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Protecting Tenants Without Preemption: How State and Local Governments Can Lessen the Impact of HUD's One-Strike Rule

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I. INTRODUCTION

Under a policy first enacted in 1988 and expanded in 1996, federally funded public housing authorities ("PHAs") and private landlords renting their properties to tenants receiving federal housing assistance have been required to include a provision in all leases under which drug-related criminal activity as well as criminal activity that in any way poses a threat to other tenants or nearby residents constitutes ground for initiating eviction proceedings.[1] This strict-liability eviction policy, which has become known as the "One-Strike Rule,"[2] was part of a broader congressional effort to combat the "reign of terror" that Congress believed drug dealers were imposing on public-housing and assisted-housing tenants.[3] Like many of the crime-related policies enacted in the 1980s and 1990s, the One-Strike Rule has done little to reduce crime rates, but has been wildly successful in ensuring that the situation of poor households receiving federal assistance remains highly precarious.[4] Calls for reform of the One-Strike Rule are almost as old as the policy itself, but given the political outlook of the current administration, the prospects for reform at the federal level are dim.[5]

While federal law and a combination of gridlock and unwillingness in the legislative and executive branches foreclose a range of possible strategies for reform, there is nonetheless room to mitigate the socially corrosive effects of the One-Strike Rule through legislative efforts at the state and local level. Courts in various jurisdictions have upheld state laws that protect vulnerable tenants despite the federal strict-liability policy, and these holdings help to provide a framework for how state and local governments seeking to protect tenants can do so without their efforts necessarily falling prey to the Supremacy Clause.[6]

This paper describes that framework and proposes three concrete measures that fit it. The paper is structured as follows: After explaining the One-Strike Rule and the threat it poses to vulnerable tenants (Section II), the paper discusses the burden the Rule imposes on tenants and the benefits it is supposed to bring to other parties,

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1. For the current version of the applicable statutes, see 42 U.S.C. § 1437d(*l*)(6) (2012) (covering public housing) and 42 U.S.C. § 1437f(o)(7)(D) (2012) (Section 8). On the history and development of these provisions, see, e.g., Robert Hornstein, *Litigating Around the Long Shadow of* Department of Housing and Urban Development v. Rucker*: The Availability of Abuse of Discretion and Implied Duty of Good Faith Affirmative Defenses in Public Housing Criminal Activity Evictions*, 43 U. TOL. L. REV. 1, 4–5 (2006) [hereinafter *Litigating*]; Sarah Clinton, Note, *Evicting the Innocent: Can the Innocent Tenant Defense Survive a* Rucker *Preemption Challenge*?, 85 B.U. L. REV. 293, 297–301 (2005); Paul Stinson, *Restoring Justice: How Congress Can Amend the One-Strike Laws in Federally-Subsidized Public Housing to Ensure Due Process, Avoid Inequity, and Combat Crime*, 11 GEO. J. ON POVERTY L. & POL'Y 435, 436–37 (2004).

2. Reference to the policy as a "One-Strike"-rule dates back to President Clinton's 1996 State of the Union address, in which he asserted that, because "[c]riminal gang members and drug dealers are destroying the lives of decent tenants," the new "rule for residents who commit crime and peddle drugs should be 'one strike and you're out.'" Address Before a Joint Session of the Congress on the State of the Union, 1996 PUB. PAPERS 79, 83 (Jan. 23, 1996).

3. 42 U.S.C. § 11901 (2012) (codifying the "Anti-Drug Abuse Act of 1988," Pub. L. No. 100-690 (1988)).

4. *See infra* Section III.

5. For early criticism of the One-Strike Rule, see, e.g., Jason Dzubow, *Fear-Free Public Housing? An Evaluation of HUD's One Strike and You're Out Housing Policy*, 6 TEMP. POL. & C.R. L. REV. 55, 58–71 (1996) (discussing concerns over innocent tenants, procedural protections, disparate impact, and lack of effectiveness).

