Golden Gate University Law Review

Volume 33
Issue 2 *Law & Social Change*

Article 3

January 2003

Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century

Heidi Lee Cain

COMMENT

HOUSING OUR CRIMINALS: FINDING HOUSING FOR THE EX-OFFENDER IN THE TWENTY-FIRST CENTURY

"Courts, commentators, and legislatures have recognized that a person with a criminal record is often burdened by social stigma, subjected to additional investigation, prejudiced in future criminal proceedings, and discriminated against by prospective employers."[1]

"The only way they can get away with it is because it affects poor people."[2]

INTRODUCTION

Crime control is an obsession in the United States.[3] Gubernatorial and presidential candidates of both major

---

[1] Journey v. State, 895 P.2d 955, 959 (Alaska 1995) (footnotes omitted).

[2] Frank J. Murray, *Court Upholds Drug-Use Eviction*, THE WASH. TIMES, Mar. 27, 2002, at A1 (Interview with Sheila Crowley of the National Low Income Housing Coalition, in response to the United States Supreme Court's decision in The Department of Housing and Urban Development v. Rucker, rejecting an innocent landowner defense for the "One Strike and You're Out" housing policy).

[3] *See generally* JOHN C. CURTIN, 2010: AMERICAN CRIMINAL JUSTICE IN THE TWENTY-FIRST CENTURY (1997). Curtin describes the criminalization model's essence as social order, whereby "[i]ndividuals who exhibit the behaviors regarded as social problems are to be contained, repressed, classified for varying degrees of threats to public safety and isolated...." *Id.* at 2. The American populous is dominated by the criminalization movement. *Id.* at 4. *See also* NAT'L CRIMINAL JUSTICE COMM'N, THE REAL WAR ON CRIME (Steven R. Donziger ed., 1996). As a reflection of how obvious the crime control phenomenon is, this book opens with "[w]e are a nation both afraid of and obsessed with crime." *Id.* at 1. *See also* Michele H. Kalstein, et al., *Calculating Injustice: The Fixation on Punishment as Crime Control*, 27 HARV. C.R.-C.L. L. REV. 575 (1992). The political crime control policy was preceded by a brief re-integration and rehabilitation movement which lasted until the 1970s, where U.S. policy reflected a

parties use a "get tough on crime" dialogue as the backdrop of their campaigns.[4] Stories of violent crime predominate media coverage.[5] Both voters and legislators, acting upon the "tough on crime" jargon and media-saturated violence, have enacted habitual offender statutes[6] and mandatory minimum sentencing standards,[7] applicable to violent and drug criminals alike.[8] Lawmakers and criminal justice authorities have declared a war on both adults convicted of child abuse[9] and children themselves.[10] Policy makers have embraced a shift away from rehabilitation[11] as a justification for incarceration,

---

concern towards assisting ex-offenders. *Id.* at 591. It is arguable whether this period actually had an impact on the well-being of ex-offenders or whether this policy was implemented for a long enough period to realistically observe any results. *Id.*

[4] NAT'L CRIMINAL JUSTICE COMM'N *supra* note 3, at 79-80 (noting George Bush Sr.'s Willie Horton ad in 1988, William J. Clinton's 1995 ads touting his record on crime issues, and George Bush, Jr.'s attack on incumbent Ann Richards for being "soft on crime" in the Texas gubernatorial race).

[5] *Id.* at 68-73. "Coverage of crime on three major network television news shows tripled from 571 stories in 1995 to 1632 stories in 1993." *Id.* at 69 (footnote omitted). A study of "ten network and cable channels in 1992 showed 1846 incidents of violence in one day." *Id.* (footnote omitted). Further, "the Annenberg School of Communication at the University of Pennsylvania found that seven out of ten prime time shows in the past ten years depicted violence." *Id.*

[6] *See e.g.,* CAL. PENAL CODE § 667 (WEST 1999).

[7] *See e.g.,* U.S. SENTENCING GUIDELINES MANUAL (2000). The federal sentencing guidelines impose zones corresponding with minimum and maximum numerical levels for each crime. *Id.* at § 5C1.1. The numerical value of each crime can be reduced for offenders who accept full responsibility for the crime, *Id.* at §3E1.1, and those who substantially assist authorities in the investigation of others, *Id.* at §5K1.1, in addition to mitigating defenses. *See e.g., Id.* at §5K2 et seq. Judicial discretion does still exist. *Id.* at §5K2. *See also* Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751 (1999). Tonry notes that the new federal sentencing guidelines are referred to as "real offense sentencing." *Id.* at 1756.

[8] *See* Tonry, *supra* note 7, at 1756-59 (commenting on real offense sentencing and Virginia's sentencing scheme punishing young offenders harsher than their older counterparts).

[9] *See* Thomas D. Larson, *To Disclose or Not to Disclose: The Dilemma of Homeowners and Real Estate Brokers Under Wisconsin's "Megan's Law,"* 81 MARQ. L. REV. 1161, 1162, n.10, (1998) (citing to 39 state statutes requiring community notification of sex offenders).

[10] *See* Tonry *supra* note 7, at 1759; *See also* Fox Butterfield, *Juvenile Crime Wave Triggers Overhaul of Youth Laws in Most States*, DENV. POST, May 12, 1996, at A4 (discussing the possibility of children convicted of certain crimes to be punished as adults).

[11] For a detailed explanation of the justifications of punishment, see NORVAL MORRIS & DAVID J. ROTHMAN, *Introduction to* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY IX – XII (Norval Morris & David J. Rothman eds., 1995). Morris and Rothman use the term "reformation" in place of rehabilitation. *Id.* at X. The reformation ideal embodies that "[t]he prisoner's time in prison should be devoted to fitting him to live a law-abiding life on release." *Id. See also* JOHN IRWIN & JAMES AUSTIN, IT'S ABOUT TIME: AMERICA'S IMPRISONMENT BINGE

idealized and attempted in the twentieth century, to incapacitation as a justification in and of itself.[12] The state of California alone allocates more financial resources to the construction of prisons than universities.[13] "[T]he United States has created the most punitive criminal justice system in the modern industrialized world."[14] Various correctional staff unions and victims' rights groups support even greater punishment behind prison walls, such as custodial abuse of inmates.[15] The United States is systematically punishing an enormous portion of its population at a phenomenal rate.[16] The punitive wave has washed away all previous justifications for punishment.[17] Sovereign states systematically incapacitate much of our poor, marginalized and underrepresented population.[18]

No area of law has remained untouched by this crime control phenomenon.[19] Congress and state legislatures have

---

64-65 (2nd ed., The Wadsworth Contemporary Issues in Crime and Justice Series, Wadsworth Publishing Co., 1997) (commenting on the demise of rehabilitation).

[12] *See generally* CURTIN, *supra* note 3. Curtin notes that incarceration is policy while rehabilitation, deterrence, vengeance, retribution, and the like were normative goals of punishment rather than actual causes. *Id.* at 38. These goals are rationalizations but should not be mistaken for the cause of incarceration. *Id.* at 38–39.

[13] *See* Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency*, 9 HASTINGS WOMEN'S L.J. 27, 29 (1998)

[14] *Id.* at 31. The US competes with South Africa and Russia for the highest incarceration rate in the world. *Id.* at 31, n.19 (citing *Prison, Jail Rolls Increase 113% in 10 Years*, S.F. CHRON., Aug. 19, 1996, at A6).

[15] Haney, *supra* note 13, at 37.

[16] *See generally* CURTIN, *supra* note 3, and IRWIN, *supra* note 11, for discussions on the systematic warehousing of America's underclass. These authors advance differing definitions and reasons for the warehousing of the underclass.

[17] Haney, *supra* note 13, at 27. The title of Haney's article describes the criminalization movement in the United States perfectly. *See also* Kalstein, *supra* note 3. Specifically, the justifications for prison have been specific deterrence (deter the individual offender from committing further crime), general deterrence (deter others in society from committing that crime), rehabilitation (assist the crime violator in becoming a lawful member of society upon release) and incapacitation (removing the offender from society to avoid future harm). *Id.* at 576. Vengeance, not mentioned above, is, of course, as active as ever as a moral and emotional incarceration justification. *See generally* CURTIN, *supra* note 3.

[18] *See generally supra* note 3 and accompanying text, and IRWIN, *supra* note 11.

[19] *See e.g.*, Employment Law Seminar, *The Regulation of Employee Information in the United States*, 21 COMP. LAB. L. & POL'Y J. 787 (2000) (screening employees for criminal records); In re Network Assoc., Inc., Sec. Litig., 76 F. Supp. 2d 1017 (N.D. Cal. 1999) (district court denies presumptive lead plaintiff under Securities Exchange Act of 1934, § 21D(a)(3)(B)(iii)(I, II), *as amended*, 15 U.S.C.A. § 78u- 4(a)(3)(B)(iii)(I, II) due in part to criminal background). *See also* John J. Ammann, *Criminal Records of the Poor and their Effects on Eligibility for Affordable Housing*, 9 J. AFFORDABLE HOUSING &

significantly increased "civil disabilities" for ex-offenders within the last twenty years.[20] Through legislative proscriptions, criminal offenders face civil penalties, such as the forfeiture of personal and real property used in connection with drug offenses.[21] In many states, ex-offenders are permanently restricted from engaging in various political rights, gaining certain professional licenses, and receiving social welfare benefits.[22] This criminalization movement has also influenced the United States judiciary.[23]

Public and private landlord-tenant law has accordingly been touched by the war on crime.[24] Recently, the United States Supreme Court upheld the "One-Strike and You're Out" housing policy,[25] affording a strict liability eviction of federally

---

COMMUNITY DEV. L. 222 (2000) (citing individual stories of the difficulties involved in getting public housing with a criminal record).

[20] Jeremy Travis, et al., *Prisoner Reentry: Issues for Practice and Policy*, 17 CRIM. JUST. 12, 16-17 (2002). *See generally* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991).

[21] *See e.g.*, 28 U.S.C. § 881 (2000) (Federal statute providing types of property that can be forfeited if connected with drug crimes); *See also* Austin v. United States, 113 S. Ct. 2801 (1993) (holding that while property used in the facilitation of a crime can be forfeited under §881, the forfeiture may be subject to the excessive fines clause of U.S. CONST. amend. VIII).

[22] Cheh, *supra* note 20, at 1332-48 (discussing these, amongst other, penalties and examining the affect on individual civil rights).

[23] *See e.g.*, Harmelin v. Mich., 501 U.S. 957 (1991) (the United States Supreme Court plurality decision with a majority of the justices holding that a sentence of 50 years to life as adequate under U.S. CONST. amend. VIII for possession of cocaine); *Cf.* Andrade v. Attorney Gen., 270 F.3d 743 (9th Cir. 2001) (holding that California's habitual offender statute may be cruel and unusual punishment in certain circumstances), *cert. granted sub nom.* Lockyer v. Andrade, 535 U.S. 969 (2002).

[24] *See* Parts II – IV *infra*. *See also* Robyn Minter Smyers, *High Noon in Public Housing: The Showdown Between Due Process Rights and Good Management Practice in the War on Drugs and Crime*, 30 URB. LAW. 573 (1998).

