NOTE

HUD v. Rucker, Unconscionable Due Process for Public Housing Tenants

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INTRODUCTION

Marisa Perez's seventeen-year-old son, Carlos, was difficult to discipline. In the past three years, she had taken him to juvenile hall twice, and had called the police on him four times.[1] She finally ordered him to move out of the apartment where he and his three younger siblings had lived for thirteen years.[2] Despite her orders, Marisa had a feeling that Carlos would return while she was at work to hang out with his friends.[3] She confiscated his key in an attempt to prevent such visits.[4] When the complex's security guards caught Carlos with a marijuana pipe on the premises, Marisa was hardly surprised.[5] She was, however, stunned by the eviction notice that soon followed. Marisa was a single mother with a relatively well-paying job.[6] Moving out of public housing would result in a nearly two hundred percent rent increase, a prohibitive amount for Marisa.[7]

Marisa's eviction notice was an unduly harsh consequence of her son's behavior. Authority for the eviction stems from rules promulgated by the Department of Housing and Urban Development (HUD), under 42 U.S.C. § 1437d(1)(6).[8] Under this statute, tenants can be evicted if their guests or relatives are caught using or possessing drugs on or off the premises of the complex.[9] HUD's strict liability interpretation of that clause implicates due process concerns and the fundamental right not to be penalized for others' criminal wrongdoing.[10] Perhaps more importantly, strict liability eviction is not sound public policy.[11] A reasonable knowledge or foreseeability requirement would not undermine the deterrence effect of severe drug sanctions aimed at public housing tenants.[12]

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[1] Peter Delevett, *Mom Deserves Another Chance to Beat Eviction*, SAN JOSE MERCURY NEWS, June 12, 2002, at B2, *available at* http://www.mpp.org/CA/news_1065.html.; Ben Winograd, *Drug Pipe May Cost Family Its Apartment*, SAN JOSE MERCURY NEWS, June 10, 2002, at A4, *available at* http://www.bayarea.com/mld/mercurynews/news/local/3438165.htm.

[2] Delevett, *supra* note 1, at B2.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Winograd, *supra* note 1, at A4.

[8] *See* HUD v. Rucker, 535 U.S. 125, 127-28 (2002).

[9] *Id.*

[10] *See infra* Part III.B.

[11] *See infra* Part III.D.

[12] Nelson H. Mock, Note, *Punishing the Innocent: No-Fault Eviction of Public Housing*

In *HUD v. Rucker*, the United States Supreme Court considered 42 U.S.C. § 1437d(1)(6) and found HUD's interpretation allowing strict liability eviction constitutional.[13] This Note argues that the Supreme Court's interpretation incorrectly moves towards a new, narrower definition of substantive due process. The Court arrived at this interpretation by ignoring well-established principles of statutory interpretation, congressional intent, and contract law. Part I of this Note discusses the history of the Housing Act, establishes the framework for discussing constitutional concerns and statutory interpretation, and examines the common law principle of unconscionable contracts. Part II presents the facts and procedure of *Rucker*, and describes the Court's rationale for finding section 1437d constitutional. Part III argues that the Court incorrectly found section 1437d's language unambiguous, ignored established due process jurisprudence, and misinterpreted congressional intent.

I. BACKGROUND

This Part lays the legal foundation necessary for discussing strict liability evictions in public housing. Section A summarizes the evolution of federally assisted low-income housing in the United States. Section B discusses a legal framework for statutory interpretation. Section C examines substantive due process' fundamental guarantees as they relate to tenants' leasehold and social assistance holdings. Section C also introduces family living arrangements and freedom of intimate association as fundamental rights. Section D augments the discussion of due process with the complementary principle of unconscionability from contract law.

A. Brief History of the United States Housing Act

Housing policy became a federal issue when Congress enacted the United States Housing Act in 1937.[14] Extremely poor economic

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Tenants for the Actions of Third Parties, 76 TEX. L. REV. 1495, 1514 (1998). A reasonable knowledge or foreseeability requirement would demand that a tenant knew or should have known of the drug use or possession before being subjected to eviction proceedings. This standard, which applies to most civil actions and other deprivation proceedings, is discussed in Part I.C of this Note.

[13] *Rucker*, 535 U.S. at 128.

[14] *See generally* United States Housing Act of 1937 (Wagner-Steagall Housing Act), 50 Stat. 888 (1937) (announcing goals of program to be employment, slum clearance, and housing).

conditions revealed an increasingly apparent gap between the need for affordable housing and its availability.[15] In 1949, Congress declared that there was a serious housing shortage, and that national security and general welfare depended on "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American."[16] In 1968, Congress updated the law and passed both the Housing and Urban Development Act and the Fair Housing Act.[17] The new legislation emphasized the importance of encouraging private investors and developers to participate in building new low-income housing through subsidies and tax incentives.[18] The preference for private participation soon led to fewer federal funds, as lawmakers declared a reduced need for public investment.[19] Then in the 1980s, President Reagan implemented large budget cuts in public housing.[20]

As the number of affordable housing units decreased, existing housing became increasingly crime and drug infested.[21] In response to deteriorating living conditions in public housing projects, Congress passed the Anti-Drug Abuse Act of 1988.[22] HUD promulgated

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[15] M. H. Hoeflich & John E. Thies, *Rethinking American Housing Policy: Defederalizing Subsidized Housing*, 1987 U. ILL. L. REV. 629, 629 (1987) (arguing that federal subsidized housing programs caused state programs to atrophy and then resulted in vacuum of services as federal programs cut back).

[16] Housing Act of 1949, ch. 338, § 2, 63 Stat. 413 (1949). Congress reiterated this goal in 1968. *See* Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 2, 82 Stat. 476 (1968) (stating that highest priority should be providing housing for poor families without adequate, safe housing); *see also* Randi Lyn Engel, Comment, *Critical Housing Needs and The Emergency Low Income Housing Preservation Act of 1987: A Short-Term Solution to a Long-Term Problem*, 40 EMORY L.J. 163, 163 (1991).

[17] Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 2, 82 Stat. 476 (1968); Fair Housing Act of 1968, P.L. 90-284, Title VIII, § 800, 82 Stat. 81 (1968); *see also* Carl A.S. Coan, Jr., *The Housing and Urban Development Act of 1968: Landmark Legislation for the Urban Crisis*, 1 URB. LAW. 1, 16 (1969).

[18] *See* Coan, *supra* note 17, at 16; *see also* Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 2, 82 Stat. 476 (1968) (stating that "in the carrying out of such programs there should be the fullest practicable utilization of the resources and capabilities of private enterprise and of individual self-help techniques"); STAFF OF SENATE SUBCOMM. ON HOUSING AND URBAN AFFAIRS, COMM. ON BANKING AND CURRENCY, 90TH CONG., CONGRESS AND AMERICAN HOUSING 1892-1967, 8 (Comm. Print 1968) (describing "turnkey" method for permitting private developers to deal with local authorities in same manner as private clients).

[19] *See* R. Allen Hays, THE FEDERAL GOVERNMENT AND URBAN HOUSING 91, 233-36 (1995); Marc Jolin, Comment, *Good Cause Eviction and the Low Income Housing Tax Credit*, 67 U. CHI. L. REV. 521, 524 (2000).

[20] *See* Jolin, *supra* note 19, at 525.

[21] *See id.* at 524. Jolin does not assert that there is a link between fewer housing units and increased crime, just that the evolution occurred simultaneously. *Id.*

[22] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 5101, 102 Stat. 4181 (1988)

regulations under this statute, requiring public housing authorities to condition leases on drug free conduct.[23] In 1990, Congress reformed the Anti-Drug Abuse Act of 1988 by passing the Cranston-Gonzalez National Affordable Housing Act.[24] This new act did not materially alter the 1988 Act's drug-related eviction language. While public housing continued to suffer from disproportionate criminal activity, the public criticized the anti-drug provisions as unduly harsh.[25] Nevertheless, in 1996, President Clinton and HUD secretary Henry Cisneros adopted a tough new "One Strike and You're Out" policy for public housing tenants.[26] Under the policy, only one violent criminal or drug-related

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(codified at 21 U.S.C. § 1501) (repealed 1997).