6. *See infra* Section IV.

and argues that the resulting distribution of burdens and benefits is unjust (Section III). The paper then lays out three concrete measures that state and local governments can enact to protect tenants who face eviction for criminal activity under the Rule that would survive a federal preemption challenge: Requiring "good cause" for eviction, giving tenants the right to cure a breach of their lease, and providing tenants with free counsel in landlord-tenant court (Section IV).

II. THE ONE-STRIKE RULE EXPLAINED

The Department of Housing and Urban Development ("HUD") administers a range of programs that provide assistance to low-income families and individuals. Of the more than 5 million households receiving federal assistance, about ninety percent either live in federally funded public housing or rent a house or apartment under one of the two Section 8 programs, viz., the Section 8 Housing Choice Voucher program and the Section 8 Project-Based Rental Assistance Program.[7] The One-Strike Rule, which gives landlords and PHAs the discretion to terminate the lease for any "criminal conduct," covers all of the approximately 4.5 million low-income households who receive assistance under these three programs.[8]

The Rule is incorporated in the statutory scheme that regulates various federal affordable housing programs. Under 42 U.S.C. § 1437f(o)(7)(D), lease agreements between a tenant receiving federal housing assistance under the Section 8 Housing Choice Voucher program (hereafter, "Section 8 program") and his or her landlord must provide that:

> [D]uring the term of the lease, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any violent or drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, 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.[9]

Lease agreements between federally funded PHAs and their tenants are required to contain a virtually identical provision under 42 U.S.C. § 1437d(*l*)(6).[10]

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7. *See* CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: FEDERAL RENTAL ASSISTANCE (2015), http://www.cbpp.org/research/housing/policy-basics-federal-rental-assistance.

8. 24 C.F.R. § 982.310(c) (2017), which covers evictions for criminal activity and incorporates the statutory language noted below, applies to both the tenant-based and the project-based Section 8 program, as noted in 24 C.F.R. § 983.257 (2017). For the 4.5 million figure (covering the 2014 fiscal year), see CTR. ON BUDGET & POL'Y PRIORITIES, FACT SHEET: FEDERAL RENTAL ASSISTANCE (2017), http://www.cbpp.org/sites/default/files/atoms/files/4-13-11hous-US.pdf.

9. At least one court has held that this statutory requirement is not "self-executing"—that is, the mere fact that that the statute requires this provision to be contained in a lease agreement to a voucher holder or public housing tenant does not entail that the tenant may be evicted for criminal activity when the lease does not in fact incorporate the provision. *See* Pratt v. D.C. Hous. Auth., 942 A.2d 656, 661–62 (D.C. 2008).

10. The statutory provision covering Section 8 tenants differs from that covering public housing tenants, first, in that the former but not the latter covers not just threats to the safety, well-being, or right to

To understand the extent to which these provisions leave tenants living under the threat of eviction, it is necessary to unpack three aspects of how they have been interpreted and applied: (a) what constitutes "criminal activity" within the meaning of such a provision, (b) the other persons covered by such provisions and the extent to which a tenant must be aware of their actions, and (c) the sort of evidence that a landlord or PHA must be able to produce in order to evict a tenant for a violation of this kind of provision.

A. "Criminal Activity" Under the One-Strike Rule

First, consider what constitutes "criminal activity" within the meaning of the required lease provision. As to "drug-related criminal activity," HUD regulations explain that the illegal use of *any* drug on or near the premises by the tenant, other members of the household, guests, or other people that are "under the tenant's control" (hereafter, "other covered persons") constitutes "drug-related criminal activity" within the meaning of the required provision.[11] HUD's conception of drug-related criminal activity is thus exceedingly broad, and it is unsurprising that courts have allowed evictions for "drug-related activity" that encompassed no more than smoking marijuana, for example.[12] Courts reason that because Congress enacted the statute to ensure that federally assisted low-income housing is "free from illegal drugs," landlords and PHAs have the authority to evict tenants for any illegal use of drugs, irrespective of what kind of drugs are at issue, whether there was an intent to distribute, and so on.[13]

As to "criminal activity that threatens the health, safety, or right to peaceful enjoyment" of the premises by other tenants, or of their residences by nearby residents, courts have permitted eviction on grounds that range from offenses where the threat to relevant others is arguably clear, such as harassment and