[25] 42 U.S.C. § 1437d(l)(6) (2000) (hereinafter *1996 One Strike*). 42 USC § 1437d(l)(5). In 1988, Congress passed the Anti-Drug Abuse Act of 1988, providing "any member of the [public housing] tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity...on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy." Pub. L. No. 100-690, 102 Stat. 4181 § 5101 (1988) (hereinafter *1988 One Strike*). In 1990, Congress enacted the Cranston-Gonzales Act, providing an expedited grievance procedure for public housing evictions relating to "...any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises ... or any drug-related criminal activity on or near such premises...." Pub. L. No. 101-625, 104 Stat. 4709 (codified at 42 U.S.C. § 1437d(k)) (1990). Congress enacted the Housing Opportunity Program Extension Act of 1996, amending the Anti-Drug Abuse Act's criminal activity eviction clause by replacing "on or near" the premises with "on or off" the premises. Pub. L. No. 104-120, 110 Stat. 834 (1996) (codified as 42 U.S.C. § 1437d(l)(5)). The 1998 Amendment to the Anti-Drug

subsidized housing tenants should they or their guests commit a crime on or off the residential property.[26] In his opinion for the unanimous court, Chief Justice Rehnquist espoused that this type of clause commonly serves as a basis for evictions in private leaseholds.[27] Civil forfeiture statutes, nuisance abatement laws, and the perceived expansion of a landlord's tort liability for criminal acts on rental property have supported the private landlord's concerns and thus her prohibition of ex-offenders as tenants.[28] Regulating immoral and undesirable behavior is the justification.[29] The actual result is the removal of the poor from the eyesight of the community, at the expense of ideological liberties.

I. PURPOSE

This Comment examines the United States Supreme Court's statement in *The Department of Housing and Urban Development v. Rucker*[30] that a strict liability clause would be enforceable in private leases. [31] The Court accordingly infers that ex-offenders and suspected offenders would encounter obstacles in their attempt to receive and maintain housing leases, both public and private. Part II discusses the "One Strike and You're Out" housing act[32] and the Court's decision in *Rucker*.[33] The Court upheld the federally mandated public housing strict liability clause in part because the tenant would

---

Abuse Act redesignated former paragraph (l)(5) as (l)(6). Pub. L. No. 105-276, 112 Stat. 2461 § 512(b)(1)(codified at 42 U.S.C. § 1437d(l)(6)) (because no substantial changes to the language occurred in 1998, this act will be hereinafter referred to as *1996 One Strike*).

[26] Dep't of Hous. and Urban Dev. v. Rucker, 122 S.Ct. 1230 (2002).

[27] *Id.* at 1235.

[28] *See* B. A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime Committed on the Premise*, 42 CASE W. RES. L. REV. 679 (1992). Glesner's article is a detailed and thorough account of lawsuits against landlords, which supports the private landlord's perception of expanding liability. *See also* Montgomery L. Effinger, *Premises Liability and Owner's Duty: Adequate Security for the Enemy Within*, 70 N.Y. ST. BAR JOUR. 51 (1998).

[29] *See generally* Kalstein, *supra* note 3, at 579-82 (displaying that U.S. policy evolved from the utilitarian model of criminal justice and punishment, with the purported justifications of punishment as general deterrence (social crime control), specific deterrence and incapacitation).

[30] 122 S.Ct. 1230 (2002).

[31] *Id.* at 1235.

[32] *1996 One Strike*, *supra* note 25.

[33] 122 S.Ct. 1230 (2002).

be treated the same in a private lease.[34] This Comment thus explores the development of both private landlord-tenant law and public housing law.

Part III examines a landlord's procedures for tenant selection in private housing leases. Part III compares the legal boundaries in private tenant selection with the Congressional mandates for tenant screening in public housing leases. Part III also displays legal safeguards for the ex-offender who believes she has been denied private housing based on her past. Part IV discusses the grounds, relating to criminality, upon which a private landlord may evict a tenant. Part IV compares judicial interpretations of state statutes regulating private leases providing for strict liability evictions of tenants for criminal acts of guests or third parties, similar to the "One Strike and You're Out" policy in public housing. Part V examines U.S. ideologies and proposes a model of re-integrative housing, using community resources, government, and law, to assist ex-offenders in attaining and maintaining their basic need of shelter.

II. BACKGROUND

One cannot divorce a property law analysis from the effects of the criminalization movement.[35] Historically, both Congress and state legislatures enacted statutes preventing criminally suspect groups from gaining or maintaining private interests in land.[36] Modernly, local law enforcement agencies board up houses where suspected drug trafficking or distribution occurs.[37] Congress recently gave civil forfeiture laws more teeth in an effort to deter owners from allowing their property to be used in connection with criminal activity.[38] Unlike civil forfeiture laws affecting landowners, the public housing lease

---

[34] *Id.* at 1235.

[35] *See supra* notes 20-25 and accompanying text.

[36] *See generally* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998) (discussing Alien Sedition Land Laws aimed at Japanese Americans); Deborah Kenn, *Institutionalized Legal Racism: Housing Segregation and Beyond*, 11 B.U. PUB. INT. L.J. 35 (2001) (discussing racialized lending and zoning practices).

[37] *See e.g.* MD. REAL PROP. § 14-120 (1998); CAL. PENAL CODE § 11225 (2000); and WASH. STAT. 7.43.010 (1992) (state nuisance abatement statutes).

[38] *See generally* Andrea M. Jakkola, *Civil Forfeiture Reform: The Challenge for Congress to Preserve Its Legitimacy While Preventing Its Abuse*, 23 J. LEGIS. 93 (1997).

provides for a strict liability eviction of a tenant whether or not the residential premise was used for the commission of the crime or the tenant was connected to the criminality.[39]

A. ONE STRIKE AND YOU'RE OUT

In 1988, Congress enacted the Anti-Drug Abuse Act[40] in response to its perception of the dramatic boom in public housing projects. The Anti-Drug Abuse Act required public housing authorities receiving federal funds or assistance to include a lease provision stating that criminal activity of a tenant, guest or person under the tenant's control is good cause for eviction.[41]

A new Congress emphasized its unyielding dedication to a war on crime in public housing in 1990 with the Cranston-Gonzalez National Affordable Housing Act.[42] This version of the Act reiterated the policy that housing authorities were not to tolerate drug or violent criminal activity.[43] The Cranston-Gonzalez Act further stated that "any criminal activity that threatens the health, welfare, safety or right to peaceful enjoyment" of the premises is grounds for termination.[44] Accelerated administrative grievance procedures for the eviction of criminal tenants were also added.[45]

In 1996, both Congress and President Clinton gave the code more bite by declaring it "One Strike and You're Out."[46] This policy expanded the rights of public housing authorities to review tenant files and conduct criminal background screening for prospective tenants.[47] The Department of Housing and

---

[39] *See 1996 One Strike, supra* note 25.

[40] *1988 One Strike, supra* note 25. *See also* EJ Hurst II, Note, *Rules, Regs, and Removal: State Law, Foreseeability, and Fair Play in One Strike Terminations From Federally-Subsidized Public Housing*, 38 BRANDEIS L.J. 733, 737-738 (2000); *See also* Rucker v. Davis, 237 F.3d 1113 (9th Cir. 2001) *overruled by* Dep't of Hous. and Urban Dev. v. Rucker, 122 S.Ct. 1230 (2002). Judge Michael Daly Hawkins gives a thorough account of the legislative history in his subsequently overruled decision. *Id.* at 1115-17.

[41] *1988 One Strike, supra* note 25.

[42] Pub. L. No. 101-625, 104 Stat. 4709 (codified at 42 U.S.C. § 1437d(k)) (1990); *See* Rucker v. Davis, 237 F.3d at 1115-17, for a thorough legislative history.

[43] *See* Hurst *supra* note 40.

[44] *Id.*

[45] *Id.*

[46] President William Jefferson Clinton, State of the Union Address (Jan. 23, 1996).

[47] *See generally* Jason Dzubow, *Fear-Free Public Housing?: An Evaluation of HUD's*

Urban Development, (hereinafter "HUD") accordingly issued "One Strike and You're Out Screening and Eviction Guidelines for Public Housing Authorities," outlining the statutory language and requiring public housing authorities to screen and evict tenants for drug related or "safety threatening" behavior.[48] Congress and HUD both allowed the public housing authorities discretion to consider the totality of circumstances when determining whether to evict a tenant.[49]

This legislation, as it reads today, requires public housing authorities receiving federal funds to include a clause in leases making any drug or violent criminal activity, cause, per se, for termination of the tenancy, with little regard for the proximity of the activity to the premise.[50] Specifically, the Act requires the lease provision to:

> 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....[51]

The "One Strike and You're Out" policy is characterized as a strict liability law compelling the removal of a tenant's lease interest if the public housing authority discovers alleged "criminal activity."[52] A tenant need not be the alleged criminal.[53] Criminal activity of a guest or someone assumed to

---

"One Strike and You're Out" Housing Policy, 6 TEMP. POL. & CIV. RTS. L. REV. 55 (1997).

[48] *See* Dep't of Hous. and Urban Dev. v. Rucker, *supra* note 26, at 1232-33 (describing HUD's regulations).

[49] *Id.* at 1235. The United States Supreme Court focused on the discretion retained by the local housing authority: "The statute does not *require* the eviction of any tenant who violated the lease provision...." *Id.* (emphasis in original).

[50] *See 1996 One Strike*, *supra* note 25; S*ee also* S. S.F. Hous. Auth. v. Guillory, 41 Cal. App. 4th Supp. 13, 19 (1995) (holding that "providing a reasonable cause standard for eviction that is inconsistent with the cause provisions set out in [One Strike] is preempted...." "[D]rug related activity by any member of a tenant household is cause *per se* for termination of the lease where, as here, the housing authority receives federal funds.").

[51] *1996 One Strike*, *supra* note 25.

[52] The United States Supreme Court characterized the statute as "strict liability" in Dep't of Hous. and Urban Dev. v. Rucker, *supra* note 26, at 1235.

[53] The tenant is responsible for the activities of subtenants, guests or other persons under her control. *See 1996 One Strike*, *supra* note 25.

be under the tenant's control is grounds for termination of the tenancy.[54] Furthermore, criminal activity by any of these persons need not occur on the leased premise.[55] The public housing authority can thus terminate a tenancy based on "criminal activity" by a guest or invitee allegedly committed away from the residence even if the tenant doesn't know about the activity.[56] Public housing authorities are permitted, however, to exercise discretion in the interests of justice.[57]

Congress presumptively intended to omit an "innocent landowner defense," thus permitting the eviction of a tenant who has no knowledge of or connection with the criminal activity.[58] The affected and soon to be homeless tenant, who neither knows of or has actual control over the acts of this third person, has no remedy or defense under "One Strike and You're Out."[59] Additionally, many critics claim that Congress and HUD have created incentives for public housing authorities to strictly enforce this act.[60] Thus, the public housing authority's discretion to consider the circumstances of an unknowing and "innocent tenant" is illusory.[61]

---

[54] *See e.g.* Rucker v. Davis, *supra* note 40, at 1117 (describing Herman Walker, a disabled man whom the PHA evicted because his caregiver was caught with cocaine).

