening of Applicants for Federally Assisted Housing, 42 U.S.C. § 13661(a) (2006).

29. Stinson, *supra* note 10, at 472 (citing United States v. 121 Nostrand Ave., 760 F. Supp. 1015, 1018 (E.D.N.Y. 1991) ("[Public Housing] [t]enants—and especially their minor children—who are evicted are likely to become homeless, with whatever stability their lives afforded seriously jeopardized.")).

30. *Id.* at 436 ("The federal law as currently interpreted not only allows the immediate withdrawal of this crucial property interest, but has virtually eliminated any meaningful opportunity for these people to be heard, to defend themselves against the charges, or to ask for relief.").

31. 24 C.F.R. § 966.4(l)(5)(iii)(A) (2008).

32. Stinson, *supra* note 10, at 450 (citing U.S. DEP'T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 204 (2003), http:// www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf).

lescent or young adult male child or grandchild, sells or possesses drugs."[33] The *Rucker* Court has essentially required public housing leaseholders to eject their children from their homes when they discover the children's drug activity, in order to avoid a potential eviction. This phenomenon has been labeled an "assault" on the values of women who believe that they are responsible for their children and want to use their homes to protect them, especially when those children are coming in contact with drugs.[34] Further, a report by the American Civil Liberties Union has explained that even if women would be willing to kick out family members for known drug use, "courts have penalized women, notwithstanding their lack of any involvement in criminal activity, for their failure to meet unreasonable, and in some cases unattainable, standards of control in their relationships with those close to them."[35]

At least one author has asserted that the policy was motivated in large part by a desire to "control the behavior of the stereotypical welfare mother who is full of excuses for her progeny and always ready to overlook their shortcomings where drugs are concerned, out of an abundance of misguided maternalism."[36] Another author, Mairi N. Morrison, has explained that the stereotyping of poor, black mothers plays a large role at the point where a woman is trying to defend herself and escape an eviction. Morrison notes that two competing stereotypes can make it nearly impossible to convince a PHA to exercise its discretion and allow a mother to remain in her home when she truly had no

33. Regina Austin, *"Step on a Crack, Break Your Mother's Back": Poor Moms, Myths of Authority, and Drug Related Evictions from Public Housing*, 14 YALE J.L. & FEMINISM 273, 275 (2002).

34. Austin, *supra* note 33, at 286.

35. *See* AM. CIVIL LIBERTIES UNION (ACLU) ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 37–38 (2005), http://www.aclu.org/images/asset_upload_file393_23513.pdf. The report goes on to explain that the government

> fail[s] to take into consideration the reasons why a woman may remain silent or fall short of a court's standard for assertiveness in the face of a partner or family member's drug related activity. Ignored are factors like domestic violence, economic dependence, disability that makes one reliant on others to provide support or medical care, and immigration status linked to marriage. Women are also penalized for supporting spouses and family members seeking help for drug addictions, instead of turning them over to the criminal justice system.

Id. at 38. *See also* Madeline Howard, *Subsidized Housing Policy: Defining the Family*, 22 BERKELEY J. OF GENDER L. & JUST. 97, 117–21 (2007) ("Unlike the *Rucker* plaintiffs, caregivers who can afford private housing can react to the criminal behavior of a child with the discipline they feel is appropriate, and assist the child in making better choices.").

36. Austin, *supra* note 33, at 286.

knowledge or control over a child's involvement with drugs.[37] On the one hand, these women are presumed to have knowledge of the drug use, but are also presumed to be powerless to fix it. This is precisely why PHAs feel that a strict liability no-fault eviction policy is required.[38] On the other hand, these women are seen as strong, powerful black matriarchs who must have not only had knowledge of the drug-related activity, but must also have been the brains behind the operation.[39] Morrison insists that the unfairness of the no-fault policy is even more profound for poor, black single mothers than for other public housing residents, since deeply embedded stereotypes keep PHAs from exercising their discretion in favor of these tenants even when they are clearly innocent.[40]