[23] These regulations have remained substantially the same since their inception. According to the 1999 version, the tenant is obligated to: "assure that the tenant, any member of the household, a guest, or another person under the tenant's control shall not engage in: (A) any criminal activity that threatens the health, safety or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or (B) any drug-related criminal activity on or near such premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of the tenancy and for eviction from the unit." 24 C.F.R. § 966.4(f)(12)(i) (1999); *see also* 24 C.F.R. § 966.4(l)(5)(i) (2001). The most recent version reads as follows: "To assure that no tenant, member of the tenant's household, or guest engages in: (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents; or (B) Any drug-related criminal activity on or off the premises; (ii) To assure that no other person under the tenant's control engages in: (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents; or (B) Any drug-related criminal activity on the premises; (iii) To assure that no member of the household engages in an abuse or pattern of abuse of alcohol that affects the health, safety, or right to peaceful enjoyment of the premises by other residents." 24 C.F.R. § 966.4(f)(12) (2004). The provision requiring eviction has also changed slightly since the Supreme Court decision that is the focus of this Note. Under the current regulation, public housing authorities must evict immediately if they determine "that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing." *Id.* § 966.4(l)(5)(i)(A) (2004). Furthermore, according to the current regulation, "[t]he lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the [public housing authority] to terminate tenancy. In addition, the lease must provide that the PHA may evict a family when the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents." *Id.* § 966.4(l)(5)(i)(B).

[24] Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625.

[25] Ryan Johnson, Comment, *Criminal and Drug Related Evictions From Public Housing for the Activities of Third Parties*, 1 LOY. J. PUB. INT. L. 49, 52-53 (2000).

[26] Remarks to the Community in Louisville, 32 WEEKLY COMP. PRES. DOCS. 102, 107 (Jan. 24, 1996); *see also Cisneros Seconds President's Call to Crack Down on Criminals in Federally Assisted Housing Developments*, PR NEWSWIRE, Jan. 24, 1996.

offense was enough to provide grounds for lease termination.[27] The new policy inspired many to question whether drug-related activities or harsh new laws were more dangerous.[28]

Today, federal law requires public housing leases to contain provisions regarding criminal behavior and drug use.[29] The law also dictates the behavior of public housing authorities in enforcing those provisions.[30] Under 42 U.S.C. § 1437d(l)(6), public housing leases must include a clause to the following effect:

> [A]ny 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.[31]

HUD's regulations provide that local public housing authorities have discretion to consider all circumstances before evicting a tenant.[32] Their discretion extends to cases where "the tenant did not know, could not foresee, or could not control behavior by other occupants of the unit."[33] While section 1437d is silent on knowledge or foreseeability requirement, the administrative regulation explicitly allows housing authorities to disregard any defense based on lack of knowledge or foreseeability.[34]

In 1999, HUD expanded the reach of its regulations by allowing public housing authorities to deny grievance hearings to tenants evicted under the anti-drug lease terms.[35] The agency was concerned about the

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[27] Remarks to the Community in Louisville, 32 WEEKLY COMP. PRES. DOCS. 102, 107 (Jan. 24, 1996).

[28] Lisa Sandberg, *Habitat: Public Housing Residents Reclaim Projects From Dealers*, INTER PRESS SERVICE, June 7, 1996.

[29] 42 U.S.C. § 1437d(l)(6) (1998). The current legislation uses identical language. *See* 42 U.S.C. § 1437d(l)(6) (2004).

[30] 42 U.S.C. § 1437d(l)(6) (1998).

[31] *Id.*

[32] 24 C.F.R. § 966.4(l)(5)(vii)(B) (2004).

[33] 56 Fed. Reg. 51560, 51567 (Oct. 11, 1991).

[34] *Id.* (stating that housing authorities should consider all relevant factors, but that tenants should not be excused by arguing that they did not know, could not foresee, or could not control behavior by other occupants of unit).

[35] 24 C.F.R. § 966.51(a)(2)(i) (1999) (providing that housing authorities may deny grievance hearings for any lease terminations resulting from drug-related criminal activity occurring on or near premises); *see also* Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560 § 3.3.1 (1991) (codified at 24 C.F.R. § 966) (stating that "the tenant is not entitled to a hearing by the housing authority before eviction for drug-related and other criminal activity . . . a housing authority may use an expedited administrative grievance

prevalence of drug use and drug dealing by non-residents on public housing grounds, and hoped to deter that behavior by linking the penalties for such behavior to tenant evictions.[36] As a result, HUD issued regulations explicitly stating that grievance proceedings are not required for drug-related evictions.[37]

B. *Statutory Interpretation*

When analyzing an agency's construction of a statute, a federal court must first determine whether Congress has directly addressed the exact question at issue.[38] The court must give effect to Congress' unambiguously stated intent.[39] In many cases, however, congressional intent is ambiguous or the statute is silent on the precise question at issue.[40] In these cases, the court must then determine whether the agency's solution is based on a permissible interpretation of the statute.[41] Thus, in applying this canon to the lease terms discussed in this Note, the court should analyze whether HUD's interpretation of section 1437d is reasonable in the context of the public housing program.[42]

In making this determination, courts should not examine statutory provisions in isolation.[43] Certain statutory language only reveals its meaning, or ambiguity, in context.[44] If the court finds a provision ambiguous, it must look to the overall statutory scheme.[45] Legislative history may guide the court's analysis.[46] The court should also ensure that each provision of a statute has independent meaning.[47] Judges and lawmakers should not interpret clauses in a manner that makes them

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procedure for these evictions").

[36] *See* 134 CONG. REC. 33,148 (daily ed. Oct. 21, 1988).

[37] 24 C.F.R. § 966.51(a)(2)(i) (1999); Elijah Gosier, *Landlord's Standard: Innocent Until Accused*, ST. PETERSBURG TIMES, Nov. 5, 2002, at 2D (explaining that there is no avenue for appeal through grievance hearing when eviction is based on drug-related criminal activity); *see also Economy Cited as Factor in 1,712 Forced Moves in County Through June*, MILWAUKEE J. SENTINEL, Aug. 6, 2002, at 01B (noting that landlords must give formal notice and allow for hearing when tenants are evicted for not paying rent).

[38] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984); Rucker v. Davis, 237 F.3d 1113, 1119 (9th Cir. 2001).

[39] *Chevron*, 467 U.S. at 842-43.

[40] *Id.*

[41] *Id.*

[42] *See id.* at 845.

[43] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000).

[44] *Id.*

[45] *Id.*

[46] United States v. Hockings, 129 F.3d 1069, 1071 (9th Cir. 1997).

[47] Fed. Deposit Ins. Corp. v. Laidlaw Transit, Inc., 21 P.3d 344, 353 (Alaska 2001).

superfluous or redundant.[48] Finally, courts should avoid constructions that would lead to absurd or odd results, or create serious doubts about constitutionality.[49]

The courts also must give administrative agencies some leeway to fill gaps left by Congress while implementing certain programs.[50] Necessity and efficiency, however, cannot lend legitimacy to constitutionally flawed regulations.[51] Administrative agencies may not exercise their authority unconstitutionally.[52] They also should not act in a manner that thwarts the administrative structure enacted by Congress, regardless of the severity of the problem that they seek to address.[53]

C. *Constitutional Concerns*

HUD's regulation, which allows for no-fault, no-knowledge, and no-foreseeability lease terminations, raises several constitutional questions. Prior to the Supreme Court's decision in *HUD v. Rucker*, there was extensive academic, journalistic, and judicial debate over the constitutionality of HUD's regulations.[54] Although the Court's unanimous decision has largely silenced such commentary, its failure to address the constitutional concerns raised by the Ninth Circuit merits more discussion.

The fundamental principles of fairness and justice embodied in the Constitution dictate that the government only hold people liable for their own individual acts or omissions.[55] According to due process

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[48] United States v. Alaska, 521 U.S. 1, 59 (1997).