[55] *See 1996 One Strike*, *supra* note 25 ("on or near the premise."). In *Rucker*, *supra* note 40, Ms. Rucker was evicted because her daughter was caught with cocaine *three blocks away* from her unit. *Id.* at 1117. Willie Lee and Barbara Hill, co-plaintiffs of Rucker, were evicted because their grandsons were found smoking marijuana in the apartment complex parking lot. *Id.*

[56] *See* Rucker v. Davis, *supra* note 40. Ms. Rucker claimed she searched her daughter's room for drugs, never found any, and was thus unaware of her daughter's drug activity. *Id* at 1117.

[57] Dep't of Hous. and Urban Dev. v. Rucker, *supra* note 26, at 1235 (discussing local PHA discretion).

[58] *Id.* at 1234 (showing that Congress explicitly placed the innocent landowner defense in civil forfeiture and thus intended to omit it from this act).

[59] *Id.* at 1235.

[60] Incentives being less HUD administrative regulation and more public housing authority autonomy. *See generally* Barclay Thomas Johnson, *The Severest Justice is Not the Best Policy: The One-Strike Policy in Public Housing*, 10 J. AFFORDABLE HOUSING & COMM. DEV. L. 234 (2001). Lack of enforcement subjects the public housing authority to increased HUD supervision. *See* 42 U.S.C. § 1437d(j)(1)(I)(3). HUD evaluates whether the PHA is troubled from whether it "implements effective screening and eviction policies and other anticrime strategies." 42 USC 1437d(j)(I)(3)(I)(i). If it is troubled, a receiver will be appointed or HUD will "take possession of the public housing authority." 42 USC 1437d(j)(3)(B)(ii)(III)(aa)-(bb). *See generally* Barclay Thomas Johnson, *The Severest Justice is Not the Best Policy: The One-Strike Policy in Public Housing*, 10 J. AFFORDABLE HOUSING & COMM. DEV. L. 234 (2001).

[61] *See* Hurst, *supra* note 40, at 754-755 (recommending that Congress ***require***

In the *Department of Housing and Urban Development v. Rucker*,[62] the United States Supreme Court upheld the "One Strike and You're Out" housing act.[63] In *Rucker*, the Oakland Housing Authority evicted tenants who had no knowledge of their guest or children's criminal activities.[64] The Court relied on the express terms of the statute, noting that the statute does not explicitly mandate public housing authorities to evict an "innocent" tenant.[65] Rather, the public housing authority retains the discretion under the act to "consider all of the circumstances of the case..." in determining whether to evict.[66] Theoretically, the public housing authority could thus use its discretion and allow an innocent tenant to carry on the leasehold.

The unanimous court[67] addressed an attack on the statute because it lacked an innocent owner defense by comparing the "One Strike and You're Out" provision with the civil forfeiture statute.[68] Unlike within the "One Strike and You're Out" statute, Congress explicitly placed an "innocent owner defense" that exempts those who have no knowledge of the criminal activity occurring on their land from forfeiture.[69] The Court inferred that Congress clearly intended to omit an innocent owner defense from the "One Strike" provision.[70]

The Court further found that due process does not protect the federally subsidized tenant because the government is acting not to "...criminally punish or civilly regulate [federally subsidized tenants] as members of the general populace.[71] It is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required."[72] The public housing

---

PHA's to consider the totality of circumstances in each case).

62 122 S.Ct. 1230 (2002).

63 *Id.* at 1236.

64 *Id.* at 1232 (describing the circumstances of Rucker, Hill and Lee); *See also supra* notes 55-57, and accompanying text.

65 *Id.* at 1235.

66 *Id.* at 1232 (quoting 24 C.F.R. § 966.4(1)(5)(i) (2001)).

67 *Id.* at 1237 (Justice Breyer took no part in the consideration of these cases).

68 *Id.* at 1233-34.

69 *Id.*

70 *Id.*

71 *Id.* at 1236.

72 *Id.*

authority is thus not a state actor for the purpose of invoking this lease clause.

Further, because the tenants agreed to the language and knew of the potential for liability, the Court did not find the strict liability eviction of a tenant for the acts of third persons impermissible. According to the Court in *Rucker*, "[s]uch 'no fault' eviction is a common 'incident of tenant responsibility under normal landlord-tenant law and practice.'"[73] The *Rucker* decision treats the Congressional act as an ordinary lease clause and the public housing authority as an ordinary landlord.[74] Further, the Court makes an underlying assumption that because the tenants "agreed" to this lease clause, they had a choice to refuse the clause or the housing.[75] The Court, as it would in a private housing situation, enforced the terms of the contractual agreement between the Oakland Housing Authority and the tenants.[76]

The decision in *Rucker* appears to be based on two theories. First, landlord-tenant law in the private sphere, through interpretation and enforcement, is similar, if not identical to public landlord-tenant law. This theory is apparent through the Court's reference to the "One Strike and You're Out" provision as "clear," and mutually "agreed" upon by the parties.[77] Second, the relationship between a public housing authority and a federally subsidized tenant is analogous to the private landlord-tenant relationship.[78] Thus, this Comment will examine the development and changes of private landlord-tenant law to determine whether such a "no-fault eviction" clause for criminal would currently be permissible in "normal" landlord-tenant law.

B. LANDLORD-TENANT LAW EVOLUTION

The origins of landlord-tenant law reflect the disparity of wealth and the dependence inherent in the landlord-tenant

---

[73] *Id.* at 1235 (*citing to* 56 Fed.Reg. at 51567).

[74] *Id.*

[75] Considering the economic situations which bring an individual or family to public housing, however, there seems to be little choice or negotiation in the terms of a lease.

[76] Dep't of Hous. and Urban Dev. v. Rucker, *supra* note 26, at 1236.

[77] *Id.*

[78] Multiple references to the land as the PHA's land, and the PHA as a landlord, rather than construing it as a governmental action. *Id.* at 1230.

relationship.[79] Landlord-tenant relationships developed out of an agrarian interest in maintaining productive land and gaining an income from production.[80] Lords permitted serfs to develop and maintain the land, in exchange for "rents," a portion of the income the serfs gained from crops.[81] Habitation on the land was incidental to farming and maintaining the land's value and productivity.[82] Tenancy at this time was considered a status, not a property interest, because the tenant "held at the will of the lord with no right to alienate and with no right to pass the land on to [her] heirs."[83] Thus, the feudal lord could evict a serf arbitrarily and a serf could neither assign nor sell her property interest.[84] Feudal serfs (tenants) did not stand on an equal bargaining level with the lords (landlords).[85]

As landlord-tenant common law developed, courts construed the leasehold as a conveyance of land.[86] Due to economic and social shifts, periodic tenancies and tenancies for a term of years became important to lords in an effort to maintain the labor force on the land.[87] The tenant's right and obligation to repair and maintain the land further developed into his right to exclusive possession against all others.[88] Courts treated covenants in the lease as independent,[89] and tenants as their own sovereigns. Caveat emptor dominated the landlord-tenant relationship.[90] A landlord had no legal duty to

---

[79] *See generally*, Honorable Richard Rivera, *The Evolution of Landlord & Tenant Law: An Overview of Past and Present*, 6 PLI/NY 7 (1997).

[80] *Id.* at 15-16. Rivera considers original leaseholds as performing two functions: money borrowing devices and labor contracts. *Id.* at 15. As a money borrowing device, tenants worked the land to recover profit, and rents payable to the landlord for use of the land. *Id.* The principle that value was measured by the land's production, and thus by the tenant's labor, is embodied by the labor contract aspect. *Id.* at 16.

[81] *Id.*

[82] *See* Irma W. Merrill, *Landlord Liability for Crimes Committed by Third Parties Against Tenants,* 38 VAND. L. REV. 431, 433 (1985).

[83] Robert H. Kelley, *Any Reports of the Death of the Property Law Paradigm for Leases Have Been Greatly Exaggerated,* 41 WAYNE L. REV. 1563, 1573 (1995); *See also* Rivera, *supra* note 80, at 14.

[84] Rivera, *supra* note 80, at 18; Kelley, *supra* note 84, at 1573.

[85] *See* Kelley, *supra* note 84, at 1574 (noting the disparity of wealth in the lord-serf relationship).

[86] *Id.* at 1575-76 (noting that under the common law view, the lease was a conveyance).

[87] Rivera, *supra* note 80, at 16-17.

[88] *Id.* at 17-18; *See also* Kelley, *supra* note 84, at 1575.

[89] Kelley, *supra* note 84, at 1566.

[90] *See* Rivera, *supra* note 80, at 19.

repair leased property and the tenant took the land "as is," unless the parties explicitly agreed otherwise.[91] The tenant's covenant to pay rents was independent of the property's condition, or any other covenant by the landlord, aside from the covenant of quiet enjoyment.[92] Thus, if a third party ousted the tenant, his obligation to pay rent did not cease.[93]

With the onset of industrialization, tenants sought not for productive land, but for shelter.[94] Caveat emptor was still the general policy, however, until the landlord-tenant law "revolution" in the 1960's.[95] The covenants of the landlord and tenant were treated as independent of the other.[96] In the 1960s, courts began applying contract principles to lease interpretation, and implied a warranty of habitability and construed rent payment covenants as dependant on this warranty.[97] No longer were tenants the "jack-of-all-trades," capable of maintaining the land.[98] Rather, due to urban industrialization, tenants lived on the land for the sake of their off-land jobs.[99] The land itself was merely incidental to the shelter it provided.[100] Thus, courts began construing the lease as a contractual right with dependent promises rather than a property interest with independent covenants.[101] "[A] property owner's bundle of rights will be confined by the government's interest in preserving the health and welfare of its citizens."[102]

---

91 *Id.*

92 *Id.*

93 *See* Kelley, *supra* note 83, at 1580-81 (noting that once the landlord "put the tenant in actual, lawful possession of the premises...and thereafter did not disturb the tenant's quiet enjoyment...the tenant's obligation to pay rent became absolute."). *See also Rivera, supra* note 79, at 17-18 (noting that tenants generally did not receive the right to recover possession of land from subsequent lessees, or ejectors, until 1235).

94 *Id.* at 1576.

95 *See* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 521 (1984).

96 *See* Kelley, *supra* note 84, at 1566.

97 *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970); *See also* Rabin, *supra* note 96, at 522-26 (discussing the effect of Javins on landlord-tenant law).

98 *See* Kelley, *supra* note 84, at 1576; *See also* Rivera, *supra* note 80, at 20.

99 Kelley, *supra* note 84, at 1576.

100 *Id.*

101 *Id.*

102 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, 718 (1994).

The landlord-owner's rights under traditional property law have been limited by this revolution.[103] No longer can the landlord-owner freely determine the amount of rent, select tenants without restriction or gain immediate possession when the term of the tenancy ends.[104] Landlords must now maintain minimal standards of health and safety, cleanliness, maintenance and fire protection.[105] The law has thus placed greater liability and responsibility on the landlord than historically.