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peaceful enjoyment other tenants in the same property, but also any such threats to any "persons residing in the immediate vicinity of the premises." 42 U.S.C. § 1437f(o)(7)(D) (2012). Second, it differs in that it covers "violent or drug-related activity on or near [the] premises," as opposed to "any drug-related criminal activity on or off [the] premises." *Id.* The Section 8 provision is, then, simultaneously *broader* (in expanding coverage to non-tenants residing nearby and including any violent activity on or near the premises) as well as *narrower* (in limiting relevant drug-related criminal activity to that activity which happens on or near the premises, as opposed to anywhere on or off the premises) than the provision in the Public Housing statute. These differences can obviously be of great importance in individual cases, but do not bear directly on the argument of this paper, and will therefore be set aside in what follows.

11. "[T]he lease must provide that the owner may evict a family when the owner determines that a household member is illegally using a drug." 24 C.F.R. § 982.310(c)(1). The regulation covering eviction for criminal activity of public housing tenants, 24 C.F.R. § 966.4(*l*)(5) (2017), contains the same provision. As noted in note 10, *supra*, the statute covering criminal activity eviction from federally funded public housing is broader than that covering Section 8 voucher holders, in that it requires that leases contain a provision rendering any drug-related crime on or off the premises a ground for eviction.

12. Milwaukee City Hous. Auth. v. Cobb, 860 N.W.2d 267, 270 (Wis. 2015); *see also* Hous. Auth. of Joliet v. Chapman, 780 N.E.2d 1106, 1007–08 (Ill. App. Ct. 2008) (permitting eviction for recovery of marijuana during traffic stop of tenant's teenage son, who lived with her).

13. *Cobb*, 860 N.W.2d at 272–73 (quoting Boston Hous. Auth. v. Garcia, 871 N.E.2d 1073, 1078 (Mass. 2007)). This broad reading comports with the interpretative principles that inform how the statute has been understood to apply to other covered persons. *See supra* Section II.B.

threatening of other tenants[14] and burglarizing a neighbor's unit,[15] to offenses where that connection is considerably more tenuous, such as assaulting and attempting to rob a patron of a convenience store located about a mile from the public housing complex where the tenant resided.[16] Several courts have, however, made explicit that this part of the required lease provision does not give PHAs and landlords leasing to Section 8 voucher holders the "blanket authority" to evict tenants for any criminal behavior whatsoever, irrespective of the behavior's location and nature.[17] For example, the D.C. Superior Court has held that a "clear nexus" must be established between the criminal activity and the health, safety, or peaceful enjoyment of the premises by other tenants before criminal activity can serve as a ground for eviction.[18] The requirement that there be a "close nexus" is justified, the court argued, because giving PHAs and landlords the "unfettered right to evict people who have committed illegal acts or crimes anywhere" is incompatible with the aim of providing a "stable home" to financially challenged members of the community and would therefore go directly against the societal values that motivate providing affordable housing in the first place.[19] Other courts have expressed a similar sentiment.[20] However, given the latitude that courts have in interpreting the broad language of the statutes and regulations, tenants in jurisdictions without precedents that limit the discretion of PHAs and landlords on this issue may well be without recourse if they face eviction for actions that bear no discernable relationship to the safety, well-being or peaceful enjoyment of other tenants or nearby residents.[21]

In sum, tenants who either live in federally funded public housing or who lease under the Section 8 program are at risk of eviction when they or any other covered person illegally uses or possesses any drug on or near the premises, irrespective of the kind of drug, and the quantity in their possession. Such tenants also risk eviction when they or any other covered person engages in criminal conduct that can be construed as bearing on the safety, well-being, or peaceful enjoyment of their residence by other tenants or nearby residents.

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14. *See, e.g.*, Cincinnati Metro. Hous. Auth. v. Brown, No. C–120580, 2013 WL 5432087, at *1–3 (Ohio Ct. App. Sept. 25, 2013); Hous. & Redev. Auth. of Franklin v. Miller, 935 A.2d 1197, 1998 (N.J. Super. Ct. App. Div. 2007).