[49] United States v. X-Citement Video, Inc., 513 U.S. 64, 69-70 (1994); Rucker v. Davis, 237 F.3d 1113, 1119 (9th Cir. 2001).

[50] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[51] *Id.*

[52] Castro v. Viera, 541 A.2d 1216, 1220 (Conn. 1988).

[53] ETSI Pipeline Project v. Missouri, 484 U.S. 495, 517 (1988).

[54] Commentators questioned whether the policy violated or conformed to: substantive and procedural due process, the Eighth Amendment's prohibition against excessive fines, the First Amendment's guarantee of freedom of association, and the takings clause of the Fifth Amendment. *See, e.g.*, Lisa Weil, *Drug Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161, 179 (1991) (positing that vicarious liability makes HUD eviction policy both distressing and constitutionally suspect); Mock, *supra* note 12, at 1522-24 (noting due process concerns resulting from lack of relationship between liability and action of tenant).

[55] Scales v. United States, 367 U.S. 203, 224-25 (1961) (holding that guilt is personal, and when punishment of status or conduct can only be justified by reference to relationship of status or conduct to other criminal activity, relationship must be "sufficiently substantial" to satisfy due process clause of Fifth Amendment). *But see* HUD v. Rucker, 535 U.S. 125, 129 (2002).

jurisprudence, guilt is personal.[56] Due process requires a substantial reference between the criminal activity of others and the individual subject to punishment.[57] A substantial reference to third party criminal activity is one where the person being punished either knew or should have known about the third party's criminal activity.[58]

Due process also requires courts to protect individual rights to life, liberty, and property from government invasion.[59] The Supreme Court has considered public benefits, such as housing and welfare, as property rights in the due process context.[60] Generally, the idea that guilt must be personal is relevant only when criminal liability is at stake.[61] Jurisprudential integrity, however, demands that the same principle should apply to serious deprivations of property interests.[62]

In *Goldberg v. Kelly*, the Supreme Court held that individuals receiving federal welfare assistance have a property interest in continually receiving those benefits.[63] *Goldberg* involved a claim by welfare recipients in New York City.[64] The plaintiffs claimed that New York State officials planned to terminate their welfare benefits without a hearing or prior notice.[65] In holding that the officials' plans would violate procedural due process, the Court noted that welfare benefits

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[56] *Scales*, 367 U.S. at 224-25.

[57] *Id.*

[58] *Id.*

[59] U.S. CONST. amend. XIV, § 1; Galvan v. Press, 347 U.S. 522, 530 (1954) (holding that guarantee of due process bars Congress from enactments that "shock the sense of fair play"); *see also* Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997) (holding that Fourteenth Amendment requires more than guarantee of fair process: it addresses substantive sphere as well); Zinermon v. Burch, 494 U.S. 113, 125 (1990) (holding that due process clause contains substantive component that forbids "arbitrary" and "wrongful" government actions); Daniels v. Williams, 474 U.S. 327, 331 (1986) (holding that government official's deliberate actions to deprive prisoner of life, liberty, or property are prohibited by Fourteenth Amendment).

[60] Goldberg v. Kelly, 397 U.S. 254, 263 n.8 (1970).

[61] *See* Ramsey v. United Mine Workers, 401 U.S. 302, 320 n.3 (1971). *See generally* RONALD DWORKIN, LAW'S EMPIRE 313-54 (1986) (discussing role of integrity in statutory interpretation and philosophical concept of integrity in law).

[62] *See Goldberg*, 397 U.S. at 261-62.

[63] *Id.* at 261-63; *see also* Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965) (arguing that many important entitlements now flow from government, such as: farming and corporate subsidies, airline routes and television channels, long-term defense, space and education contracts, and social security; also arguing that such forms of public security, with notable exception of entitlements for poor, are not considered luxuries or charity, but necessities that are fully deserved). *See generally* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[64] *Goldberg*, 397 U.S. at 255-56.

[65] *Id.* at 256.

create a significant property interest for their recipients.[66]

Similarly, in *Greene v. Lindsey*, the Supreme Court held that public housing tenants have a property interest in their leases.[67] Again, as in *Goldberg*, the plaintiffs raised a procedural due process claim.[68] The tenant plaintiffs in *Greene* argued that simply posting eviction notices to their apartment doors did not constitute sufficient notice under the Fourteenth Amendment.[69] The Court stated that the adequacy of the eviction notice would come into question only if the housing authority had denied the tenants a substantial property right.[70] According to the Court, that deprivation had occurred because the tenants lost the right to continue living in their homes.[71]

Furthermore, the Supreme Court has indicated that the government cannot seize property not used in the commission of a crime if the owner did not know about the illegal activity.[72] Civil asset forfeiture has been the subject of much constitutional debate and criticism.[73] Partly in response to widespread concern, the Court has restricted civil asset forfeiture on various constitutional grounds.[74] For example, the Court has held that the Fourth Amendment protects against unreasonable

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[66] *Id.* at 263 n.8.

[67] Greene v. Lindsey, 456 U.S. 444, 450-51 (1982); *see also* Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d 483, 488-89 (9th Cir. 1974).

[68] *Greene*, 456 U.S. at 447.

[69] *Id.*

[70] *Id.* at 451 (stating that right to continued residence in home is significant interest in property of which tenants had been deprived).

[71] *Id.*

[72] Bennis v. Michigan, 516 U.S. 442, 455-56 (1996) (Thomas, J., concurring) (suggesting due process claim exists if property forfeited was not used in commission of crime and owner had no knowledge of illegal activity); *see also* Rucker v. Davis, 237 F.3d 1113, 1125 (9th Cir. 2001).

[73] Civil asset forfeiture under 21 U.S.C. § 881 (2000) allows the government to seize any property when there is probable cause that the property is linked to drug-related criminal activity, or to another targeted felony. *See generally The Civil Asset Forfeiture Reform Act: Hearings on H.R. 1916 Before the Judiciary Comm.*, 104th Cong. (1996) (statement of Mark J. Kappelhoff, Legislative Counsel, American Civil Liberties Union); Mark J. Crandley, *A Plymouth, a Parolee, and the Police: The Case for the Exclusionary Rule in Civil Forfeiture After* Pennsylvania Board of Probation & Parole v. Scott, 65 ALB. L. REV. 147, 150 (2001) (arguing that exclusionary rule should apply to civil asset forfeiture); Karis Ann-Yu Chi, Comment, *Follow the Money, Getting to the Root of the Problem With Civil Asset Forfeiture in California*, 90 CAL. L. REV. 1635, 1635 (2002) (arguing that financial gain creates motive that leads to problematic behavior by government in forfeiture proceedings); Douglas Kim, Note and Comment, *Asset Forfeiture, Giving Up Your Constitutional Rights*, 19 CAMPBELL L. REV. 527, 527-30 (1997) (describing widespread criticism of civil asset forfeiture and discussing its constitutionality).

[74] One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 702 (1965).

seizures in civil asset forfeiture proceedings.[75] The Court has also stated that the government's seizure of property under civil forfeiture laws presents serious due process concerns.[76] Strict liability evictions give public housing officials the authority to deprive citizens of their property interests in a manner analogous to the power granted by civil asset forfeiture laws.[77] Thus, the Court should subject any regulation resulting in the eviction of public housing tenants to a substantive due process inquiry.

Under the first step of a due process inquiry, the Court determines which standard of scrutiny to apply to challenged legislation according to the nature of the right asserted.[78] In general, there are two levels of judicial scrutiny.[79] Courts examine laws that affect fundamental rights under strict scrutiny.[80] Laws that impinge on non-fundamental rights are evaluated under rational basis scrutiny.[81] Under strict scrutiny, the government must show that the law is necessary to accomplish a compelling state interest.[82] Under rational basis scrutiny, the government carries a lighter burden of showing that the law is rationally related to a legitimate state interest.[83] No legitimate state interest exists, for example, where the government deprives an individual of his or her property in an arbitrary or invidious manner.[84] The judicial branch

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[75] United States v. James Daniel Good Real Prop., 510 U.S. 43, 49 (1993); *One 1958 Plymouth Sedan*, 380 U.S. at 696.