The "revolution" created by contract law's application to lease construction has not erased the landlord's prior advantages.[106] The bargaining positions of the parties are still favorable to the landlord.[107] Landlords typically use form leases, without negotiating the particular terms with the tenant.[108] The American belief that "If it's my property, I can do what I want with it" has not been dismantled.[109] Landlords, however, are presumably more cautious of the conditions of the property and the status of the tenant who therein resides because of the fear of potential legal liability.[110]

Many theorize that the civil rights movement and radical activism propelled the "revolution" in landlord tenant law of the 1960s.[111] Both movements influenced the political and social elements of property ownership and rights.[112] The revolution in landlord-tenant law can also be paralelled with the great migration of African American ex-sharecroppers into cities.[113] Just prior to the revolution of landlord tenant law, governmental support for the racially aligned undeserving poor began.[114] Additionally, private and public housing trends were influenced by white flight from the cities to the suburbs in the

---

103 *See generally* Merrill, *supra* note 83, at 434.

104 *See generally,* Rabin, *supra* note 96.

105 *Id.*

106 Kelley, *supra* note 84, at 1577.

107 *See* Javins, *supra* note 97, at 1079 (noting the unequal bargaining power and the commonality of form leases); *See also* Green, *supra* note 103, at 712.

108 Javins., *supra* note 97, at 1079.

109 *See* Joan Williams, *The Rhetoric of Property,* 83 IOWA L. REV. 277, 283 (1998).

110 *See generally* B. A. Glesner, *supra* note 28.

111 *See* Rabin, *supra* note 96, at 546-48.

112 *See* Green, *supra* note 103, at 705-07.

113 *See generally,* Troy Duster, *Individual Fairness, Group Preferences, and the California Strategy, in* RACE AND REPRESENTATION: AFFIRMATIVE ACTION (Robert Post & Michael Rogin eds., 1998).

114 Green, *supra* note 103, at 688.

wake of desegregation, the National Housing Act, and racialized zoning and lending practices encouraged by local and federal housing authorities.[115] This racially defined, lower economic class population coincidentally contributes largely to the United States' present prison population.[116]

C. PUBLIC HOUSING EXPANSION

Public housing was created to assist a temporarily weak population.[117] During the Great Depression, the many families who lost their financial stability were characterized as the undeserving poor.[118] Today, due to social and economic shifts on federal and local levels, public housing no longer houses those for whom it was created.[119] Further, the central power apparently does not view housing this particular population as its responsibility or concern.[120]

Both the legislative and executive branches attempted to appease this group of undeserving poor by creating governmental subsidies for housing, among other benefits. [121] The central government espoused that the public housing would not compete with housing and business in the private sector.[122] President Franklin Delano Roosevelt's New Deal legislation was "designed to provide a 'floor of protection for the industrial working class, ...'"[123] Pursuant to the United States Housing Act of 1937, the federal government seized land and developed twenty thousand housing units in urban areas

---

[115] Duster, *supra* note 113, at 117; *See also* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (plaintiffs sued suburban city because they believed the zoning ordinance that prohibited development of low-income housing was race-based).

[116] Paige M. Harrison & Allen J. Beck, Ph.D., *Prisoners in 2001*, Bulletin, Washington, DC: U.S. DEP'T OF JUST., Bureau of Just. Stat., July 2002, NCJ 195189 (reports that 10% African American men, ages 25-29, are incarcerated).

[117] *See* Michelle Adams, *Separate and [Un]equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 436-39 (1996).

[118] Green, *supra* note 103, at 688.

[119] *See Id.* at 686-92.

[120] Adams, *supra* note 118, at 438-39 (one merely needs to look at the construction of housing since the migration of African Americans to the cities).

[121] *See* Green, *supra* note 103, at 690.

[122] *Id.*; Of course, in reality, public housing does compete with private housing. Interview with Professor Roger Bernhardt, Professor of Law, Golden Gate University, in San Francisco, Cal. (July 20, 2002).

[123] *See* Duster, *supra* note 114, at 117.

to accommodate the former middle class undeserving poor.[124] After such federal takings were held unconstitutional, [125] local public housing authorities were established to regulate these urban housing developments and land seizures.[126]

Housing problems existed prior to the Great Depression and the New Deal legislation that created public housing.[127] Historians and legal theorists have written extensively on over-crowded and expensive "black belts" and deteriorated yet inhabited tenement buildings.[128] The impetus for the creation of this legislation, however, was the new population enduring social and economic crisis.[129]

After the New Deal legislation and federal funding revived the economy, the middle class resumed its previous position, but not the previous housing.[130] Veterans, returning from World War II, subsequently laid their claims to public housing during the 1940's.[131] This population "...forced the adoption of an aggressive strategy to remove the revived middle class from public housing, where it had grown comfortable and wanted to remain."[132]

In the 1950s and 1960s, the African American migrant population flooded northern urban areas, and thus public housing projects.[133] In accordance with law and social practice at this time, however, this group did not generate the sympathy that the undeserving poor received.[134] Suburban areas resisted public housing developments with African Americans.[135] Public Housing Authorities, who largely

---

124 *See* Adams, *supra* note 118, at 433–34.

125 *Id.*

126 *Id.*

127 *Id.* at 434.

128 *Id.*

129 *Id.* at 431-36.

130 *See* Green, *supra* note 103, at 691.

131 *Id.*

132 *Id.*

133 *Id.* at 691-92.

134 *Id.* at 692. Looking back, one cannot deny the racist law existent until the 1960's civil rights movement; interracial marriage was prohibited in many states, poll taxes were specially enforced, schools and public facilities were segregated.

135 *See* Duster, *supra* note 113, who explains the circumstances surrounding white flight to the suburbs and realtor, broker and governmental resistance to allowing blacks into the suburbs. *Id.* at 119. Ironically, this occurred and was maintained during and after the "civil rights movement" which makes many wonder whether the civil rights movement was actually effective. *Id.* at 122.

nurtured this resistance,[136] redeveloped urban areas and created high-rise housing projects, still visible and operating today.[137]

HUD and local housing authorities primarily assist families whose income is less than 30% the area median income.[138] Hud, however, estimates that public housing programs meet the needs of less than 17% of those eligible for assistance.[139] The Quality Housing and Work Responsibility Act of 1998[140] purports to transfer the power of regulating public housing from the federal government to the local housing authorities.[141] Public housing authorities must conform with federal housing regulations, including criminal screening and "One Strike and You're Out," to receive federal funding.[142]

III. THE PROBLEMS OF "CRIMINALS" ATTAINING HOUSING

In 1999, over 600,000 prison inmates were released onto the streets.[143] Those released on parole receive some

---

[136] *See e.g.,* Hills v. Gautreaux, 425 U.S. 284 (1976); *See generally*, Duster, *supra* note 113.

[137] For a really devastating look at the high rise housing projects, look at The Chicago Housing Authority and the American Dream, available at www.Columbia.edu/~sk652/index.html (last visited Feb. 15, 2003). "Ironically, the massive Robert Taylor Homes, consisting of 28 identical sixteen-story buildings, virtually guaranteed racial segregation because it was built in the middle of the redeveloped slums of the Black Belt, thus keeping its over 28,000 residents isolated within the South-Side." *Id.* While the Chicago Housing Authority, under the direct supervision of HUD, is condemning these ghastly buildings to build more adequate public housing, most are still present and inhabited today. *Id.*

[138] *See* National Low Income Housing Coalition, *Public Housing, in* 2001 ADVOCATE'S GUIDE TO HOUSING AND COMMUNITY DEVELOPMENT, http://www.nlihc.org/advocates/publichousing.htm (last visited Feb. 15, 2003) (40% of new admissions to public housing must have incomes less than 30% the area median income).

[139] *See* Otto J. Hetzel, *Asserted Federal Devolution of Public Housing Policy and Administration: Myth or Reality,* 3 WASH. U. J.L. & POL'Y 415, 421 (2000); *See also* Michael D. Weiss & Lauri Thanheiser, *Helter Shelter: The [Dis]organization of Public Housing Policy*, 51 WASH. UNIV. J. URB. & CONTEMP. L. 189, 196 (1997).

[140] Classified generally as 42 U.S.C. § 1437 et seq.

[141] *See* Hetzel, supra note 139, at 415-16.

[142] Hetzel, *supra* note 139, at 441.

[143] *See generally* Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences, in* SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY, WHEN PRISONERS RETURN TO THE COMMUNITY, at 1 (U.S. DEP'T OF JUST., Nat'l Inst. of Just., Nov. 2000).

assistance in finding employment and housing.[144] Considering the enormous caseloads of parole officers, however, the effectiveness of this assistance is questionable.[145] Additionally, fourteen states have completely abolished parole.[146] Other states, such as California, have not abolished parole in its entirety, but instead have coupled minimal parole supervision with determinant sentencing.[147] Further, prisons generally do not offer pre-release assistance to inmates soon to be released and in need of housing.[148] If support is afforded, prison officials do not feel responsible for assisting these people with finding housing.[149] A majority of the offender population is thus left without resources for obtaining housing or employment upon their release from jail or prison.[150]

Acquisition of adequate housing affects whether these persons will re-offend.[151] According to a United Kingdom study, two-thirds of offenders without satisfactory accommodation re-offend within twelve months after release.[152] In contrast, only one-fourth of ex-offenders who attain adequate housing re-offend within the same time period.[153] It appears that domestic stability is necessary for an ex-offender to re-integrate and become a lawful and productive member of society.[154]

In light of the "One Strike and You're Out" public housing law, many ex-offenders will not receive governmentally subsidized housing.[155] Private, unsubsidized housing may

---

144 *Id.* at 3 (describing some parole officer duties).

145 *Id.* at 3.

146 *Id.* at 2 (stating that automatic mandatory release has replaced discretionary sentencing and supervised release in 14 states).

147 *Id.* at 2 (noting that in California, parole supervision is usually one year, and supervision has replaced services).

148 Travis, *supra* note 20, at 14.

149 *Id.*

150 Petersilia, *supra* note 143, at 3-5.

151 CTR. FOR HOUS. POLICY, THE HOUSING NEEDS OF EX-PRISONERS (1996), available at http://www.jrf.org.uk/knowledge/findings/housing/H178.asp (last visited Feb. 16, 2003).

152 *Id.*

153 *Id.*

154 *Id. See also* Owen Covington, *Ex-offenders Seek Second Chance*, High Point Enterprise, available at http://www.hpe.com/2001/01/02/news/102news8.html (last visited Feb. 16, 2003).

155 LEGAL ACTION CENTER, HOUSING LAWS AFFECTING INDIVIDUALS WITH CRIMINAL CONVICTIONS (2000), *available at* http://www.enterprisefoundation.org/model%20documents/1150 (last visited Feb. 16, 2003).

present the only opportunity for social integration of these ex-offenders.[156] If lease clauses analogous with "One Strike and You're Out" are typical and legally enforceable in private housing, the 600,000 ex-offenders released from prison this year will have nowhere to turn but to the streets, to crime, and back to prison.[157]

IV. TENANT SCREENING

Tenants with past criminal offenses are prevented from obtaining leases or residing within public or federally subsidized housing.[158] The public housing authorities look at the criminal history of every housing applicant as well as each member of the housing applicant's immediate family to determine whether the persons will be suitable tenants.[159] Each applicant signs a waiver allowing the housing authority to access this information.[160] If the housing authority determines that the past criminal behavior may adversely affect the health, safety or welfare of other tenants, or the housing project, the housing authority may reject the applicant.[161] The housing authority need not show that an individual applicant was actually convicted of criminal activities to deny the applicants access to public housing.[162] The housing authority only needs to show that the applicant has "engaged in" such activity.[163] Thus, those with criminal histories, such as convictions, past arrests or past bad acts, will likely be barred from receiving any benefit from federally subsidized housing.[164]

Unlike public housing authorities and landlords who accept federal funds, a private landlord is not required to screen potential tenants.[165] A landlord, however, may be

---

156 However, as noted in Covington's article, *supra* note 153, it is difficult to convince private landlords to rent to ex-offenders.