15. Cincinnati Metro. Hous. Auth. v. Patterson, No. C–130161, 2013 WL 6409302, at *1, *6 (Ohio Ct. App. Dec. 6, 2013) (holding that both residential burglary and possession of marijuana by tenant's grandson, who did not live with tenant but visited regularly, constituted violations of lease's prohibition on criminal activity sufficient for eviction).

16. Lowell Hous. Auth. v. Melendez, 865 N.E.2d 741, 741–42 (Mass. 2007).

17. D.C Hous. Auth. v. Whitfield, No. 04-LT-410, 2004 WL 1789912, at *4–5 (D.C. Super. Ct. Aug. 11, 2004).

18. *Id.* at *6.

19. *Id.*

20. *See, e.g.*, Kolio v. Haw. Pub. Hous. Auth., 349 P.3d 374, 379 (Haw. 2015); Cabrini-Green Local Advisory Council v. Chi. Hous. Auth., No. 96 C 6949, 2007 WL 294253, at *3 (N.D. Ill. Jan. 29, 2007) (holding that lease provision giving landlord discretion to terminate tenancy for any criminal activity whatsoever failed to be "rationally related to a legitimate housing purpose." (citing Richmond Tenants Org. v. Richmond Redev. & Hous. Auth., 751 F. Supp. 1204, 1205–06 (E.D. Va. 1990)).

21. For an overview of the different approaches courts have taken to the exercise of discretion by PHAs, see *Litigating*, *supra* note 1, at 11–21.

B. Tenants, Other Covered Persons and Fault Under the One-Strike Rule

Next, consider the relation between the tenant and the perpetrator of the criminal activity. The statutorily mandated lease provision concerns not only criminal activity committed by the tenant himself, but also by any other covered person—that is, any member of the tenant's household, any guest, and any other person that is "under the tenant's control."[22] While the statutory language may appear on its face to leave open whether a tenant must be at fault in any way for the criminal activity of other covered persons before they may be evicted, the Supreme Court's decision in *Department of Housing and Urban Development v. Rucker* makes clear that the statute permits evictions of tenants who neither knew nor should have known that other covered persons engaged in prohibited criminal activity.[23] The Court held, first, that the plain language of the statute authorizes no-fault evictions, as it provides that "any drug-related criminal activity . . . shall be cause for termination of tenancy," and the word "any" must be understood to have an expansive meaning, viz., it is understood to mean "one or some indiscriminately of whatever kind."[24] Therefore, the Court reasoned, "any drug-related activity engaged in by the specified persons is grounds for termination, not just drug-related activity that the tenant knew, or should have known, about."[25] In addition, the Court held that fault is not a requirement because, in enacting this statute, Congress sought to render federally assisted low-income housing wholly "free from illegal drugs." Because (a) any tenant who fails to prevent drug-related criminal activity by other household members or guests "is a threat to other residents" since drugs lead to "murders, muggings, and other forms of violence," and (b) this threat to others exists irrespective of whether the tenant was aware of the drug use, the Court concluded that the statute covers any illegal use of drugs by any covered person.[26]

The Supreme Court's decision in *Rucker* only explicitly covered the permissibility of no-fault evictions for drug-related criminal activity by household members of a public housing tenant. In applying the decision, though, lower courts have found that its holding is not limited to these circumstances, but instead extends to non-drug-related criminal activity as well. Citing *Rucker*, they have permitted, for example: The no-fault eviction of a public housing tenant because his stepson, who was staying with the tenant as a guest, had caused several disturbances at a school directly adjacent to the public housing complex;[27] the no-fault eviction of a public-housing tenant because her son, who was listed on the lease but had not lived in the tenant's unit for several months, robbed a convenience store close to the tenant's complex;[28] the no-fault eviction of a tenant

22. 42 U.S.C. § 1437f(o)(7)(D) (2012); 42 U.S.C. § 1437d(*l*)(6) (2012).

23. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002). The case law predating *Rucker* gives a mixed picture. *Compare, e.g.*, Charlotte Hous. Auth. v. Patterson, 464 S.E.2d 68, 72 (N.C. Ct. App. 1995) (holding that tenant knowledge of criminal activity by other covered persons is required for eviction), *with* Hous. Auth. of New Orleans v. Green, 657 So. 2d 552, 554–55 (La. Ct. App. 1995) (knowledge not required).

24. *Rucker*, 535 U.S. at 130–31.

25. *Id.* at 131.

26. *Id.* at 134.

27. Lowery v. Hous. Auth. of Terre Haute, 826 N.E.2d 685, 687–88, 690 (Ind. Ct. App. 2005).

28. Bishop v. Hous. Auth. of S. Bend, 920 N.E.2d 772, 777, 780–81 (Ind. Ct. App. 2010).

of a Section 8 Project-Based Rental Assistance complex after the arrest of the tenant's son (who was a member of her household) and the seizure of marijuana within the unit;[29] and the no-fault eviction of a Section 8 Housing Choice Voucher holder when a search of her apartment returned the shotgun with which her cousin, who was not a member of the tenant's household, had shot and killed her boyfriend the day before.[30]

Whereas courts have generally not hesitated in extending *Rucker*'s holding to both non-drug-related criminal activity and to Section 8 Voucher holders, some courts have been reluctant to extend *Rucker* to guests and other "persons under the tenant's control" who are not members of the tenant's household. Most notably, the North Carolina Court of Appeals denied a PHAs request for permission to evict a tenant when the police arrested an acquaintance whom she had asked to babysit her children in her apartment and found marijuana on the acquaintance's person when they searched him.[31] In light of the tenant's ignorance of the fact that her guest had brought illegal drugs into her apartment, the absence of any complaints against her by other tenants, and her cooperation with the police investigation, the court held that it would be unconscionable to evict the tenant for the criminal conduct of her guest.[32]

Other courts have been less reluctant: The Ohio Court of Appeals, for example, permitted a PHA to evict a tenant who had let a friend that she "knew . . . from the neighborhood" in her apartment when he asked whether he "could sit down with her."[33] The tenant claimed she had no idea that her friend was running from the police when he asked her whether he could come in, or that he was carrying marijuana, but this did not sway the court from permitting her eviction.[34]

In sum, tenants who either live in federally funded public housing or who receive assistance under the Section 8 program are at risk of eviction when any covered person engages in criminal activity that is either drug-related or that poses a threat to the safety, well-being, or peaceful enjoyment of the premises by other tenants, irrespective of whether the tenant was or should have been aware of that activity. "Covered persons" include any actual member of the tenant's household, any person whose name is on the lease, irrespective of whether they in fact reside in the unit, and any regular guest. Incidental guests such as babysitters and visiting friends have been excluded in some jurisdictions, but there is no guarantee that they will not be considered "covered persons."

C. The Evidentiary Burden of Landlords and PHAs Under the One-Strike Rule

Finally, consider what landlords and PHAs need to prove in order to be able to evict tenants for criminal conduct. Though some may think eviction *is*

29. Camco, Inc. v. Lowry, 839 N.E.2d 655, 668–70 (Ill. App. Ct. 2005).

30. Scarborough v. Winn Residential L.L.P., 890 A.2d 249, 251–52, 255–59 (D.C. 2006).

31. E. Carolina Reg'l Hous. Auth. v. Lofton, 767 S.E.2d 63, 65, 71 (N.C. Ct. App. 2014), *aff'd on other grounds*, 789 S.E.2d 449 (N.C. 2016).

32. *Id.* at 66–68.

33. Cuyahoga Metro. Hous. Auth. v. Davis, 967 N.E.2d 1244, 1246 (Ohio Ct. App. 2011).

34. *Id.* at 1246, 1249. In an earlier case involving the same PHA, however, the Ohio Court of Appeals court did find in favor of a tenant who neither knew nor should have known that a guest who was not a member of her household was carrying crack cocaine. Cuyahoga Metro. Hous. Auth. v. Harris, 861 N.E.2d 179, 181–82 (Ohio Ct. App. 2006).

appropriate following a covered person's conviction by a court of law, a conviction is not required in order to evict. In 1995, HUD promulgated the following regulation regarding the burden of landlords leasing to tenants under the Section 8 Housing Choice Voucher program:

> The owner may terminate tenancy and evict by judicial action a family for criminal activity by a covered person in accordance with this section if the owner determines that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction.[35]

HUD's regulation governing the eviction of public housing tenants for criminal activity contains a similar provision.[36]

It is worth noting just how lax this standard is. First, the regulation does not merely assert that a criminal conviction is not necessary, but that the tenant (or another covered person) does not even need to have been arrested for the alleged crimes that serve as the basis for their eviction. In a recently issued guidance document, HUD asserted that these regulations should not be understood to give landlords and PHAs license to initiate eviction proceedings on too flimsy of an evidentiary basis, focusing in particular on the use of arrest records.[37] However, guidance documents, unlike regulations, are not binding law, and it is unclear what (if any) effect this guidance has had on how landlords and PHAs respond when learning that a tenant or other covered person has been arrested, and no provision of law requires that they have other evidence of criminal activity. Second, while the regulation makes clear that landlords need not prove criminal activity beyond a reasonable doubt, it leaves open what standard *does* apply. While several courts have held that landlords and PHAs must prove criminal activity by the civil preponderance standard,[38] the regulation does not mandate proof by this standard,

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35. 24 C.F.R. § 982.310(c)(3) (2017).

36. 24 C.F.R. § 966.4(*l*)(5)(iii) (2017) ("The PHA may evict the tenant by judicial action for criminal activity in accordance with this section if the PHA determines that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction.").

37. U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF INDIAN & PUB. HOUS., PIH 2015-19, GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 3–4 (2015) (arguing that an arrest is not evidence of criminal activity that can support termination of tenancy of public housing or Section 8 tenants).

38. *See, e.g.*, Miles v. Fleming, 214 P.3d 1054, 1057 (Colo. 2009) (explaining that, while a landlord is tasked with determining whether tenant has engaged in criminal activity in Section 8 criminal eviction case, it "remains for the court to determine whether criminal activity has actually been proved by a preponderance of the evidence, and therefore whether the owner's determination is not only reasonable, but in fact correct."); D.C. Hous. Auth. v. Cherry, No. 03lt15931, 2004 D.C. Super. LEXIS 25, at *8 (D.C. Super. Ct. Jan. 20, 2004) (holding that PHA "must prove at trial by a preponderance of the evidence that the tenant committed the act before it can evict the Defendants" in public housing criminal eviction case).

and thus leaves the door open to permitting eviction when a landlord or PHA has *not* shown criminal activity by a preponderance of the evidence.[39]

Applying this lax evidentiary standard, courts have permitted eviction for criminal activity on the basis of, for example, the testimony of a housing authority safety officer who had not entered a tenant's apartment or seen the tenant smoking, but had smelled marijuana from the hallway and determined on the basis of the smell's intensity, his interaction with the tenant, and "14 years of experience as a public safety officer" that the tenant was smoking marijuana.[40] The safety officer undertook no further action, and the tenant was never convicted, charged, or even arrested;[41] nonetheless, the court found that the PHA had sufficient evidence of criminal activity to permissibly evict the tenant.

Putting these aspects of the Rule—the Rule's sweeping provisions concerning the covered criminal activities and covered persons, the no-fault standard, and the Rule's lenient evidentiary burden on landlords and PHAs—together, the One-Strike Rule exposes any tenant who has household members or regular guests whose behavior is not fully within his or her purview and control at risk of eviction, as well as any tenant who engages in behavior that his or her landlord or PHA can with some plausibility construe as covered "criminal activity," even if it does not rise to the level of actual criminality. Because tenants can be evicted even when innocent, on the basis of an unfounded suspicion of criminal activity or a tangential connection to someone who may have committed a crime, the One-Strike Rule puts almost all tenants living in federally assisted low-income housing in a precarious position.