[76] *James Daniel Good Real Prop.*, 510 U.S. at 62.

[77] *See* Rucker v. Davis, 237 F.3d 1113, 1125 (9th Cir. 2001).

[78] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 696 (2001); *see also* Catlin v. Sobol, 93 F.3d 1112, 1120 (2d Cir. 1996); State v. Champoux, 566 N.W.2d 763, 772-73 (Neb. 1997).

[79] There are various intermediate levels of scrutiny devoted to discrete areas involving non-fundamental rights. These areas include legislation that implicates gender, marital relationships, and family rights. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 499-501 (1977); Loving v. Virginia, 388 U.S. 1, 12 (1967).

[80] *See* Michael H. v. Gerald D., 491 U.S. 110 (1989); Poe v. Ullman, 367 U.S. 497 (1961); Taylor v. I.R.S., 915 F. Supp. 1015, 1021 (N.D. Iowa 1996), *aff'd*, 106 F.3d 833 (8th Cir. 1997); *see also* 16A AM. JUR. 2D *Constitutional Law* § 386 (2003).

[81] *See* cases cited *supra* note 79.

[82] *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). *See generally* Nebbia v. New York, 291 U.S. 501, 525 (1934) (holding that laws do not violate substantive due process if they are not unreasonable, arbitrary, or capricious and means chosen have "real and substantial relation to the object sought to be attained").

[83] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).

[84] United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 177 (1980) (stating that Congress cannot achieve purpose in patently arbitrary or invidious way); *see also* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999) (holding that every due process challenge starts with determination of whether plaintiff has been deprived of protected interest in property or liberty); Mock, *supra* note 12, at 1523 (1998) (citing Long Grove Country Club Estates,

generally treats the legislature with great deference under rational basis scrutiny.[85] Courts, however, have declared statutes unconstitutional based on the lack of a legitimate state interest, even under rational basis scrutiny.[86]

When the challenged statute involves a fundamental right, courts do not apply rational basis scrutiny, but rather the more stringent strict scrutiny.[87] Courts define fundamental rights as those that are entrenched in the traditions and consciences of Americans.[88] Beyond the foundational idea that guilt must be personal, judges have repeatedly characterized the freedom to decide family living arrangements as a fundamental right.[89] The Supreme Court has interpreted due process to protect the private realm of family life from state interference.[90] A law that requires family members to control each other's behavior at all times impinges on this freedom.[91] The right to arrange living situations also

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Inc. v. Village of Long Grove, 693 F. Supp. 640, 657 (N.D. Ill. 1988)).

[85] *Cleburne*, 473 U.S. at 440.

[86] For example, in *Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001), the Ninth Circuit held that a regulation prohibiting prisoners from receiving third-class or bulk-rate mail was not rationally related to a legitimate government objective. *Id.* at 902. The government claimed that the regulation was necessary to prevent contraband from entering the prisons. *Id.* The court found insufficient evidence that third-class or bulk-rate mail contributed to the entrance of illegal materials. *Id.* at 902-03. Similarly, in *Deibler v. Rehoboth*, 790 F.2d 328 (3d Cir. 1986), the Third Circuit held that a local ordinance requiring candidates for office to be current in their taxes was not rationally related to any legitimate government purpose. *Id.* at 328, 330. Also, in *United States Dep't of Ag. v. Moreno*, 413 U.S. 528 (1973), the Supreme Court held that Congress' attempt to restrict food stamps to only those households consisting of related persons did not pass rational basis scrutiny. *Id.* at 538 (stating that "in practical operation, the 1971 amendment excludes from participation in the food stamp program . . . only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility.").

[87] *See* sources cited *supra* note 79.

[88] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[89] *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (deciding that strict scrutiny would apply where statute "directly and substantially" interferes with fundamental right of deciding family living arrangements); Moore v. City of Cleveland, 431 U.S. 494, 499 (1972) (noting that usual judicial deference to legislature is inappropriate where there is intrusive regulation of family, and that Court has frequently held freedom of personal choice in matters of marriage and family life to be fundamental rights protected by due process clause of Fourteenth Amendment).

[90] Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The Seventh Circuit has said this jurisprudence is divisible into two categories. United States v. Davies, 768 F.2d 893, 897 (7th Cir. 1985). One group of cases challenges the constitutionality of state interference with the structure or definition of the family. *Id.* at 898 n.2 (citing cases). Another group of cases discusses the right to make important family decisions. *Id.* at 898 n.3 (citing cases).

[91] *See, e.g.*, Healy v. James, 408 U.S. 169, 183 (1972) (holding that even government actions that do not directly restrict individuals' abilities to associate freely can abridge associational rights); Diggs v. Hous. Auth., 67 F. Supp. 2d 522, 531-32 (D. Md. 1999)

relates to the freedom of intimate association.[92] Intimate associations include marriage, family, and choice of one's close friends.[93] The freedom to enter into personal relationships is central to the Constitution's guarantee of individual liberty.[94] Lease terms pursuant to section 1437d will require family members to coordinate living arrangements according to unpredictable and uncontrollable factors relating to drug use.[95] This requirement violates one's freedom of association under the due process clause.[96]

D. Public Housing Leases as Unconscionable Contracts

In general, courts are interested in the fairness of contractual terms only when there is evidence of oppression, fraud, or mistake.[97] Thus, lease terms are often protected in order to preserve the freedom of contract.[98] A contract, however, is unconscionable if, for example, one

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(finding that public housing regulations cannot unreasonably interfere with tenants' ability to entertain guests in their own apartments).

[92] The Supreme Court has held that associational rights "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Bates v. Little Rock, 361 U.S. 516, 523 (1960).

[93] *See* Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) (stating that individuals' decisions regarding certain intimate human relationships must be protected against undue government intrusion because such relationships safeguard freedom which is central to Constitution, and freedom of association is protected as fundamental component of personal liberty); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

[94] *Roberts*, 468 U.S. at 617. The Court went on to explain that because the Bill of Rights is designed to secure individual liberty, it must create a sanctuary for formation and preservation of certain kinds of highly personal relationships from unjustified government interference. The Court did not precisely identify every type of relationship that would merit constitutional protection, but noted that "certain kinds of personal bonds played a critical role in the culture and traditions of the Nation," and that relationships with certain characteristics deserve protection under freedom of association because they are intrinsic to personal liberty. *Id.* at 618-20; *see also* Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding that law precluding households with individual unrelated to another member of household from getting food stamps violated equal protection under rational basis scrutiny because goal of law was to "discriminate against hippies.").

[95] HUD v. Rucker, 535 U.S. 125, 127-28 (2002).

[96] *Roberts*, 468 U.S. at 619-20 (stating that cohabitation with one's relatives is type of activity that exemplifies need for constitutional protection).

[97] *See* Jewett, Bigelow & Brooks v. Detroit Edison Co., 274 F. 30, 39 (6th Cir. 1921); Bartley v. Nat'l Union Fire Ins. Co., 824 F. Supp. 624, 634-35 (N.D. Tex. 1992). *See generally* John D. Calamari & Joseph M. Perillo, CONTRACTS 9.30, 9.23, 11.29(b), 11.29(c), 11.35, 13.1, 22.1 (4th ed. 1998) (explaining that bargained-for contract terms may be unenforceable under waiver, estoppel, mistake, misrepresentation, illegality of contract, impossibility of performance, and unconscionability doctrines).