157 *See* Petersilia, *supra* note 143, at 5.

158 *See* Travis, *supra* note 20, at 17.

159 42 U.S.C. § 1437d(c)(4)(A) (2000).

160 *Id.* at § 1437d(s)

161 *See* Johnson, *supra* note 61, at 239-40.

162 42 U.S.C. § 1437d(t)(3)(B) (2000).

163 *Id.*

164 *See supra* notes 159-164.

165 *See generally* Shelley Ross Saxer, *"Am I My Brother's Keeper?": Requiring Landowner Disclosure of the Presence of Sex Offenders and Other Criminal Activity*, 80

potentially liable for criminal acts committed by tenants against other tenants. A landlord may also be concerned with potential governmental forfeiture for properties used for illegal purposes, and drug nuisance abatement statutes. Thus, a private landlord may be fearful of the possibility of litigation and believe she has greater reason to screen and investigate housing applicants.[166]

A. PRIVACY INTERESTS

State and federal law govern who may access criminal offense records.[167] Generally, states consider facts concerning arrests and convictions public record.[168] The common law recognized that the individual's right "to determine the extent he wishes to share himself with others,"[169] or to "control the dissemination of information about himself"[170] should not be distorted simply because the information is considered public record.[171] Congressional statutes and United States Supreme Court's decisions, however, have followed a narrow interpretation of the individual's interest in preventing dissemination of past criminal acts to the public, in favor of society's interest in obtaining such information.[172]

There is no explicit right to privacy in the United States Constitution.[173] The Bill of Rights has "penumbras, formed by emanations" surrounding express rights and guarantees, which

---

NEB. L. REV. 522, 561-69(2001).

166 *Id.*

167 Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the* Constitution, 86 MINN. L. REV. 1137, 1140 (2002).

168 *See e.g.*, Paul v. Davis, 424 U.S. 693 (1976) (no constitutional privacy right affected by publication of name of arrested but untried shoplifter); *See also* Robert R. Stauffer, Note, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 HARV. J. ON LEGIS. 239 (1987); *See also* CAL. PENAL CODE § 1203d (2002).

169 U.S. Dept. of Justice v. Reporter's Comm. For Freedom of the Press, 489 U.S. 749, 764 n.16 (1989).

170 *Id.*

171 Even within the common law paradigm, however, many recognized that few facts about an individual's life are actually secret. *Id.* at 763 n.14. Thus, as Karst, commented, a "[m]eaningful discussion of privacy...requires the recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in selective disclosure." *Id.* (citing Kenneth L. Karst, *"The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROB. 342, 343-44 (1966)).

172 *See infra* Part V.A.

173 Griswold v. Connecticut, 381 U.S. 479, 491 (1965).

create a zone of privacy.[174] One type of privacy interest recognized by courts is the individual's interest in avoiding disclosure of personal matters.[175]

The United States Supreme Court has considered this issue in the context of tort liability for those who disclose and publish personal matters, such as criminal history, and whether an individual has a constitutionally protected privacy interest in her criminal history.[176] The Court weighs the privacy interest of the individual against the public's interest in both acquiring this information and observing the judicial process.[177] The Court has found that crime, prosecutions and judicial proceedings "are without question events of legitimate concern to the public...of critical importance to our type of government...."[178]

In *Paul v. Davis*,[179] police chiefs distributed a flyer of "active shoplifters," which included an individual who had been arrested, but not convicted, for shoplifting.[180] The individual brought suit against the police under 42 U.S.C. §1983 for violating his penumbral right to privacy, for disclosing the facts of his arrest on the shoplifting charge.[181] The United States Supreme Court held that facts surrounding an arrest, an official act, do not fall within the zone of privacy protected by the Constitution.[182] An Illinois state court in *Jones v. Taibbi*[183] echoed the opinions of both the Supreme Court in *Paul* and many state courts in finding that an ex-offender has no protected right in maintaining the privacy of her criminal records. [184] In accordance with the concern of public access to the judicial and criminal process, legislative initiatives such as Megan's law, requiring sex offenders to register with the police

---

174 *Id.* at 484.

175 Whalen v. Roe, 439 U.S. 589, 599 (1977).

176 *See* Paul v. Davis, *supra* note 169; *See also* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

177 *See id.* at 490-92.

178 *Id.* at 492.

179 424 U.S. 693 (1976)

180 *Id.* at 713.

181 *Id.* at 696-97.

182 *Id.* at 713.

183 512 N.E.2d 260 (Mass. 1987).

184 *Id.* at 269-70 (arrest and criminal record are part of the public record).

departments for the cities in which they live, have buttressed these federal and state courts' opinions.[185]

California courts have construed the right to privacy under the California Constitution as broader than the federal courts' interpretation of the right to privacy under the federal constitution.[186] California courts found that the ex-offender's privacy interest may outweigh the public interest in an individual's criminal history, where a conviction or arrest is remote.[187] In *Briscoe v. Reader's Digest Association, Inc.*,[188] a California court found that an individual with an eleven-year-old arson conviction might have a privacy interest in keeping the criminal record private.[189] While the court found that present criminal activities are "the legitimate province of a free press,"[190] a publishing company, or another private party who publicly disseminates remote criminal activities, can be held liable for a tort action.[191] Although the California view that a remote felony may be entitled to privacy is in the minority, this view protects the interests of a felon with a remote conviction.[192]

The United States Supreme Court has also considered to what extent the Freedom of Information Act allows government-compiled criminal information to be disclosed to a private individual or the public.[193] The Freedom of Information Act (hereinafter "FOIA") prohibits the revelation of certain information to the public.[194] For example, the government may withhold information and documents compiled "for law enforcement purposes" to the extent that "the production of such records would ... constitute an unwarranted invasion of personal privacy."[195] The Federal Bureau of Investigation has

---

185 *See* CAL. PENAL CODE § 290 (2000).

186 See eg., Briscoe v. Reader's Digest Ass'n, 483 P.2d 34 (1971).

187 *Id.* at 41.

188 483 P.2d 34 (1971).

189 *Id.* at 41.

190 *Id.* at 39.

191 *Id.* at 43.

192 *See e.g.*, Baker v. Burlington Northern, Inc., 587 P.2d 829 (Idaho 1978); Roshto v. Hebert, 439 So.2d 428 (La. 1983); Faloona by Fredrickson v. Hustler Magazine, 607 F. Supp. 1341 (N.D. Tex. 1985).

193 U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, *supra* note 170.

194 *Id.* at 755-56.

195 *Id.*

a vast compilation of criminal "rap sheets" which could potentially be released to third persons under the FOIA unless protected by this exception.[196] The Court found, however, that the disclosure of these records to private individuals was not what the FOIA framers intended, and thus, these records are protected under this exception.[197] The Court, however, made clear that this opinion had no bearing on whether an individual can bring a tort action for criminal record disclosure or whether the constitution embraced past criminal records within the "zone of privacy."[198]

While a private landlord would not be permitted to request an FBI rap sheet on a tenant applicant, there is nothing prohibiting the landlord from researching and collecting this information on her own.[199] Additionally, should a landlord do the footwork and retrieve the criminal information, no guidelines exist which prevent her from considering even a remote offense as part of the ex-offender's rental application.[200] Some commentators have noted that a landlord may disclose this information if they determine that the information is truthful, the ex-offender has not been rehabilitated, and it is disclosed to warn someone for whom the landlord owes a duty.[201] The landlord alone, however, has the discretion to determine the above factors.

B. TENANT SCREENING AGENCIES

More and more frequently, landlords hire tenant-screening agencies to review the histories of housing applicants. [202] A typical tenant-screening agency collects and disseminates credit history information about the prospective tenant.[203] This information includes whether the tenant has ever been the

---

196 *Id.* at 752-53.

197 *Id.* at 780.

198 *Id.* at 763 n.13.

199 *Id.* at 763-64.

200 California does preclude the use of past convictions as a basis for denying rental applications; *see* CAL. GOVT. CODE § 12955.3 (2000).

201 *See* Saxer, *supra* note 166, at 562-64.

202 *See* Stauffer, *supra* note 169, at 241.

203 *Id.* at 240.

subject of a formal complaint or been involved in any litigation.[204]

Generally, there are three types of tenant screening agencies: those maintaining public records, financial information, or lifestyle information.[205] The public records agency compiles information generally accessible to the public.[206] Particularly, this agency finds information about the tenant's involvement in legal disputes.[207] Usually, this agency does not research surrounding facts of the litigation or convey the outcome of these disputes.[208] These reports will not indicate whether the tenant was the prevailing party.[209]

The financial agency discovers and conveys the financial information of a tenant applicant, just as one would expect from a credit-reporting agency.[210] This report normally accounts for the tenant's bill paying habits, bank accounts, outstanding creditors, occupation, and income.[211]

The tenant agencies reporting on a tenant's lifestyle collects a broader amount of information and detail than the other two agencies.[212] These agencies will hire private investigators to gather information ranging from the tenant's martial status to the tenant's general reputation among acquaintances.[213]

The typical tenant screening agency does not actively collect and compile criminal data, because their main purpose is to inform the landlord about the financial capabilities of the prospective tenant.[214] Through both the public records and lifestyle investigations, however, tenant-screening agencies would likely find a past criminal conviction and report it to the landlord.[215] Fortunately, these agencies are regulated by the Fair Credit Reporting Act and thus must keep the information

---

204 Gary Williams, *Can Government Limit Tenant Blacklisting?*, 24 SW. U. L. REV. 1077, 1079 (1995).

205 Stauffer, *supra* note 169, at 242-43.

206 *Id.*

207 *Id.* at 242.

208 *Id.*

209 *Id.* at 244

210 *Id.* at 243

211 *Id.*

212 *Id.* at 244

213 *Id.*

214 *Id.*

215 *Id.* at 242-45.

they disseminate accurate.[216] Should the tenant-screening agency mis-inform the landlord about an individual's criminal past, they may be subject to tort liability.[217]

Certain tenant screening agencies would not actively pursue information about an applicant's past criminal history.[218] An ex-offender, or someone only recently released from prison, however, has most likely not maintained bill payments, rents or credit cards. This individual would have either a gap in credit history, during the period of incarceration, or accumulated multiple debts from years of unpaid and unaccounted for bills. In any event, the tenant-screening agency would discover such a credit gap or record of delinquency, and the landlord would likely reject this candidate.[219]

C. OTHER SCREENING CONSIDERATIONS

A non-offender may be excluded from housing leases if she answers incriminating questions a landlord may legally ask. Legislative policies waging a war on drug use have curtailed anti-discrimination laws governing tenant selection.[220] A landlord can ask whether an applicant is currently using drugs, or has used drugs within the last year.[221] Additionally, the landlord may inquire whether the tenant applicant has ever been convicted of manufacturing or distributing drugs.[222] The landlord should, however, ask all the prospective tenants the same questions should she want to avoid the appearance of discrimination.[223]

The landlord may subconsciously weigh a number of factors to determine whether the applicant is likely to commit a

---

216 *Id.* at 251.