III. WHY THE ONE-STRIKE RULE IS UNJUST

Criticism of the One-Strike Rule is as old as the Rule itself,[42] yet much of this criticism has focused exclusively on the costs imposed on the tenants who are evicted or at risk of eviction.[43] These costs, while significant, are only one part of the equation: In assessing whether the One-Strike Rule is a sound and morally defensible piece of public policy, the benefits of the Rule to its intended beneficiaries (and the corresponding costs of doing away with the Rule) must be taken into account as well. The One-Strike Rule is intended, first and foremost, to benefit other tenants in public-housing facilities, project-based facilities, and in privately owned housing in the direct vicinity of the units occupied by Section 8 Voucher holders, and secondarily, to prevent costs to PHAs and landlords resulting

39. *Cf.* Stinson, *supra* note 1, at 450 ("Although theoretically a PHA's proof must withstand court scrutiny in a civil eviction proceeding, the statute and implementing regulations themselves are vague about the exact parameters of a one-strike violation and a PHA may seek to evict on less than sufficient evidence.").

40. Milwaukee City Hous. Auth. v. Cobb, 860 N.W.2d 267, 270 (Wis. 2015).

41. *Id.*

42. *See, e.g.*, Dzubow, *supra* note 5; Robert Hornstein, *Mean Things Happen in This Land: Defending Third Party Criminal Activity Public Housing Evictions*, 23 S.U. L. REV. 257, 281–83 (1996); Lisa Weil, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161, 168–82 (1991).

43. *See infra* Section III.B.

from criminal activity by tenants.[44] This section spells out the central burdens and benefits that the One-Strike Rule imposes on tenants and other affected parties in more detail; it then argues that the Rule's allocation of burdens and benefits is unjust, because the benefits are uncertain while the burdens are not, and the burdens are placed on the shoulders of the most vulnerable members of society.

A. Burdens Imposed by the One-Strike Rule

The One-Strike Rule imposes burdens on all tenants who are at risk of eviction because of its enactment, as well as on the tenants who are actually evicted as a result of its application. This sub-section sets out the nature of the most important burdens and the shoulders that have to carry them in more detail.

1. The Rule Exposes Tenants to a Constant Threat of Eviction

At the most general level of description, the One-Strike Rule imposes the burden of being at risk of eviction on a majority of tenants living in federally subsidized low-income housing. As explained in Section II, any tenant can be evicted if he or she engages in criminal activity that is either drug-related or poses a threat to the safety, well-being, or peaceful enjoyment of the premises by other tenants or nearby residents, or if he or she has a household member or regular guest who engages in such activity, irrespective of whether the tenant is aware of and/or able to prevent or otherwise control said activity.[45] Further, given that this is an express "one strike" policy, a single instance of criminal activity can suffice—there is, in other words, no need to establish a pattern (or even repeated instances) of criminal activity.[46] And finally, given the low evidentiary bar for landlords and PHAs in criminal-activity evictions, tenants are at risk of eviction when they or any other covered person merely engage in behavior that a landlord or PHA can plausibly construe as constituting "criminal activity," even if the evidence on which the landlord or PHA relies in alleging criminal activity falls far short of what would be needed for a conviction in a criminal case.[47] Putting these points together, the One-Strike Rule creates an environment in which it is reasonable for many tenants in federally assisted housing to live with a constant fear of eviction, as the Rule hangs over their heads like a sword of Damocles.[48]

This reasonable fear is a real cost for those who experience it, and adds to the already highly precarious nature of the daily life of many individuals and families

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44. The Supreme Court in *Rucker* held that "[w]ith drugs leading to murders, muggings, and other forms of violence against tenants, and to the deterioration of the physical environment that requires substantial governmental expenditures, it was reasonable for Congress to permit no-fault evictions in order to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs." Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002) (internal quotation marks and references omitted).

45. *See supra* Section II.A and II.B.

46. *See supra* Section II.A.

47. *See supra* Section II.C.