[98] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970) (holding that

party enters the contract without having any meaningful choice.[99] Vastly unequal bargaining power also indicates unconscionability.[100] As early as 1903, courts began holding contracts invalid or unenforceable when they were so improvident and unreasonable that they posed a real danger to the public.[101] An example of an unconscionable contract is a contract that restricts a person's career choices.[102] Another example is a contract that enables one party to oppress third persons.[103] Most discussions of unconscionability begin by comparing the parties' bargaining power.[104]

Courts have noted the vast inequality of bargaining power between landlords and tenants for decades.[105] State and federal governments have enacted special tenant protections that should make a strict contract paradigm an inappropriate method of analyzing leases.[106] Rather, courts may consider aspects of civil rights laws, property law, and other consumer protection measures when construing lease terms.[107] Although the procedural challenges involved in bringing an unconscionable contract claim against the government are beyond the scope of this Note, the Supreme Court's endorsement of the local public housing authority's

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leases of urban dwelling units should be interpreted like contracts).

[99] *See, e.g.*, Lease First v. Hartford Rexall Drugs, Inc., 483 N.W.2d 585, 587-88 (Wis. Ct. App. 1992) (indicating that contract principle of unconscionability is meant to prevent unjust enforcement of onerous contractual terms imposed on one party by other because of significant disparity in bargaining powers).

[100] *See, e.g.*, Christian v. Christian, 365 N.E.2d 849, 855 (N.Y. 1977) (defining unconscionable bargain as one that no reasonable, non-delusional person would make on one hand and no honest and fair person would accept on other, and where inequality is so significant and apparent as to "shock the conscience and confound the judgment of any person of common sense").

[101] Mittenthal v. Mascagni, 66 N.E. 425, 426 (Mass. 1903) (stating that determining question is whether contract is so improvident and unreasonable, or such abnegation of legal rights, that government should refuse to recognize it for "protection of mankind").

[102] Simons v. Fried, 98 N.E.2d 456, 456 (N.Y. 1951).

[103] State *ex rel.* Coleman v. Fry, 95 P. 392 (Kan. 1908) (holding that if agreement inevitably results in enabling one party to oppress third persons, it will not be enforced).

[104] *See* case cited *supra* note 99 and accompanying parenthetical.

[105] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970) (stating that landlords have ability to put tenants in take it or leave it situation which is exacerbated by housing shortage); Edwards v. Habib, 397 F.2d 687, 701 (D.C. Cir. 1968); President's Committee on Urban Housing, A Decent Home 96 (1968).

[106] *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. III 1991); Civil Rights Act of 1866, 42 U.S.C. § 1982 (1988); Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1988). Some jurisdictions have also held discrimination based on sexual orientation to be invalid. *See, e.g.*, WIS. STAT. ANN. 101.22 (West Supp. 1993); D.C. CODE ANN. 1-2515 (1987).

[107] Shelby Green, *The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681, 716-18 (1994).

role as that of a mere landlord enforcing consensual lease terms merits a discussion of those terms' legality.[108]

II. *HOUSING AND URBAN DEVELOPMENT V. RUCKER*

A. Facts and Procedure

Pearlie Rucker was a sixty-three-year-old great-grandmother who had been living in public housing since 1985.[109] The Oakland Housing Authority (OHA) sought to evict Rucker after her mentally disabled daughter was found with cocaine three blocks away from Rucker's apartment.[110] Rucker also lived with two grandchildren and one great-granddaughter.[111] According to Rucker, she regularly searched her daughter's room for evidence of drug use and had never found anything.[112]

Willie Lee, seventy-one, and Barbara Hill, sixty-three, lived with their two grandsons.[113] OHA commenced eviction proceedings against them because their grandsons were caught smoking marijuana together in the housing complex's parking lot.[114] Both Lee and Hill said they never knew that their grandsons had ever used drugs.[115]

Herman Walker was a partially paralyzed, seventy-five-year-old man who was incapable of living independently.[116] On three occasions within two months, housing authorities discovered drug paraphernalia in Walker's apartment that belonged to his caregiver.[117] After the third instance, Walker fired his caregiver.[118]

HUD v. Rucker arose when Rucker, Lee, Hill, and Walker each sought to permanently enjoin their evictions in the United States District Court for the Northern District of California.[119] The district court granted the

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[108] HUD v. Rucker, 535 U.S. 125, 135 (2002) (stating that government "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").

[109] Rucker v. Davis, 237 F.3d 1113, 1117 (9th Cir. 2001).

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.* at 1118.

injunctions, holding that the tenants had raised serious questions about HUD's interpretation of section 1437d as allowing for strict liability evictions.[120] According to the district court, the balance of hardships tipped decisively in the tenants' favor.[121]

B. The Ninth Circuit's Holding and Rationale

An en banc panel of the Ninth Circuit affirmed the district court by a 7-4 vote.[122] The court based its final opinion on textual interpretation and an analysis of congressional intent.[123] In particular, the court stated that HUD's interpretation contradicted legislative intent and would lead to odd, absurd, or unjust results.[124] The court also articulated significant doubts about the constitutionality of HUD's interpretation.[125]

C. Supreme Court's Rationale

The Supreme Court granted certiorari and reversed.[126] The Court held that section 1437d had a plain meaning. The section unambiguously required lease terms that allowed public housing authorities to evict tenants for others' drug-related activities regardless of the tenants' knowledge of the drug-related activity or its foreseeability.[127] According to the Court, Congress expressly intended to allow for this type of strict liability eviction.[128] Congress hoped to increase deterrence of drug-related activity and to simplify enforcement difficulties.[129] The Court noted that in civil asset forfeiture proceedings, a property owner is allowed to defend himself or herself based on lack of knowledge or consent.[130] This doctrine is known as the innocent owner defense.[131] The

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[120] *Id.*

[121] *Id.*

[122] *Id.* at 1128.

[123] *Id.* at 1119-23.

[124] *Id.* at 1124 (stating that "HUD conceded at oral argument that there was nothing more Pearlie Rucker could have done to prevent eviction," and, giving as example of another absurd result, fact that statute, as admittedly interpreted by HUD, authorized eviction of entire family if one tenant's child was visiting friends three thousand miles away and was caught with marijuana).

[125] *Id.* at 1124-25.

[126] Rucker v. Davis, 237 F.3d 1113 (9th Cir. 2001); HUD v. Rucker, *cert. granted*, 533 U.S. 976 (2001), *rev'd*, 535 U.S. 125 (2002).

[127] *Rucker*, 535 U.S. at 127-28.

[128] *Id.* at 128, 135.

[129] *Id.* at 134.

[130] *Id.* at 132.

[131] *Id.*

Court pointed out that Congress knew how to create an innocent owner defense because it had done so in other congressional statutes.[132] Thus, the Court held that under principles of statutory construction, if section 1437d did not explicitly state an innocent owner defense, then the defense's existence elsewhere indicated that the omission was intentional.[133]

The Court also engaged in a strict textual analysis of the words in section 1437d(l)(6).[134] Under this examination, the Court held that the phrase "under the tenant's control" modified only "other person," and did not refer to guests and members of the tenant's household.[135] According to the Court, this plain language left no room to argue that the phrase "under the tenant's control" authorized an implicit innocent owner defense.[136] In the Court's estimation, this conclusion was a matter of elementary grammar.[137] The word "any" preceding "drug-related activity," in the Court's view, proved Congress' unambiguous intent that eviction did not require that the tenant knew or should have known about the activity.[138]

The Court also refused to look outside the text to ensure that Congress actually intended the facially unambiguous meaning.[139] Where the text is unambiguous, reference to legislative history is inappropriate.[140] Therefore, according to the Court, the Ninth Circuit should not have consulted legislative history.[141]

Additionally, the Court stated that evicting innocent tenants absent any knowledge or foreseeability requirement would not lead to "odd" or "absurd" results, as the Ninth Circuit had claimed.[142] The Court based this conclusion on the fact that public housing authorities have the discretion to initiate eviction proceedings.[143] Because the HUD rules did

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[132] *See id.* (quoting 21 U.S.C. § 881(a)(7) (1994) ("No property shall be forfeited under this paragraph. . . by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of the owner.")).

[133] *Rucker*, 535 U.S. at 132.

[134] *Id.* at 130-31.

[135] *Id.* at 131.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.* at 132-33.