217 *See generally* Williams, *supra* note 205; Stauffer, *supra* note 169.

218 Stauffer, *supra* note 169, at 250.

219 *Id.* at 251.

220 CAL. GOVT. CODE § 12955.3 (2000) (prohibits considering past drug crimes, but not drug use within the last year).

221 *See* David Lang, Note, *Get Clean or Get Out: Landlords Drug-Testing Tenants*, 2 WASH. U. J.L. & POL'Y 459, 464-65 n.34 (2000) (citing to United States v. Southern Mgmt, Corp., 955 F.2d 914, 922-23 (4th Cir. 1992)).

222 *Id.* Lang displays that under the Fair Housing Act, the term "disability" does not embrace current drug use. *Id.* at 464-65. He also notes that the Fair Housing Act does not prevent a landlord from refusing to rent to a tenant convicted of manufacturing or distributing a controlled substance. *Id.* at 465.

223 *Id.*

crime. The landlord's biases regarding race, age or sex may contribute to the selection process without any overt signals or telling questions. Federal and local civil rights laws prohibit consideration of these protected characteristics.[224] Determining whether a landlord considered these factors is difficult.[225] The credibility of an ex-offender may be questionable when balanced against that of an established and respected landlord.[226]

More frequently, landlords can find local or state legislative support for denying an individual housing based entirely on a past offense.[227] In Georgia, the Farmers Home Administration regulation authorizes landlords to reject tenants who may pose a direct threat to the safety or health of others.[228] This act regulates residential units designated as "low-income." [229] Landlords have used this act as the basis of disapproving any residential lease application filed by certain violent felons.[230] While this particular act does not require landlords to reject such applications, landlords have used this act to expand exclusionary policies to all convicted felons.[231]

Further, property owners associations, or homeowners associations, have amended their covenants and restrictions to prohibit property owners from selling or leasing to sex offenders.[232] The homeowners associations rely on the assumption that the individual convicted of sex offenses poses a risk to the community due to the probability of future offenses.[233] Courts have upheld these amendments even though they arguably limit the property owner's right to sell or lease her property.[234] Considering that courts have upheld

---

[224] *See* Federal Fair Housing Act of 1937, 12 U.S.C. § 4545 (2000); California Fair Employment and Housing Act, CAL. GOVT CODE § 12940 (2000).

[225] *See* Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 B.U. Pub. Int. L.J. 35, 43 (2001).

[226] FED.R. EVID. 609(a)(1)-(2).

[227] *See* Stephens v. Greensboro Properties, Ltd., 544 S.E.2d 464 (Ga. 2001); *See also* Collins v. AAA Homebuilders, Inc., 333 S.E.2d 792 (W. Va. 1985) (holding that a landlord may deny housing to a tenant with a prior conviction).

[228] Stephens, *supra* note 227, at 469.

[229] *Id.* at 466.

[230] *Id.*

[231] *Id.*

[232] *See* Mulligan v. Panther Valley Prop. Owners Assoc., 766 A.2d 1186, 1189 (N.J. Super. Ct. App. Div., 2001).

[233] *Id.*

[234] *Id.*

such amendments prohibiting leases with sex offenders, it is possible that homeowners associations may amend their covenants to prohibit leases with all ex-offenders.

V. GROUNDS FOR EVICTION

Once the ex-offender has entered into a lease, or if the ex-offender has maintained housing while incarcerated, a landlord may attempt to evict the ex-offender and her family.[235] The landlord's grounds for eviction may be based on state statutes[236] or terms within the lease. In the following sections, both will be examined, with a particular emphasis on the statutory grounds for eviction. In both cases, as with the issue in *Rucker*, courts generally favor the plain language of either the statute or the lease terms, unless the language is ambiguous. The courts profess that the public policy, however, is against forfeiture of a tenancy.[237] Thus, courts strictly construe the terms of the lease or the statute at issue.[238]

A. USE OF PREMISE FOR ILLEGAL PURPOSE

Many statutes provide for the forfeiture or termination of a lease due to a tenant's illegal use of the premises.[239] A New York ordinance stated that a lease would become void if the tenant "uses or occupies the premises for any illegal trade, manufacture or other business."[240] Statutes like this do not explicitly define what constitutes an illegal trade, manufacture or other business.[241] Other states, such as Massachusetts, specify the illegal uses for which the landlord may evict the tenant.[242] Examples of illegal uses under the Massachusetts statute are gaming, lottery, prostitution, and lewdness.[243]

Where a statute explicitly provides the particular prohibited illegal use, the tenant must have engaged in that

---

235 *See infra.*
236 New Jersey Anti-Eviction Act, N.J. STAT. ANN. § 2A:18-61.1 (West 2000).
237 190 Stanton Inc. v. Santiago, 302 N.Y.S.2d 693, 696 (N.Y. Civ. Ct. 1969).
238 *Id.*
239 *See* Glesner, *supra* note 111, at 776.
240 *See* Santiago, *supra* note 237, at 694.
241 *Id.* at 695.
242 Roseman v. Day, 185 N.E.2d 650, 652 (Mass. 1962).
243 *Id.*

particular prohibited conduct in order to form the basis of an eviction.[244] In *Roseman v. Day*,[245] a landlord attempted to evict a tenant under a Massachusetts statute that expressly set forth five specific grounds for an illegal use eviction.[246] The tenant, however, was accused of selling harmful narcotic drugs, an activity not then enumerated in the statute.[247] The court found that the landlord could not invoke the statute to void the lease. [248]

Courts have defined an illegal "use" of the premises must amount to more than isolated incidents of criminality on the premises.[249] To constitute an illegal use of the premises, the use must be of a continuing nature or customary character.[250] The term "use" cannot be construed to include an isolated act.[251] Rather, "use" implies the doing of something customarily or habitually upon the premise.[252]

Courts agree that no matter what the nature of the use, isolated or continued, the illegal activity under such statutes must actually occur upon the demised premise to constitute grounds for eviction under an illegal use statute.[253] Accordingly, prior to the decision in *Rucker*, federal courts of appeal found that voiding a lease for crimes that occurred off the public housing premise was contrary to the statutory prohibition of unreasonable lease terms.[254] While this reasoning has not maintained its weight in public housing lease interpretation since *Rucker*, courts may continue to construe private leases in this manner.

Many states with statutes that articulate the specific grounds for eviction have subsequently included drug use or possession as an illegal use of the premise.[255] For example, a

---

244 *Id.*
245 185 N.E.2d 650 (Mass. 1962).
246 *Id* at 652
247 *Id.*
248 *Id.*
249 *See* 190 Stanton Inc. v. Santiago, *supra* note 237, at 695.
250 *Id.*
251 *Id.; See also* Glesner, *supra* note 111, at 776-77.
252 *See e.g.*, U.C.L. Realty Co. v. Brown, 84 N.Y.S.2d 840 (1948).
253 *See e.g.*, 1895 Grand Concourse Assoc. v. Ramos, 685 N.Y.S.2d 580, 583 (1998).
254 *See e.g.*, Tyson v. N.Y. City Hous. Auth., 369 F. Supp. 513 (S.D.N.Y. 1974).
255 *See generally* D.E Evins, Annotation, *Construction and Application of Statute Authorizing Forfeiture or Termination of Lease Because of Tenant's Illegal Use of Premises*, 100 A.L.R.2d 465 (1965).

Massachusetts statute now explicitly includes as grounds for eviction, drug possession, or other criminal drug charges, where the tenant is arrested or suspected of conducting illegal activity on the premise.[256]

Due to heightened communal concerns regarding drug trafficking and use,[257] states and localities frequently *require* landlords to evict tenants for criminal activities on the premises through nuisance abatement statutes.[258] These statutes declare nuisances "certain property, including privately owned residential buildings, used for the purpose of illegally administering, manufacturing, distributing, or storing controlled dangerous substances or paraphernalia."[259] The statutes authorize certain persons, including the city or county attorney, to bring an action to abate the nuisance.[260] Once the court has declared the property a nuisance, courts will grant relief (or abate the nuisance) by requiring the tenant with knowledge of the particular criminal activity to vacate the property.[261] In Massachusetts, for example, the nuisance statute makes it a crime for a landlord who knows or has reason to know that the tenant is engaging in the prohibited activity to allow it to continue.[262] Upon receiving notice from the county or the court that the tenant is using the property for illegal purposes, the landlord may also be criminally liable if she does not take all reasonable measures to legally evict the tenant.[263] Thus, the central governmental authority has the power to step in where it feels that an owner has not adequately prevented criminal uses on the rental property.

B. LANDLORD LIABILITY FOR DISCOVERY OF CRIMINAL PROPENSITIES

A landlord may have grounds for eviction where she subsequently discovers that the tenant has a criminal record or

---

256 MASS. GEN. LAWS ANN. ch. 139, § 19 (West 2002).

257 *See* Martin v. Howard County, 667 A.2d 992, 993 (Md. Ct. Spec. App. 1995).

258 *See* MINN. STAT. ANN. § 609.5317 (West 1987); MASS. GEN. LAWS ANN. ch. 139, § 19 (West 2002).

259 *See* MD. CODE ANN., REAL PROP. § 14-120 (1996).

260 Martin, *supra* note 258, at 993-94.

261 MD. CODE ANN., REAL PROP. § 14-120(f)(1) (1996).

262 MASS. GEN. LAWS ANN. ch. 139, § 20 (West 2002).

263 *Id.; See also* MINN. STAT. ANN. § 609.5317 (West 1987).

a history of criminal acts.[264] Some commenters assert that the landlord owes a duty to other tenants if the landlord knows of the tenant's criminal propensities.[265] Thus, the landlord may arguably have a duty to evict a tenant for the tenant's past criminal behavior.[266]

Recently, tenant initiated lawsuits against landlords for criminal activities on the premises have become more and more frequent.[267] The general rule is that a residential landlord has no duty to police the premise.[268] Depending on the circumstances, however, some courts find landlords liable to the tenant for the criminal acts on the premise.[269]

In construing whether a landlord has a duty to her tenants for criminal acts on the premise, courts employ contract or tort principles.[270] Using contract principles, courts have implied a warranty of security when landlords provided security measures at the beginning of the tenancy and yet failed to maintain them.[271] Nevertheless, courts are reluctant to find landlords liable for criminal activities where there are no express lease terms stating that the landlord shall provide security on the premise.[272]

Through the use of tort law, courts require evidence that the criminal conduct was foreseeable to the landlord.[273] Thus, the court examines factors to determine foreseeability, such as the proximity of past criminal activities, whether the other criminal acts are recent, the similarity between the past criminal acts and the present act, and whether the past criminal acts were publicized.[274] Nonetheless, courts generally find that a landlord does not owe a duty to protect tenants from criminal attacks unless the landlord created the risk or was

---

264 *See* Effinger, *supra* note 28,at 52-53.