IV. Some Proposed Strategies to Challenge or Reform the Federal No-Fault Eviction Policy

Due to widespread frustration with the federal no-fault eviction policy, lawyers and policymakers have been coming up with ideas about how to challenge or alter the policy. Some potential policy changes include the addition of an innocent owner defense, akin to that used in civil forfeiture cases, as well as the application of a negligence standard to drug-related evictions.[41] Another possibility is a modification of the HUD regulations, or of individual PHAs' rules, to *require* PHAs to consider the particular circumstances of a case, including whether a tenant had knowledge or control of the drug-related events, whether social services would be helpful in the situation, and what the consequences of eviction would be for the tenant and her family.[42] Given that legislative change often happens quite slowly, the fastest and most comprehensive route to reform in this area is to bring a case against the United States or HUD to challenge the no-fault policy directly. Local cases against individual PHAs to require fair implementation of the policy would also be effective.

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37. Mairi N. Morrison, *The Knowledge/Power Dilemma and the Myth of the Supermother: A Critique of the Innocent Owner Defense in Narcotics Forfeiture of the Family Home*, 7 Colum. J. Gender & L. 55, 59 (1997).
38. *Id.*
39. *Id.*
40. *Id.* at 73–78.
41. Mock, *supra* note 22, at 1525.
42. Stinson, *supra* note 10, at 478–79 (pointing out that such a scheme has been implemented effectively in Oakland County, California).

It has been suggested that a substantive due process challenge under the Fourteenth Amendment to the United States Constitution may be a good legal mechanism to challenge the policy. A tenant facing eviction could argue that her eviction amounts to a deprivation of property for an irrational and invidious purpose.[43] Proponents of this route argue that it could be effective, because the Supreme Court has held that public housing leaseholders have a property interest in the continued occupancy of their homes, and because there is something fundamentally unfair—and thus irrational and invidious—about punishing an innocent person.[44] The problem with such an approach is that it would only address individual cases after an eviction proceeding had already begun—it would not address the overall policy problem.

Author Paul Stinson has laid out several possibilities for a front-end challenge to the policy, including due process challenges to aspects of the one-strike system that were not before the *Rucker* Court.[45] Stinson has suggested challenging the no-fault policy because it gives PHAs the authority to determine guilt based on essentially any type of information and any type of process, without any oversight, all of which likely leads to incorrect eviction decisions.[46] Stinson also argues that the *Rucker* Court inappropriately treated HUD as a private landlord, applying normal contract principles that govern leases when, in fact, there is "no bargained for exchange" in public housing leases dictated by HUD.[47] In this way, the Court avoided evaluating the federal no-fault policy within the excessive fines portion of the Eighth Amendment, under which such a policy would likely have been questionable.[48] A third due process argument that Stinson puts forth is based on the fact that drug-related evictions are exempted from normal PHA grievance procedures, so tenants must obtain counsel and go to court to challenge them. This is an "often insurmountable barrier" for the extremely poor tenants affected; as a result, they are essentially denied any right to be heard.[49]

Another, somewhat different approach suggested by Stinson is a challenge under the FHA. Stinson explains that since the no-fault eviction policy disproportionately affects minorities, one could bring a disparate impact claim under 42 U.S.C. § 3604(a), the portion of the FHA that makes it unlawful to "make unavailable or deny . . . a dwelling

43. Mock, *supra* note 22, at 1522–23.
44. *Id.*
45. Stinson, *supra* note 10, at 458–66.
46. Stinson, *supra* note 10, at 459.
47. *Id.* at 461.
48. *Id.* at 462.
49. *Id.* at 463–64.

to any person because of race."[50] Stinson points out that many courts recognize that proof that a facially neutral policy has a discriminatory effect is sufficient to make out a prima facie case that the FHA has been violated.[51] After developing this theory a bit, however, he concludes that this type of argument faces very difficult barriers to success.[52] I will flesh out his concerns in the next section, where I will also argue that this sort of disparate impact claim actually has great potential as a way to challenge the federal policy on drug-related evictions as discriminatory based on sex.

V. Sex Discrimination as a New Angle of Attack

I have been unable to find an author who has approached a challenge to the no-fault drug eviction problem from the angle of sex discrimination,[53] despite the fact that even a cursory look at the statistics about public housing residents shows that this is an area with untapped potential. It has long been understood by social scientists that the most impoverished households tend to be female-headed.[54] Since residents of public housing represent the poorest citizens in this country, the most common family structure existing in public housing likely is female-headed households.