[140] *Id.*

[141] *Id.* ("Given that the en banc Court of Appeals' finding of textual ambiguity is wrong . . . there is no need to consult legislative history.")

[142] *Id.* at 134; Rucker v. Davis, 237 F.3d 1113, 1119 (9th Cir. 2001).

[143] *Rucker*, 535 U.S. at 134.

not require public housing authorities to evict innocent tenants based on the illegal acts of third parties, the Court reasoned that the regulation did not violate due process.[144]

The Court also distinguished between the government's actions as a sovereign and its actions as a landlord.[145] Because the government was enforcing lease terms as a landlord, the Court held that precedent requiring individuals to have some relationship to the wrongdoing did not apply.[146] The Court thus invoked the freedom of contract to remove the HUD regulations from due process scrutiny.[147]

III. ANALYSIS

The Supreme Court's decision in *Rucker* focused on the asserted purpose of strict liability evictions under section 1437d, at the expense of well-reasoned statutory interpretation, substantive due process analysis, and sound public policy considerations. Section A of this Part argues that the statute's language is ambiguous, and that canons of statutory interpretation should have led the Court to consider the legislative history as well as the overall statutory scheme. Section B argues that the Court's interpretation unnecessarily and unconstitutionally restricts the reach of substantive due process. Section B then supports that assertion by arguing that the freedom of choosing family living arrangements, the freedom of intimate association, and the basic idea that guilt must be personal, when taken together amount to a fundamental right. Therefore, Section B concludes that regulations affecting those rights should be subject to strict judicial scrutiny. Section C complements the due process arguments with a glimpse into unconscionability. This section also rebuts the Court's assertion that public housing leases are essentially contracts that place the government in a landlord position, thus removing such leases from due process concerns. Finally, Section D articulates several policy arguments that counsel against the current movement towards zero tolerance for drug-related criminal behavior in public housing.

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[144] *Id.* at 135-36.

[145] *Id.* at 135.

[146] *Id.*

[147] *See id.*

A. Statutory Interpretation

According to the Supreme Court, the plain meaning of section 1437d authorizes eviction even in cases where the tenant did not know about, or was not able to foresee, the drug-related activity leading to the eviction.[148] However, the Court did not address several vague phrases in the statute. For example, section 1437d states that any drug-related activity "shall be cause for termination of tenancy."[149] As argued by the Ninth Circuit, that language does not specify whose tenancy is subject to termination.[150] This language is ambiguous because it could refer to all people named on the lease, as interpreted by HUD, or it could refer only to the offending party.[151]

Further analysis reveals other ambiguities in the statute's language.[152] The statute lists "public housing tenant, any member of the tenant's household, or any guest, or other person under the tenant's control" as persons whose criminal activity could result in the tenant's eviction.[153] The phrase "under the tenant's control" creates significant ambiguity and modifies the entire sentence.[154] According to the Court, however, the disjunctive "or" immediately before "other person under the tenant's control" means that the tenant's ability to control applies only to people who are not already mentioned in the statute.[155] This argument hinges on the definition of "control." A reasonable interpretation of "control" includes some element of knowledge or foreseeability. This element should thus apply to all the categories the statute lists, not just "other persons."[156] HUD argued, and the Supreme Court agreed, that by "control," Congress meant only that the tenant allowed the offending third party to access the premises.[157] If the Court defined control in that sense in order to create a separate category of "other persons," then the word control is ambiguous. If Congress intended "other person under the tenant's control" to be a separate category including only those people who had been granted access by the tenant, the clause is redundant following the word "guest."

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[148] *Id.* at 127-28.

[149] Rucker v. Davis, 237 F. 3d 1113, 1119 (9th Cir. 2001).

[150] *Id.* at 1120.

[151] *Id.*

[152] *Id.*

[153] 42 U.S.C. § 1437d(l)(6) (2002); *see Rucker*, 535 U.S. at 128.

[154] *See* sources cited *supra* note 153.

[155] *Rucker*, 535 U.S. at 131.

[156] *Id.*

[157] *Id.*

Legislative history also supports the conclusion that section 1437d is ambiguously worded and that the Court misinterpreted congressional intent. A Senate committee in 1990 explained its vision that public housing authorities would use prudent discretion and judge each case on the merits.[158] According to the legislators, eviction would not be appropriate if the tenant had no knowledge of the drug-related activity or had behaved reasonably under the circumstances.[159] Furthermore, the Senate committee did not intend to allow public housing authorities to evict all tenants under the lease, but rather only the offending party.[160]

Around the same time as that committee meeting, Congress also passed statutes expanding the scope of civil asset forfeiture laws.[161] The courts in turn read those provisions to allow forfeiture regardless of the owner's actual innocence or lack of knowledge.[162] Congress quickly amended the provisions to provide for an innocent owner defense.[163] This reaction suggests that Congress did not intend to allow government actors to deprive innocent citizens of their property interests.[164]

Section 1437d(l)(6) is ambiguous, and the Court should not have considered it in isolation.[165] Prior to the Supreme Court's decision,

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[158] S. REP. NO. 101-316, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941 (stating that each case should be judged on its individual merits and will require "wise exercise of humane judgment by PHA [public housing authorities] and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity"); Rucker v. Davis, 237 F. 3d 1113, 1123 (9th Cir. 2001); *see also* S. HRG. 101-234, at 27 (1990) (commenting that "eviction of a household member involved in drug-related criminal activities shall not affect the right of any other household member who is not involved in such activity to continue tenancy"). Although the Senate committee was commenting on the Senate version of the amendment that was not enacted, the language it discusses is virtually the same.

[159] S. REP. NO. 101-316, at 179 (1990).

[160] S. HRG. 101-234, at 27 (1990).

[161] Pub. L. No. 100-690, § 5105, 102 Stat. 4301 (1988).

[162] Bennis v. Michigan, 516 U.S. 442, 455-56 (1996).

[163] Barclay T. Johnson, Note, *Restoring Civility — The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1070-72 (2002).

[164] Pub. L. No. 106-185, § 2, 114 Stat. 202, 206 (2000) (codified as amended at 18 U.S.C. § 983(d) (2000)); *see also* Sandra Guerra, *Family Values?: The Family As an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343, 365 (1996).

[165] For the proposition that the Supreme Court should have considered the contradictory findings of other courts regarding ambiguity, see *Carter v. State*, 952 S.W.2d 417, 419 (Tenn. 1997) (holding that mere fact that phrase could be reasonably interpreted either way makes it ambiguous, and where language of legislative provision is unclear, Court should look beyond language to determine legislative intent). *See also* Tata v. Nichols, 848 S.W.2d 649, 650-51 (Tenn. 1993) (holding that ambiguity must exist because term had been interpreted differently by various other jurisdictions considering issue).

several lower courts came to that exact conclusion.[166] In sum, the Court had plenty of reasons to reach the legitimate constitutional and policy issues raised by strict liability evictions in public housing. Commentary has accurately attributed the Court's holding to the justices' political and social philosophy rather than proper statutory interpretation or legislative deference.[167]

B. Substantive Due Process

Even if the Court determined that section 1437d's unambiguous language required strict liability evictions, substantive due process dictates that there must be an implied innocent tenant defense. One of the most fundamental requirements of substantive due process is that the government must not punish innocent people for the wrongdoings of others.[168] The Court justified disregarding this principle by misinterpreting the statute's plain meaning, and by distorting contract law and landlord-tenant law.[169] Under the due process inquiry as described in Part I, the regulation fails a strict scrutiny analysis. Section 1437d puts individuals in the untenable position of choosing between

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[166] *See* Kimball Hill Mgmt. Co. v. Roper, 733 N.E.2d 458, 463 (Ill. App. Ct. 2000); Am. Apartment Mgmt. Co. Inc. v. Phillips, 653 N.E.2d 834, 840 (Ill. App. Ct. 1995); Charlotte Hous. Auth. v. Patterson, 464 S.E.2d 68, 71 (N.C. Ct. App. 1995); Diversified Realty Group, Inc. v. Davis, 628 N.E.2d 1081, 1085 (Ill. App. Ct. 1993); Delaware County Hous. Auth. v. Bishop, 749 A.2d 997, 1002 (Pa. Commw. Ct. 2000); Memphis Hous. Auth. v. Thompson, 38 S.W.3d 504, 510 (Tenn. 2001). Several other courts also concluded that the statute was ambiguous and then found that there was an implied knowledge requirement. Noting that the term "control," used in the phrase "under the tenant's control," is not defined, many courts have based their holdings on the legislative history of the federal statute from which these lease provisions were taken. Courts have also placed particular importance on the congressional committee report that accompanied the 1990 Cranston-Gonzalez National Affordable Housing Act, which stated: "The Committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the [public housing authority] and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity." *Patterson*, 464 S.E.2d at 71; *Bishop*, 749 A.2d at 1002 (quoting and discussing Committee's report).