265 *Id.*

266 *See* Glesner, *supra* note 28, at 709-16.

267 *Id.*; *See also* Merrill, *supra* note 83, at 431.

268 *See* Glesner, *supra* note 28, at 709-16.

269 *See e.g.,* Kendall v. Gore Properties, Inc., 236 F.2d 673 (D.C. Cir. 1956) as an example of one of the earlier cases holding a landlord liable for an attack on the residential premise.

270 *See e.g.,* Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970) (tort) and Flood v. Wisconsin Real Estate Inv. Trust, 503 F.Supp. 1157 (D. Kan. 1980) (contract).

271 *See* Flood, *supra* note 270.

272 *See* Sciascia v. Riverpark Apts., 444 N.E.2d 40 (Ohio Ct. App. 1981).

273 *See* Timberwalk Apts. v. Cain, 972 S.W.2d 749, 755 (Tex. 1998).

274 *Id.* at 759.

responsible for a known physical condition that created the risk.[275] While courts have generally rejected both tort and contract theories as a basis for tenant lawsuits against landlords for criminal acts committed by other tenants, nonetheless, landlords have become more cautious of whom they accept and reject as tenants.[276]

Further, some courts have found that the landlord may have a duty to evict the criminal tenant if the tenant's past behavior or offenses reflect or indicate the possibility of future activities that may threaten the health or welfare of other tenants.[277] As with the criminal acts committed against tenants due to residential security issues mentioned above, courts have found that a landlord can only be found liable for the criminal acts of tenants if the landlord had reason to foresee the criminal conduct.[278] Accordingly, courts have determined that possible or supposed future criminal conduct does not establish the landlord's duty.[279] If the landlord discovers that the tenant has a criminal past, a court may nevertheless construe that a criminal offender tenant's subsequent crime was foreseeable to the landlord because of the tenant's past criminal offenses.[280]

Unless a state or local statute provides that a landlord may evict based on the tenant's criminal past, the landlord may be liable for an unlawful eviction if she decides to evict the tenant because she subsequently discovers the tenant's prior criminal history.[281] As discussed above, however, the potential for landlord liability for the criminal acts of her tenants is minimal.[282] Further, the ex-offender tenant is far less likely to re-offend than her homeless counterpart.[283] Thus, the landlord has little actual reason to evict the ex-offender tenant.

---

275 *See* Walls v. Oxford Mgmt. Co., Inc., 633 A.2d 103, 107 (N.H. 1993).

276 *See generally* Effinger, *supra* note 28.

277 *Id.* (showing New York court determinations).

278 *Id.*; *See also* Merrill, *supra* note 83, at 444-46.

279 *See e.g.,* Cain, *supra* note 273, at 759; *Cf.* Walls, *supra* note 273, at 107 (rejecting landlord liability based solely on foreseeability).

280 *See* Effinger, *supra* note 28, at 52.

281 *Id.*

282 *See generally* Glesner, *supra* note 28 (discussing how the liability has not expanded, but may expand).

283 *See* Part III, *supra.*

C. FAMILY AND GUEST RAMIFICATIONS

Many recently released ex-offenders live with their families.[284] In the case of public housing, as reflected by the *Rucker* decision, the tenant family may be subject to eviction by the housing authority if the ex-offender family member's crime is perceived as a threat to the "health, welfare or safety" of the housing project.[285] The public housing authority may prohibit the tenant family from providing housing for the ex-offender family member. Additionally, in the public housing realm, the tenant family bears the risk of a strict liability eviction if the ex-offender does re-offend.[286]

Private housing leases are not subject to the "One Strike and You're Out" housing policy.[287] Because many courts now construe leases through contract principles, and the ideal of negotiating the terms of the lease, however, landlords can place such a clause in the lease.[288] For those landlords who do not place such a restriction in the terms of the lease, they can find statutory grounds for eviction through state law.[289] Some states have enacted legislation similar to the "One Strike and You're Out" policy, applicable to both public and private housing.[290] Many state courts, however, rely on the ideal of the landlord and tenant negotiating the terms of the lease, in equal bargaining positions.

The court relied on the "agreed upon terms between parties" and refused to imply an "innocent owner" defense in the old case of *Bel-Clark Building Corporation v. Glauner*.[291] The court found the express terms of the lease governed whether a tenant could be evicted for the criminal acts of his

---

[284] *See* Joan Petersilia, *Challenges of Prisoner Reentry and Parole in California, in* C.P.R.C. BRIEF 12, (Cal. Policy Res. Ctr. 2000) at 3 (recently released ex-offenders reside with their families and, when familial resources are exhausted, they become homeless).

[285] *See* Part III, *supra.*

[286] *See generally,* Dep't of Hous. and Urban Dev. v. Rucker, *supra* note 26.

[287] For the purposes of this comment, private housing is that housing where neither the tenant nor the landlord receives federal subsidies.

[288] *See* Dep't of Hous. and Urban Dev. v. Rucker, *supra* note 26, at 1235 (where the court stated that such a clause would be upheld in a conventional lease).

[289] *See e.g.,* N.J. STAT. ANN. § 2C:35-1(West 2000).

[290] *Id.*

[291] 72 N.E.2d 645 (Ill. App. Ct. 1947).

sons.[292] In *Glauner*, a father was evicted on the basis of his children's activities. The father claimed that the violations of his children were not chargeable to him because he did not know about their activity, and could not be evicted unless he "authorized or ratified" the activity.[293] The lease had an express provision, however, which stated that the "lessee and those occupying under said lessee will comply with and conform to all reasonable rules and regulations that the lessor may make...."[294] The court found that the landlord did not need to show that the father knew of or authorized the acts of his children in order to terminate the lease, because he was aware of his responsibility for the acts of other occupants pursuant to the lease clause.[295] The rationale that the father can be held responsible for the acts of his children pursuant to the terms of the lease was the minority view of lease construction.[296] This view, however, is parallel to that espoused currently in *Rucker*.[297]

Prior to *Rucker*, courts were generally unwilling to find that clauses or statutes with language similar to the "One Strike and You're Out" policy provide for strict liability evictions.[298] Courts acknowledged that tenants can be held responsible for the acts of their guests and occupants, and can thus be subject to eviction should their guest's or occupant's behavior materially breach the lease. [299] Upon either statutory grounds or the actual language of the lease, courts also acknowledged that a lease cannot be terminated absent "good cause."[300] Thus, the tenant's must personally know of the guest's illegal activity,[301] participate (or acquiesce) in the guest's illegal conduct, or fail to take reasonable steps to stop the illegal activity once it is known, for her tenancy to be

---

292 *Id.*
293 *Id.* at 647
294 *Id.*
295 *Id.*
296 *Id.*
297 *See* Dep't of Hous. and Urban Dev. v. Rucker, *supra* note 26, at 1235.
298 *See* Wessington Housing Apts. v. Clinard, 2001 WL 605105 *8 (Tenn. Ct. App. 2001) and Diversified Realty Group, Inc. v. Davis, 628 N.E.2d 1081 (Ill. App. Ct. 1993) and cases cited therein.
299 Diversified Realty Group, *supra* note 298, at 1084.
300 *Id.* at 1085.
301 Lloyd Realty Corp. v. Albino, 552 N.Y.S.2d 1008, 1010 (1990).

terminated.[302] Regardless of whether the tenancy was federally subsidized, most courts were unwilling to impute a child's behavior or criminal acts to a parent unless the parent knew of or had reason to know of the child's criminal activity.[303] Additionally, courts propounded that imputing liability onto a tenant for associating with persons with criminal backgrounds or persons who engage in criminal activities is constitutionally defective.[304]

The Illinois decision in *Diversified Realty Group v. Davis* [305] shows a courts' previous willingness to interpret private leases by applying a "good cause" requirement.[306] Diversified owned rental property, which was insured by HUD, and thus was subject to HUD regulations.[307] Diversified's leases contained similar clauses as those examined in *Rucker*, holding tenants responsible for the acts of their guests and prohibiting the use of the premise for unlawful purposes.[308] Two individuals arrested for possession of cocaine and questioned by the police, claimed that Ms. Davis' apartment was used for the sale of illegal substances.[309] The police entered and searched Ms. Davis' apartment, while she was out, and discovered a mixer with white powder residue in her son's closet.[310] Subsequently, Ms. Davis was served with a notice to terminate tenancy due to the breach of the lease.[311] Ms. Davis argued that she did not know that her son kept paraphernalia in his closet, and was thus not subject to termination of her lease.[312] Diversified asserted that the lease contained a strict liability clause which did not require the tenant's knowledge of her son's behavior to hold her responsible, and evict her.[313]

The Illinois court construed the lease according to general contract and property principles.[314] The court compared the

---

302 *See* Tyson v. New York City Hous. Auth., *supra* note 254.
303 *See e.g.* Santiago, *supra* note 237.
304 Lloyd, *supra* note 301.
305 628 N.E.2d 1081(Ill. App. Ct. 1993).
306 *Id.* at 1085.
307 *Id.* at 1082
308 *Id.* at 1084.
309 *Id.* at 1083.
310 *Id.*
311 *Id.*
312 *Id.*
313 *Id.*
314 *Id.* at 1084.

lease clause requiring a strict liability eviction for the acts of third parties with the requirement, within the same lease, that an eviction cannot occur absent some measure of "good cause."[315] Thus, the court held that some measure of good cause, such as a nexus between the tenant and the criminal conduct, must be shown for a tenant's eviction based on the acts of her guests and children.[316] Absent a minimal connection between Ms. Davis and the unlawful conduct, Diversified could not demonstrate good cause for Ms. Davis' eviction.[317]

When a lease is funded only by state subsidies or not governmentally funded at all, state courts are not bound by the federal government regulations regarding public housing, and thus construe lease clauses according to state law.[318] Unlike the case in *Rucker* where an individual was evicted for the criminal acts of her family member or guest off the premise, state courts appear willing to recognize an "innocent owner" defense in the terms of the rental agreement or legislation.[319] Courts construe the particular lease clause as ambiguous, in order to interpret it through the lens of reasonableness, and thus allow admission of evidence regarding the parties' or legislative intent to determine the meaning of the terms.[320] Thus, non-tenants or family members who commit criminal acts, on or off the premise, are unlikely to have an effect on the primary tenant's leasehold, unless the tenant does not take active steps to remove them.[321]

In accordance with the judicial reasonableness standard, determining the tenant's knowledge of the illegal activity is crucial for an eviction based on the actions of a family member.[322] A New York court determined that where police entered an apartment and found 500 milligrams of cocaine in the private closet of a tenant's husband, the tenant's knowledge of the

---

315 *Id.* at 1084–85.

316 *Id.* at 1085.

317 *Id.*

318 *See e.g.*, Wessington, *supra* note 298.

319 *Id.* at *1.

320 *Id.* at *4.

321 *Id.* (requiring that if the tenant knows, they must take reasonable steps to remove guest).