HUD maintains statistics regarding the percentages of female-headed households residing in public housing. The Department's website contains a tool through which users can obtain statistics about subsidized housing current as of 2000. These statistics reveal that, in 2000, 77% of households in public housing nationally were female-

50. *Id.* at 466–67 (citing Discrimination in the Sale or Rental of Housing and Other Prohibited Practices, 42 U.S.C. § 3604(a) (2006)).

51. *Id.*

52. *Id.* at 469.

53. At least two authors have proposed an FHA disparate impact claim based on sex discrimination in the similar context of domestic violence evictions. *See* Eliza Hirst, *The Housing Crisis for Victims of Domestic Violence: Disparate Impact Claims and other Housing Protection for Victims of Domestic Violence*, 10 Geo. J. on Poverty L. & Pol'y 131, 139–48 (2003); Kristen M. Ross, *Eviction, Discrimination, and Domestic Violence: Unfair Housing Practices Against Domestic Violence Survivors*, 18 Hastings Women's L.J. 249, 264–68 (2007) (reviewing cases mounting an FHA sex discrimination challenge based on domestic violence evictions).

54. *See* Suzanne M. Bianchi, *Feminization & Juvenilization of Poverty: Trends, Relative Risks, Causes, and Consequences*, 25 Ann. Rev. of Soc. 307, 307–09 (1999) (explaining that the term "feminization of poverty" was coined by Diana Pearce in 1978 for the phenomenon that women have made up an increasingly large proportion of the American poor).

headed.[55] The site's statistics do not specify whether the females heading these households are the official leaseholders of the public housing units they occupy, but it is a fair inference. In some geographical areas the percentage of female-headed households is actually significantly higher than the national figure. For example, eight states come in over the 80% mark, including Alabama, Georgia, Mississippi, and Delaware at 83%, North and South Carolina each at 85%, and Virginia and Louisiana each at an overwhelming 86%.[56] Interestingly, it is not just these eight states pulling the national average up, since thirty-six states and the District of Columbia all fall between 70% and 80%.[57] Only six states come in under 70%, and only one of those, Hawaii, is under 60%.[58]

HUD does not maintain statistics on its website about who is actually affected by the no-fault eviction policy, but given that the overwhelming majority of leaseholders in public housing are women, it should follow that the overwhelming majority of tenants evicted under the policy are women. Coverage of this problem in the press also indicates that women are disproportionately affected by the policy. A 1992 *New York Times* article profiling a woman in court fighting to remain in her home after her son was arrested for possessing crack, notes that "[i]n the waiting room [was] a succession of frazzled women, none willing to be identified, with similar problems."[59] A piece that ran in the *Buffalo News* in 2002 featured a woman who was evicted from her home, along with her four children, because her sixteen-year-old son was found in possession of crack cocaine and marijuana.[60] In an even more egregious case covered in the *San Jose Mercury News* the same year, a mother was evicted when her son was found with a drug pipe, despite the fact that

55. HUD User Data Sets, A Picture of Subsidized Households—2000, http://www.huduser.org/picture2000/index.html (last visited Mar. 14, 2009) (follow "Click Here to Start a Query" hyperlink; follow steps to select "U.S. total" for "Geographic Summary Level"; "Public Housing" for "Programs"; and "pct_female_head" for "Variables").

56. *Id.* (follow "Click Here to Start a Query" hyperlink; follow steps to select "State" for "Geographic Summary Level"; highlight and select all states listed for "States"; select "Public Housing" for "Programs"; and "pct_female_head" for "Variables").

57. *Id.*

58. *Id.* The six states with percentages of female-headed households in public housing under 70% are Hawaii, Idaho, Minnesota, North Dakota, South Dakota, and Washington.