[167] *See* Michael C. Dorf, *How a Recent Unanimous Supreme Court Public Housing Decision "Exiles Compassion from the Province of Judging,"* FINDLAW (Apr. 3, 2002), *available at* http://writ.news.findlaw.com/dorf/20020403.html (arguing that Supreme Court's lack of compassion can be traced to conservative composition of Court).

[168] HUD v. Rucker, 535 U.S. 125, 131, 135 (2002) (distinguishing Scales v. United States, 367 U.S. 203 (1961), on grounds that government was acting as sovereign, whereas in *Rucker*, government is acting as landlord and is not trying to criminally punish or civilly regulate tenants as members of general populace).

[169] *Id.*

risking their homes by helping a family member fight addiction, or abandoning that family member to comply with a government regulation. Because the individual's right to determine family living arrangements is a fundamental right, the government must show that it has a compelling interest that it cannot accomplish without the law.[170] Under this heightened level of scrutiny, strict liability eviction is not the exclusive, nor the most reasonable, method for fighting drug-related problems in public housing.

Some may echo the Supreme Court and argue that HUD's regulation is necessary, because tenants who cannot control their household members and guests pose a hazard to public housing complexes.[171] According to proponents of this argument, a household member who uses drugs off the complex's premises will continue that activity on the premises and put other tenants at risk.[172] This argument ultimately fails because under the due process clause, Congress cannot constitutionally require household members to ensure that their guests and co-tenants abstain from drug use on or off the premises.[173] Section 1437d requires public housing tenants to choose their close friends and even regulate their family in accordance with ideals prescribed by the government. A causal nexus between criminal activity and the evicted tenant is necessary to overcome this constitutional violation.[174] Substantive due process thus should serve as a check on legislative enactments that oppress fundamental rights.[175]

Even under rational basis scrutiny, the Court should have asked two questions: 1) whether the local housing authority deprived tenants of

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[170] *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977).

[171] *Rucker*, 535 U.S. at 134.

[172] *Id.*

[173] Mock, *supra* note 12, at 1523.

[174] *Id.* This point also arguably implicates the Constitution's restrictions on vague or overbroad laws. As explained by the Court in *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), the void for vagueness doctrine requires statutes defining criminal or quasi-criminal offenses with a level of definiteness that allows ordinary people to understand what conduct is prohibited and ensuring that arbitrary and discriminatory enforcement is discouraged.

[175] *See* Howard v. Grinage, 82 F.3d 1343, 1351-52 (6th Cir. 1996) (holding that due process can protect against legislative enactments thought to infringe on fundamental rights implicit in Bill of Rights, and act as check on official misconduct which infringes on fundamental right or is so literally conscience-shocking and thus oppressive, as to violate substantive due process); *see also* Brown v. Nix, 33 F.3d 951, 953 (8th Cir. 1994) (stating that in order to establish substantive due process claim, government's conduct must shock conscience or otherwise offend judicial notions of fairness or human dignity); L.A. Ray Realty v. Town Council of Town of Cumberland, 698 A.2d 202, 211 (R.I. 1997).

property, and 2) whether the deprivation took place for an irrational, arbitrary, or invidious purpose.[176] With respect to the first question, the Court has held that public housing tenants have a property interest in their leaseholds.[177] Under the two-step process above, the Court should have then examined the government's purpose.[178] The government admitted that the tenant could not have taken any action to prevent the behavior that led to eviction.[179] Therefore, the deterrence argument is unpersuasive and depriving that tenant of low cost, last resort housing is deeply "irrational" or "invidious."[180] Thus, HUD's regulation fails not only strict scrutiny, but rational basis scrutiny as well.

Questionable financial incentives are an additional reason that the Court should have questioned the legitimacy of the government's purpose, even under rational basis scrutiny. In 1996, President Clinton announced that the government would award federal funding in proportion to an increase in crime-related evictions in public housing.[181] This policy creates significant incentives for public housing officials, already struggling under budget cuts, to boost their funding by proceeding with questionable evictions.[182] The new incentives also raise serious doubts about the Court's claim that public housing officials will not exercise their discretion arbitrarily.[183] The rapidly growing shortage of public housing lends fuel to these incentives. With wait lists for public housing up to eight years long, authorities have no reason to fear that evictions might lead to vacancies.[184]

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[176] American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999) (holding that every due process challenge starts with determination of whether plaintiff has been deprived of protected interest in property or liberty); *see also* Mock, *supra* note 12, at 1523 (citing Long Grove Country Club Estates, Inc. v. Village of Long Grove, 693 F. Supp. 640, 657 (N.D. Ill. 1988)).

[177] Greene v. Lindsay, 456 U.S. 444, 451 (1982).

[178] *Greene*, 456 U.S. at 451-52. The Court may look to state law to identify the nature and scope of state interests that are to be balanced against individual's liberty interests. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 661-63 (1977) (examining various states laws regarding corporal punishment in schools to determine application of Eighth Amendment prohibition against cruel and unusual punishment); Roe v. Wade, 410 U.S. 113, 148, nn.42, 48-50, 151 (1973).

[179] Mock, *supra* note 12, at 1523.

[180] *Id.*

[181] *See* John F. Harris, *Clinton Links Housing Aid to Eviction of Crime Suspects*, WASH. POST, Mar. 29, 1996, at A14; *see also* Rucker v. Davis, 237 F.3d 1113, 1117 (9th Cir. 2001).

[182] *See* sources cited *supra* note 181.

[183] *See* Harris, *supra* note 181; *see also* HUD v. Rucker, 535 U.S. 125, 130 (2002).

[184] Symposium, *Housing Out the Poor*, 19 ST. LOUIS U. PUB. L. REV. 309, 311 (2000).

The Supreme Court's argument emphasized the twin goals of increased deterrence of drug-related activity and a simplification of enforcement difficulty.[185] The Court's approval of these goals indicates an exclusive focus on the purpose of the statute at the expense of the methods the statute used to carry out its goals. This focus is detrimental to the pursuit of integrity in constitutional jurisprudence, and indicates another step in the Court's controversial move towards purpose-oriented substantive due process scrutiny.[186] Some critics suggest that this trend results in ad hoc due process decisions and derives from political or social predilections.[187] As in the case of Marisa Perez, HUD's strict liability eviction provisions betray the idea of fair process by allowing the government to evict tenants that have done everything possible to prevent drug-related activity.[188]

C. *Unconscionable Contracts*

The Court also incorrectly failed to consider the unconscionability of a public housing contract that does not include an innocent owner defense to eviction. A key sign of an unconscionable contract is that the contracting parties have unequal bargaining power.[189] Public housing tenants have little bargaining power.[190] By definition, they are vulnerable members of society who need government assistance to provide the basic necessities of life for their families and themselves.[191] The government, on the other hand, is in a powerful position as supreme landlord.[192] Thus, there is a vast chasm between the parties' bargaining power.[193] Public housing tenants, on one side, are on the verge of homelessness,

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[185] *Id.*

[186] Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 301-02 (1997).

[187] *See, e.g.*, Stephen E. Gottlieb, PUBLIC VALUES IN CONSTITUTIONAL LAW 45, 58-59 (Stephen E. Gottlieb ed., 1993); Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, LAW & CONTEMP. PROBS. 97-99 (1988).