322 *See generally* Diversified, *supra* note 298; Wessington House, *supra* note 298; Ramos, *supra* note 253.

husband's illegal activity must be shown to evict her.[323] At the eviction hearing, the husband showed that the closet was his private closet; his wife was completely unaware of the cocaine.[324] Further, he stated that she first discovered his habit when he was arrested and she immediately demanded he leave the house.[325] The court determined that "a tenant will be liable for the illegal acts committed ... by a subtenant or occupant and is subject to forfeiture of the leasehold if the tenant had ***knowledge*** of and ***acquiesced*** to the use of the demised premises for such an illegal activity."[326] The court also noted that where the tenant is not personally involved in the criminal activity, a "nexus" between the activity and premise must be demonstrated.[327] Thus, because the wife did not know of the husband's habit, and the criminal activity of personal consumption did not imply the continuous nature of "illegal use of premises," the wife could not be evicted for her husband's possession conviction.[328]

Realistically, however, when an ex-offender lives with his family, the tenant family may have difficulties in claiming that they were unaware of his criminal propensities.[329] In *Marwyte Realty Association v. Valcarcel*, the tenant's daughter and son were arrested for selling drugs out of the apartment.[330] After the son was released from jail, the tenant allowed him to stay at the same apartment.[331] The landlord subsequently brought an action to evict the tenant as an "objectionable tenant" pursuant to a New York statute.[332] The lower Court found that because the tenant knew that her son participated in the "drug trade" out of the apartment previously, and yet she still allowed him to return to the apartment, the tenant was "condoning the illegal trade of drugs."[333] The lower court thus

---

323 Ramos, *supra* note 253.
324 *Id.* at 582.
325 *Id.*
326 *Id.* at 511.
327 *Id.* at 512.
328 *Id.* at 512-13.
329 *See e.g.* Marwyte Realty Ass'n, Ltd. v. Valcercel, 559 N.Y.S.2d 80 (1990) *overruled by* Marwyte Realty Ass'n, Ltd. v. Valcercel, 579 N.Y.S.2d 311(1991).
330 *Id.* at 81.
331 *Id.*
332 NY REAL PROP. ACTS. § 711.
333 Marwyte, *supra* note 329, at 84.

held that she was an "objectionable" tenant and could be evicted from the premise.[334]

The requirement for a tenant's personal criminal conduct, however, has remained the crux of the judicial interpretation of a lease, regardless of whether the lease clause holds the tenant responsible for the conduct of others.[335] For example, in *Marwyte*[336], the New York Supreme Court, found error in the lower court's ruling, because there was "no claim of misconduct on the part of the tenant."[337] Additionally, a Washington court restored a tenant to his rental property after being evicted for "engaging in criminal activity" where police found a marijuana pipe in his shed.[338] The court found that where a statute does not specify who must engage in the criminal activity – the tenant or a guest – the court must construe the statute in favor of the tenant.[339] The Washington court stated that only the person engaging in criminal activity should be evicted under the statute.[340] Therefore, only the tenant's criminal activity can be grounds for eviction.[341] Where the tenant does not personally engage in the activity, the criminal activity of another cannot be imputed on to the tenant.[342]

Interpreting a lease according to state law is often more beneficial to the family members of the ex-offender, who may be at risk for losing their tenancies when they allow the ex-offender to stay with them.[343] If the state law governing private and public leaseholds is akin to that in federal public housing, however, the family members have little incentive to open their homes to the ex-offender.[344] New Jersey's Anti-Eviction Act is substantially similar to the federal "One Strike and You're Out" policy, and is enforced with the same strict

---

334 *Id.*

335 *See e.g.* Marwyte Realty Ass'n, Ltd., v. Varcercel, 579 N.Y.S.2d 311, 312 (1991); *See also* Hartson P'ship v. Goodwin, 991 P.2d 1211, 1215-16 (Ct. App. Wash. 2000).

336 Marwyte, *supra* note 335, at 312.

337 *Id.*

338 Hartson, *supra* note 335, at 1212.

339 *Id.* at 1213.

340 *Id.*

341 *Id.*

342 *See* Marwyte, *supra* note 335.

343 *Id.*

344 *Id.* Although the Supreme Court overruled the lower court's decision in Marwyte, *supra* note 331, the time and cost of litigation the tenant had to endure would likely deter her, and others like her in other states, from allowing her ex-offender children to live with her. *See also* N. J. STAT. ANN. 2A:18-611.1(d),(e),(n) (West 2000).

liability gusto, as it's federal counterpart.[345] Tennessee has a substantially similar statute.[346] The courts have yet to construe the Tennessee statute, however, as providing grounds for a strict liability eviction of a tenant for the criminal acts of a third person.[347] Tennessee courts have interpreted the statute to require a tenant's knowledge of the criminal acts of the third parties in order to constitute grounds for eviction.[348]

Courts more likely require that the landlord establish some connection between the tenant and the alleged illegal activity before the eviction is proper.[349] After the decision in *Rucker*, however, some courts may find strict liability evictions reasonable in private leases.[350] This proposition supports the United States Supreme Court's statement that "[s]uch 'no fault' eviction is a common 'incident of tenant responsibility under normal landlord-tenant law and practice.'"[351]

In public housing, an entire family may lose the homestead should a guest, occupant or subtenant engage in criminal activity, or have a prior criminal record.[352] Should this be the case in private leases, a tenant could lose the leasehold for inviting friends or family members who may be criminal into their homes. Presently, courts have interpreted that the state statutes do not afford an eviction without some culpable conduct on the part of the tenant, even if the tenant is an ex-offender. [353] State legislatures, however, are taking a turn towards enacting strict liability eviction statutes for private leases.[354] Further, since the Supreme Court has interpreted the *Rucker* lease clause as both reasonable and typical in private leases, private landlords may add this clause to their

---

345 N.J. STAT. ANN. 2A:18-611.1(d),(e),(n) (West 2000); *See also* Taylor v. Cisneros, 102 F.3d 1334 (3rd Cir. 1996) (public housing eviction based on both the New Jersey Act and the federal clause).

346 TENN. CODE ANN. § 66-28-517(a) (1993)

347 *See* Wessington, *supra* note 298, at *5.

348 *Id.* at *8.

349 *See* Hartson, *supra* note 337, at 1215.

350 *Id.*

351 Dep't of Hous. and Urban Dev. v. Rucker, *supra* note 26, at 1235 (citing to 56 Fed.Reg. at 51567).

352 *Id.*

353 *See e.g.*, Wessington, *supra* note 298 (while Tennessee's statute is similar to "one Strike," the court still found that the tenant must be personally involved in the criminal activity).

354 *See e.g.*, N.J. STAT. ANN. 2A:18-611.1(d),(e),(n) (West 2000) *and* TENN. CODE ANN. § 66-28-517(a)(1993).

leases.[355] Pursuant to the Supreme Court's rationale in *Rucker*, state courts may now be more likely to enforce this strict liability eviction.[356]

VI. PROPOSAL - LEGAL AND SOCIAL IDEOLOGY

To achieve the result most beneficial to the society and afford ex-offenders housing as a first step to law-abiding lives, legislatures, courts, law enforcement and the community at large must cooperate. Currently, the primary providers of housing to ex-offenders are private not for profit organizations and religious institutions. To house the enormous ex-offender population, however, our nation must reevaluate policies pertaining to former criminals.

First, our nation needs to prioritize re-entry housing in the budget and fund re-entry plans and programs. Although many resources are allocated to the creation and maintenance of prisons, the United States allocates little to the re-entry facets of the criminal justice system, such as ex-offender housing.[357]

Second, the states should take a new approach to public safety, and ensure these ex-offenders receive their minimal living requirement of housing, by either implementing or increasing parole and probation. Many states currently employ parole and probation as a part of their punishment schemes. In those states, however, the purpose of these facets is supervision without assistance or services.[358] Parole or probation officer caseloads of 70 are common, thus leaving little time for the officer to do more than supervise.[359] Increasing the number of parole and probation officers would afford them more time to assist a recently released individual in finding both temporary and permanent housing. These officers would also have more time to connect and network with private real estate agencies in the community, who are apparently hesitant about renting to ex-offenders.[360] With more time and

---

355 *See* Dep't of Hous. and Urban Dev. v. Rucker, *supra* note 26, at 1235.

356 *Id.*

357 *See generally,* Petersilia, *supra* note 143.

358 *Id.* at 3.

359 *Id.*

360 *See* Covington, *supra* note 154 (describing a non profit program, Weed and Seed in High Point, that assists ex-felons with housing); *See also* Petersilia, *supra* note 143, at 4 (describing the Safer Foundation in Cook County, which does similar networking

resources, parole and probation officers would be in a better position to determine which of these ex-offenders should be recommended to the housing agencies. Further, the state governments will save in the long run if they expend more on parole and probation, thereby reducing the need for prisons.[361]

Third, legislatures need to reevaluate statutes like "One Strike and You're Out," and other statutes prohibiting the allocation of welfare and social subsidies to ex-offenders. The poor are more likely to encounter the criminal justice system than the rich. Thus, to receive adequate housing after release from incarceration, poor ex-offenders require financial assistance. Because state and federal resources are limited, legislatures should enact statutes providing for higher education and practical training in prison and jail, thus making ex-offenders employable. Providing offenders employment resources while incarcerated will decrease the need to allocate monetary resources to governmental subsidies for housing, or the creation and maintenance of more prisons.

The community must also share responsibility for the integration of these ex-offenders. Without drastic and immediate changes to housing law, the 600,000 people released from prison this year will be systematically and continually recycled by the criminal justice. To change the dialogue of crime control in the United States and create positive advances, we must provide ex-offenders with living necessities, particularly, housing. Not until their housing needs are met will they be equipped to lead lawful lives.

VII. CONCLUSION

The decision in *Rucker*, the "One Strike and You're Out" law, and the restrictions placed on federal subsidies for ex-offenders are rippling into private landlord tenant law. Although the current screening techniques and eviction rationales used by private landlords are not as extreme as that within the public sphere, states are expanding their laws to become more analogous with the federal, publicly subsidized

---

for ex-misdemeanants in Chicago).

[361] *See* James J. Stephan, *State Prison Expenditures, 1996,* iv, (Washington D.C., U.S. DEP'T OF JUST., Bureau of Just. Stat., 1999) NCJ 172211 (in 1996 state governments paid approximately $20,100 per year to house a single inmate).

regulations. Should this occur, more and more offenders will be released to live on the streets, and most likely, return to the confines of the criminal justice system. Legislative, judicial and communal cooperation is necessary to help ex-offenders gain stable housing, and thus diminish the likelihood that they will re-offend.

Heidi Lee Cain[*]

---

[*] Heidi Lee Cain, Juris Doctorate Candidate, July 2003, Golden Gate University School of Law. I am and will always be indebted to my mentor and inspiration, John Charles Curtin, Ph.D., who will laugh when he reads this article, laden in abstractions and ideologies. I also give much credit to Kevin Nickels, my surrogate brother, fellow inmate worker and partner in dissecting social ideologies. Wet pavement certainly does not make rain. I would also like to thank the brilliant Professor Roger Bernhardt who told me to stop listing my complaints and do something. Special thanks goes to Tiffany McClinton, without whom this Comment would never have been published.