59. Douglas Martin, *Innocent People Lose Homes: Law's Strange Twist*, N.Y. TIMES, Mar. 11, 1992, at B3.

60. Emma D. Sapong, *Public Housing Tenants Evicted on 'One-Strike' Rule Cry Foul*, BUFFALO NEWS (N.Y.), Apr. 8, 2002, at A1, *available at* 2002 WLNR 1521424.

she had previously kicked him out of the family home.[61] Interestingly, three of the four plaintiffs in *Rucker* fit this description as well: "two were grandmothers . . . whose grandsons were caught smoking marijuana in the parking lot of their complex," and Ms. Rucker herself was an older woman whose mentally disabled daughter was found with cocaine a few blocks from her home.[62]

VI. Disparate Impact Claims Under the Fair Housing Act

While the Supreme Court has not definitively settled the matter, there is a strong consensus among the lower federal courts that the FHA's prohibitions apply to practices that produce a discriminatory effect, even if a housing provider does not demonstrate an intent to discriminate.[63] A claim brought under this "disparate impact" theory seeks to show, under one of the substantive provisions of the FHA, that a "policy, procedure, or practice specifically identified by the plaintiff has a significantly greater discriminatory impact on members of a protected class" than on others.[64] The policy or practice being challenged must be neutral on its face, and it must not be purposefully applied in a discriminatory manner, since, if either of these is true, the claim would be one of intentional discrimination.[65]

The courts rely on a burden-shifting framework in disparate impact cases, focusing on two key questions: (1) whether the impact of the defendant's policy or practice is significantly greater on a class of persons protected by the FHA, and, if a prima facie case is made, (2) whether the defendant can justify its policy sufficiently to overcome it.[66] For a plaintiff to make out a prima facie case of discrimination, she must show, almost always through statistical evidence, that the defendant's policy or practice produces *significant* discriminatory effects.[67] Not every

61. Ben Winograd, *Teen's Pipe May Cost Family Its Apartment*, San Jose Mercury News, June 10, 2002, at 1B, *available at* 2002 WLNR 1871248; *see also* Bob Kerr, *A Son's Bad Decisions Hit Home*, Providence J.-Bull. (R.I.), Aug. 25, 2002, at 1, *available at* 2002 WLNR 5504494 (profiling a woman who faced eviction because her son was in possession of marijuana without her knowledge).

62. Austin, *supra* note 33, at 278.

63. Robert G. Schwemm, Housing Discrimination Law and Litigation § 10:4, at 10-28 to -29 (2008), *available at* HDISLL § 10:4 (Westlaw).

64. Schwemm, *supra* note 63, § 10:6, at 10-42 to -43, *available at* HDISLL § 10:6 (Westlaw) (citing Simms v. First Gibralter Bank, 83 F.3d 1546, 1555 (5th Cir. 1996)).

65. *Id.* at 10-6 to -8.

66. *Id.* at 10-44, -47.

67. *Id.* at 10-44.

housing practice that produces a discriminatory effect is unlawful; the degree to which a practice impacts a protected class is relevant in determining whether a prima facie case has been made.[68] However, the courts have not come up with a clear mathematical formula with which to determine whether a plaintiff's statistical evidence has shown a sufficient discriminatory effect.[69]

Once a plaintiff establishes a prima facie case of discrimination, the burden then shifts to the defendant to justify its policy or practice. The specifics of this burden are described differently by the various circuit courts. In cases involving private defendants, courts have most often required a sufficiently strong showing that a defendant's policy or practice is justified, and at least one court has required that there be no less discriminatory alternatives available.[70] In cases involving public defendants, several circuits have adopted a multifactor approach to assist them in determining liability.[71] This approach was originally set out by the Seventh Circuit in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, the best known case of its kind. The *Arlington Heights* court relied on a four-factor balancing test,[72] identifying the factors as follows:

> (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*; (3) what is the defendant's interest in taking the action complained of;[73] and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.[74]

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68. *Id.* at 10-45 to -47.
69. *Id.* at 10-48 to -49.
70. *Id.* at 10-49.
71. *Id.* at 10-49 to -50.
72. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).
73. A full-scale analysis of the different approaches taken by the courts in FHA disparate impact cases is beyond the scope of this paper. I will analyze a potential sex discrimination challenge to the federal no-fault eviction policy under the *Arlington Heights* approach, assuming that a public defendant would only need to show, under the third factor, that its policy or practice was within the ambit of its authority. And, since it was not mentioned in the *Arlington Heights* case, that it would not necessarily also need to show that its practice was the least discriminatory option.
74. *Arlington Heights*, 558 F.2d at 1290.