[188] In 2002, Florida used the Supreme Court's ruling to evict a housing activist for her son's drug related arrest in 1999. Her son was twenty-three years old at the time of his arrest. Although his name was on the lease, his mother claims he had been living elsewhere as part of a mandatory employment program. *See* Shannon Behnken, *Evict Public Housing Activist for Violating Lease, Jury Says*, TAMPA TRIB., Sept. 26, 2002, at 1, *available at* 2002 WL 26174370.

[189] Christian v. Christian, 365 N.E.2d 849, 851 (N.Y. 1977).

[190] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970).

[191] Green, *supra* note 107, at 716-18 (1994).

[192] *Javins*, 428 F.2d at 1075.

[193] *Id.*

while the government, on the other, has the ability to create and enforce laws to its own benefit.[194]

Another test of unconscionability is whether a reasonable person would contract for the terms in question.[195] No reasonable person would knowingly sign a lease that allows for eviction — immediately and with no grievance hearing — that they could not avoid by reasonable preventative behavior. The Court should have exhibited compassion and common sense, and held strict liability lease terms unconscionable.

D. Public Policy

The Supreme Court's endorsement of strict liability eviction in public housing fundamentally contradicts effective public policy and compassionate lawmaking. The United States Housing Act's purported mission was to promote general welfare by allotting public money to fix "unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income."[196] The logical consequence of no-fault evictions, however, is to deter people from reporting drug violations. For example, HUD's "One Strike and You're Out" policy did not affect Marisa Perez's behavior in any way — she was already doing everything possible to keep her son off drugs or at least away from her apartment.[197] Pearlie Rucker searched her adult, mentally disabled daughter's room frequently.[198] Yet her daughter was observed using cocaine three blocks from the complex.[199] Even HUD acknowledged during oral argument that there was nothing more Rucker could have done to protect herself from eviction.[200]

Critics may argue that harsh penalties for drug-related activity are the only way to create safe public housing complexes.[201] That argument, however, fails to account for the real consequences of strict liability

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[194] There is possibly a contract clause claim for tenants who held leases with public housing authorities prior to Congress' amendments and the announcement of increased federal funding tied to more drug-related evictions.

[195] Christian v. Christian, 365 N.E.2d 849, 851 (N.Y. 1977).

[196] 42 U.S.C. § 1437 (1988).

[197] Winograd, *supra* note 1, at A4.

[198] Rucker v. Davis, 237 F.3d 1113, 1117 (9th Cir. 2001).

[199] *Id.*

[200] *Id.* at 1124.

[201] HUD v. Rucker, 535 U.S. 125, 127, 134 (2002) (arguing that because drugs lead to "murders, muggings, and other forms of violence against tenants," and to "deterioration of the physical environment," Congress could reasonably permit no-fault evictions).

eviction provisions for public housing tenants.[202] Public housing authorities evict tenants despite the fact that the evictees could not have prevented their eviction through any action whatsoever on their part.[203] Furthermore, there is no evidence that the new tenants will be able to police their co-tenants more effectively.[204] This policy is likely to lead to a cycle of evictions, as government officials replace grandparents like Rucker with different grandparents who are charged with the equally difficult task of controlling their teenage wards.[205] Strict liability evictions in this context simply do not work to deter drug use or promote effective law enforcement.[206] The Court addresses this argument by saying that Congress had another legitimate purpose: to evict tenants who could not control their household members or guests' criminal activities.[207] Such a burdensome policing provision runs afoul of common sense justice and the Constitution's guarantees of individual freedom.[208]

Burdensome policing provisions are perhaps most questionable when applied to people who find themselves in need of public housing because they have hit rock bottom.[209] Often, the choice is between living

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[202] There is no conclusive evidence that drug-related activity in public housing has decreased since HUD implemented strict liability evictions. *See* Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 194, 205 (1998).

[203] *Rucker*, 237 F.3d at 1124.

[204] *See* Meares, *supra* note 203, at 194, 205.

[205] *See also* Dorf, *supra* note 167 (tracing Supreme Court's lack of compassion to conservative composition of Court).

[206] *Id.*

[207] HUD v. Rucker, 535 U.S. 125, 134 (2002).

[208] *See* discussion *infra* Part III.B.

[209] *See* Mark Brown, *Not All Departing Tenants Will Land on Feet: Enough Treading Water, CHA Decides, Time for Some Residents to Sink or Swim*, CHI. SUN-TIMES, Oct. 1, 2002, at 2 (discussing problems tenants face upon eviction); Elijah Gosier, *Now What?*, ST. PETERSBURG TIMES, Oct. 22, 2002, at 1D (telling story of grandmother evicted because officials found plastic baggies near her porch on several occasions); Kate N. Grossman, *Many at Risk of CHA Eviction: 90% at Taylor Homes in Violation, Warns Sociologist Who Seeks Relocation Slowdown*, CHI. SUN-TIMES, Sept. 16, 2002, at 6 (discussing high rate of relocation among public housing tenants and role of lease violations and housing authorities' demolition plans); Kate N. Grossman, *Time's Running Out for Residents to Move*, CHI. SUN-TIMES, Sept. 16, 2002, at 6 (describing public housing shortage and forced evictions due to closing buildings); Rachel Ross, *Housing Urged for Alcohol, Drug Users*, TORONTO STAR, Oct. 6, 2002, at A06 (discussing policy arguments for providing affordable housing for drug users and Ontario's propensity to implement that policy); Albor Ruiz, *Desperate Homeless Getting Cold Shoulder*, DAILY NEWS, Sept. 13, 2002, at 3 (discussing housing crises and roadblocks faced by homeless trying to get affordable housing); Stephen J. Singer, *City Power: Government Is Taking Our Property Rights*, NEWSDAY, Oct. 11, 2002, at A47 (discussing unjust contradiction between civil forfeiture laws and HUD regulations allowing for strict-liability evictions).

on the street, living with family, or living in the "drug-ridden, crime infested" complexes subsidized by the federal government.[210] Although eviction based on fault or negligence is an essential tool in such situations, strict liability is absurd and does nothing to further the government's purpose.[211] Furthermore, zero tolerance policies breed disenchantment among the targets of the policies.[212] Government actions that uniformly punish people for different levels of culpability lead to frustration and anger.[213] They may even have the counter-productive effect of causing people to disrespect legitimate authority.[214] Significant public policy concerns should have led the Court to interpret section 1437d as implying a knowledge or foreseeability requirement.

CONCLUSION

The number of HUD assisted households dropped by 65,000 from 1994 to 1998.[215] In 1999, a HUD survey revealed almost one million families on wait lists for public housing and other subsidized housing.[216] HUD's regulations are the product of a system taxed beyond its means.[217] The agency's interpretation of section 1437d is not reasonable nor does Congress mandate it. Local public housing authorities should not be entrusted with discretion so broad that they can easily wield their power unconstitutionally. When the government can use a statute in this manner, the Court should indicate that deficiency to Congress and enjoin the statute's implementation until the problem is resolved. The government's ability to make arbitrary decisions in this context should have led the Court to first find section 1437d ambiguous, and then hold HUD's interpretation unconstitutional. Public policy and common sense support only that holding.

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[210] *Rucker*, 535 U.S. at 127.

[211] Rucker v. Davis, 237 F.3d 1113, 1124 (9th Cir. 2001).

[212] Mock, *supra* note 12, at 1525.

[213] *Id.*

[214] *Id.*

[215] Symposium, *supra* note 184, at 310.

[216] DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, WAITING IN VAIN: AN UPDATE ON AMERICA'S RENT HOUSING CRISIS, at iv (March 1999).

[217] *See* Cheryl P. Derricotte, *Poverty and Property in the United States: A Primer on the Economic Impact of Housing Discrimination and the Importance of a U.S. Right to Housing*, 40 HOW. L.J. 689, 705-07 (1997) (discussing housing rights protected in international conventions).

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