In most disparate impact cases brought under the FHA, courts generally hold that defendants have failed to satisfy their burden of proof.[75]

VII. THE *ARLINGTON HEIGHTS* ANALYSIS

Paul Stinson goes through an *Arlington Heights* analysis regarding a potential claim of race discrimination and seems to have a generally pessimistic view about its likely success. While a sex discrimination analysis brings up many of the same issues as a race discrimination analysis, the differences between the two, especially statistics showing a more disproportionate effect on women than on minorities, actually make the sex discrimination claim more likely to be effective. Thus, there is real potential for a claim of disparate impact based on sex to succeed at the national level in a lawsuit against HUD. Moreover, such a claim can certainly be used as a tool to challenge the practices of individual PHAs.

Both race and sex discrimination claims would rely on section 3604(a) of the FHA, which makes it unlawful to "make unavailable or deny . . . a dwelling to any person because of race . . . [or] sex."[76] Stinson believes that the statistics necessary for a plaintiff to make out a prima facie case of discriminatory impact would be very difficult to amass.[77] While he notes that minorities make up a disproportionate percentage of public housing tenants, he also states that HUD does not keep statistics on drug-related evictions, so they would need to be compiled at the PHA level.[78] While a plaintiff seeking to bring a disparate impact challenge to the no-fault eviction policy would need to gather statistical data regarding the way in which evictions have actually been carried out, the information currently available, at least with regard to the policy's effects on women, is certainly a good starting point. In fact, it would likely be sufficient to get to the discovery phase of a lawsuit, at which point the burden of gathering eviction statistics from PHAs would become significantly easier. Further, the percentage of female-headed households in public housing, 77% nationally,[79] is even higher than the percentage of minority households nationally, 69%,[80] which makes it more likely that

75. *Arlington Heights*, 558 F.2d at 1290.
76. Discrimination in the Sale or Rental of Housing and Other Prohibited Practices, 42 U.S.C. § 3604(a) (2006).
77. *See* Stinson, *supra* note 10, at 469.
78. Stinson, *supra* note 10, at 469 & n.213.
79. HUD User Data Sets, *supra* note 55.
80. *Id.* (follow "Click Here to Start a Query" hyperlink; follow steps to select "U.S. total" for "Geographic Summary Level"; "Public Housing" for "Programs"; and "percentage minority" for "Variables").

a plaintiff could convince a court that she had made a prima facie showing of discriminatory impact. Since courts usually rely on statistics at that phase, the worse the discrimination appears statistically, the more likely a court will be to allow a case to move forward. This is especially true in some of the states where the percentage of female-headed households reaches into the high eightieth percentile, and in individual PHAs where that number might be even higher.

A. Arlington Heights *Factor One*

Assuming it were possible for a plaintiff to make out a prima facie case based on the information currently available and statistics of actual evictions, a defendant's arguments would then have to be analyzed under the *Arlington Heights* factors. The first factor, the strength of the plaintiff's showing of discriminatory impact, is very similar to the question of whether a prima facie case had been made, since it usually relies on statistical data. If a plaintiff had succeeded in making out a prima facie case, this factor would automatically weigh in favor of a finding of liability. However, the strength of its influence would depend on how strong the statistics were in a particular case. In a national case against HUD, as well as in a more local case, the precise percentage of evictions of women would inform the court as to how much weight to give to this factor.

B. Arlington Heights *Factor Two*

The second *Arlington Heights* factor for determining a defendant's liability is whether there is some evidence of discriminatory intent. While the existence of evidence of intent might help persuade a court to find for plaintiffs, such evidence is not absolutely required.[81] In addition, the *Arlington Heights* court concluded that "this criterion is the least important of the four factors that we are examining," since the purpose of a disparate impact case is to allow a plaintiff to make a case without having to show discriminatory intent.[82] As Stinson explains with regard to race, in order to show that Congress intended the no-fault policy to have a discriminatory effect, one would need to scour the legislative history to learn whether a hidden discriminatory motive was behind the

81. Stinson, *supra* note 10, at 469–70; *see also Arlington Heights*, 558 F.2d at 1292.
82. *Arlington Heights*, 558 F.2d at 1292.

passage of the one-strike laws.[83] Stinson dismisses this factor as an impossible hurdle too quickly, though. While it does pose a major problem for a case against HUD, some authors have argued that the one-strike laws were largely based on deeply held stereotypes about "welfare mothers" and poor minority families,[84] so it is quite possible that some evidence of discrimination could be discovered.

Factor two is far more likely to work to the advantage of plaintiffs in a local case against an individual PHA, however, since it would be far easier to find evidence of intentional discrimination on the part of authority employees. This could be done by examining statements made to tenants, or through other means. In a case where there was evidence of intentional discrimination on the part of a PHA, a plaintiff could bring a claim of discriminatory treatment under the FHA as well as a claim of disparate impact.[85] However, if there was insufficient evidence of intent to succeed on the disparate treatment claim, the same evidence could be used to bolster the disparate impact claim under this second *Arlington Heights* factor. It is important to remember, however, that a showing of intent is not required for a plaintiff to succeed in a disparate impact case. If the other three *Arlington Heights* factors weighed strongly in favor of a finding of liability, a lack of evidence of intent need not prevent such a finding.

C. Arlington Heights *Factor Three*

The third factor, the interest of the defendant in "taking the action which produces a discriminatory impact,"[86] is the factor Stinson considers fatal to his proposed challenge, since he thinks that HUD and the PHAs "undoubtedly have a legitimate, compelling interest in evicting drug users and criminals."[87] Stinson is probably correct that the defense has a very low burden under this factor in a normal disparate impact case against a governmental body, since it would only need to show under *Arlington Heights* that the body was acting within its legitimate authority.[88] However, there is a strong argument to be made, under the *Rucker* decision, that the burden on the defense in a public housing no-fault eviction case should be higher. The *Rucker* Court firmly stated

83. Stinson, *supra* note 10, at 470.
84. *See supra* text accompanying notes 33–40.
85. *See* SCHWEMM, *supra* note 63, § 10:2, at 10-9 to -13, *available at* HDISLL § 10:2 (Westlaw).
86. *Arlington Heights*, 558 F.2d at 1293.
87. Stinson, *supra* note 10, at 470.
88. *Arlington Heights*, 558 F.2d at 1293.

that, in these cases, a PHA is "acting as a landlord of property that it owns, invoking a clause in a lease."[89] Given this, a court might well be persuaded that the defendants in a challenge to the no-fault eviction policy should be treated as quasi-private. In that case, the standard for a private defendant to meet its burden of proof could influence a factor three determination. Since that standard is generally much higher than the standard for public defendants[90] and may require a defendant to show that there are no less discriminatory alternatives to a policy or practice,[91] it would be very hard for HUD to justify its current no-fault eviction policy, since a long list of less-restrictive alternatives easily comes to mind.[92]

There is also a good policy argument that, even if the no-fault eviction policies serve a compelling interest and are within HUD and the PHA's authority, they should still not be upheld because the one-strike eviction policy is not actually effective at reducing drug activity in public housing. Jim Moye, who has written on the issue, has presented several reasons why the policy cannot be effective. First, he argues that the excessive discretion given to PHAs, along with the failure of the statute to define "engaging" in drug activity, prevents tenants from understanding exactly what activity might result in their eviction and prevents PHAs from uniformly and systematically applying the one-strike policy.[93] Another major problem he points out is the policy failure to reach the drug users and dealers who habitually spend time in the vicinity of public housing but are not actually residents or guests of residents.[94] Since problems with the language of the policy prevent PHAs from systematically excluding residents and guests who contribute to drug activity, and since the policy cannot curb non-resident drug

89. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 135 (2002).

90. *See Arlington Heights*, 558 F.2d at 1293.

91. *See* SCHWEMM, *supra* note 64, at 10-49 & n.15. Schwemm points out that some Circuits have adopted the "no less discriminatory alternative" test, while others evaluate a defendant's showing using a multifactor approach. However, these differences in terminology matter little, since most cases have held that defendants failed to carry their burden. *Id.* at 10-49 to -51.

92. Other easily implementable alternatives include including drug-related evictions in normal PHA grievance procedures, requiring a PHA to exercise its discretion when deciding whether to evict, requiring a PHA to consider particular factors in making its decision, providing an innocent owner defense, and requiring a PHA to utilize one of the other HUD approved alternatives to eviction as a first solution before eviction is considered.

93. Jim Moye, *Can't Stop the Hustle: The Department of Housing and Urban Development's "One Strike" Eviction Policy Fails to Get Drugs out of America's Projects*, 23 B.C. THIRD WORLD L.J. 275, 285–88 (2003).

94. *Id.* at 288–89.

activity at all, it cannot be effective at achieving Congress' goal of providing drug-free public housing communities.

D. Arlington Heights *Factor Four*

The fourth factor requires an examination of the type of remedy sought by plaintiffs. The *Arlington Heights* court explains that when a plaintiff is trying to compel a governmental body to affirmatively provide housing, such as by compelling them to construct integrated housing, courts ought to be reluctant to grant relief; however, if a plaintiff seeks to prevent a body from interfering with or denying housing, relief ought to be granted more readily.[95] As Stinson notes, a challenge to the no-fault eviction policy would fall in the latter category, since in these cases leaseholders are being denied housing they had already possessed. This factor, therefore, would always counsel in favor of liability in this sort of case.[96]

Stinson is correct that factors one and four would be most favorable to plaintiffs in a disparate impact challenge to the federal no-fault eviction policy. In fact, given the even higher percentage of female-headed households in public housing than minority households, the amount of discrimination occurring under factor one is likely to sway a court more in favor of plaintiffs in a sex discrimination case than in a race discrimination one. Stinson also overlooks a strong argument that there ought to be a higher standard for the defense under factor three in no-fault eviction cases than there is in other FHA claims, due to the way the court in *Rucker* characterizes the action of PHAs in eviction situations. Given these things, a sex discrimination challenge under the FHA based on the disparate effects of the federal no-fault eviction policy has definite potential as a way to challenge the policy and induce changes that would make its application fairer.

VIII. Conclusion

The harsh federal law and HUD policy on drug-related evictions from public housing became even more ruthless with the Supreme Court's *Rucker* decision in 2002. As a result of that decision, public housing authorities across the country may evict tenants whose family

95. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1293 (7th Cir. 1977).

96. Stinson, *supra* note 10, at 471.

members, guests, or even one-time visitors engage in drug activity, even if the tenant had neither knowledge of the activity nor any control over it. A number of legal scholars have written about the unfairness of this policy and how it can produce draconian results, despite the *Rucker* Court's assurance that the PHAs' discretion would prevent undeserved evictions. Lawyers and policymakers have thus been looking at possible ways to challenge or alter the policy. One type of legal claim that had not previously been explored would challenge the policy as discriminatory based on sex, since a large majority of public housing tenants are women and it is probably the case that a large majority of the tenants falling victim to the no-fault eviction policy are women as well.

The Fair Housing Act provides a useful tool through which to bring a claim, since it allows lawsuits based on the disparate impact of a housing provider's policy or practice, and does not necessarily require a showing that such discrimination was intentional. An FHA disparate impact claim based on sex discrimination has a good likelihood of success because the percentage of women leaseholders in public housing is extremely high. Further, the *Rucker* Court's treatment of PHAs as quasi-private landlords counsels in favor of application of a higher standard by which PHAs must justify their policies.

As the structural foundation of households and communities in public housing, women are the ones who have the potential to bring relatives together, keep children safe and off the street, and raise families that rise above the crime and drug activity that often plagues these very low-income communities. The federal drug-related eviction policy and the harsh application of it that the Supreme Court has counseled create a situation where women are unable to protect and rehabilitate their children and grandchildren, because doing so might lead to eviction and therefore the loss of the main resource they had to make a life for their families. The policy almost certainly has a disproportionate impact on women. Consequently, a sex discrimination claim under the FHA may be a tool that lawyers can use to invalidate the entire policy, or at least to sue individual PHAs and force them to apply it in a fair and just manner.