48. *Cf.* Dzubow, *supra* note 5, at 73 (concluding that HUD can "effectively fulfill the goals" of creating "communities where people can live free of fear and be secure in their constitutional rights" only by adopting "a more holistic and flexible approach" to tenant criminal activity than the one set forth by the One-Strike Rule).

who occupy affordable housing—after all, about seventy percent of households receiving federal housing assistance are classified as "extremely low-income."[49] For these households in particular, the costs associated with being evicted for criminal activity are often immense, to the point of being insurmountable.[50] As the One-Strike Rule has been on the books for several decades now, it can be assumed that most tenants who receive federal assistance are cognizant of the Rule and its harsh consequences. The fear of losing what is likely to be the only safe and decent place that they can afford is itself a cost for those tenants, over and above the costs experienced by those who are actually evicted.

2. The Rule Imposes an Affirmative Duty on Tenants to Prevent Third-Party Crime

Civil liability for the harmful actions of third parties generally only arises under highly circumscribed conditions, and consequently, there is no general legal duty to prevent third-party actions that harm others.[51] Under the One-Strike Rule, however, any tenant who either has a household including members other than herself or who has regular houseguests is made subject to an affirmative duty to prevent criminal activity by those household members or guests on pain of the possibility of eviction.[52] While neither the statute nor the regulations impose such a duty explicitly, under *Rucker*, a tenant is effectively required to police the behavior of all household members and regular guests, given that tenants are at risk of eviction irrespective of whether they were aware of the actions of a covered third party.[53]

Requiring that tenants police the behavior of household members and guests is costly to tenants. First, tenants are likely to have close relationships to these individuals, and the policing of people near and dear to them may put significant pressure on and strain tenants' personal relationships, in particular the relationships they have with their children and grandchildren. Tenants subject to the One-Strike Rule are required to closely monitor the behavior of their descendants if they live with them or visit them regularly, yet arguably, "a grandparent or parent should be entitled to the presumption that their children are not engaged in a criminal activity."[54] Tenants in federally subsidized housing, however, simply cannot afford to presume innocence, for such a presumption may well leave them on the street. Tenants also risk their home whenever they open it to other relatives and

49. CTR. ON BUDGET & POL'Y PRIORITIES, *supra* note 7, at 2 (clarifying that "extremely low income" means that a households' income does not exceed 30 percent of the local median income or the federal poverty line, whichever is higher).

50. *See infra* Section III.A.3.

51. *See, e.g.*, Harold F. McNiece & John V. Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1273–82 (1948) (listing circumstances under which affirmative duties are recognized in common law tort doctrine).

52. Peter J. Saghir, *Home is Where the No-Fault Eviction Is: The Impact of the Drug War on Families in Public Housing*, 12 J.L. & POL'Y 369, 395–99 (2003); Michael A. Cavanagh & M. Jason Williams, *Low-Income Grandparents as the Newest Draftees in the Government's War on Drugs: A Legal and Rhetorical Analysis of* Department of Housing and Urban Development v. Rucker, 10 GEO. J. ON POVERTY L. & POL'Y 157, 176–77 (2003).

53. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002).

54. Saghir, *supra* note 52, at 398.

friends, making every decision whether to open their home to a sibling, cousin, or friend in need of a place to stay a potentially high-stakes decision. And when they do decide to provide a relative or friend with a place to stay, tenants must remain vigilant at all times and ensure that no criminal activity takes place. Irrespective of whether tenants open their homes to relatives and friends, the Rule puts pressure on these personal relations as well. These costs are imposed on tenants irrespective of whether any household members or guests actually engage in criminal activity.[55]

Second, this affirmative duty is especially costly to tenants when household members or guests of the tenant do engage in criminal activity. The One-Strike Rule does not just impose a duty to monitor covered persons for criminal activity, but also to successfully prevent any such activity.[56] Parents and grandparents are tasked with ensuring that their children and grandchildren do not use drugs or commit other crimes, with no concern for their suitability for this task.[57] Saddling unprepared civilians with crime-preventing duties can put those civilians at serious risk, even when the perpetrators are those who are near and dear to them, because the perpetrators may respond poorly to requests to either change their behavior or start packing their bags.[58]

3. The Rule Imposes Insurmountable Costs on Evicted Tenants

Undoubtedly, the One-Strike Rule leads to the eviction of tenants who would otherwise not be evicted.[59] Tenants evicted from federally subsidized affordable housing for criminal activity face all the same issues as other low-income tenants who are evicted for other reasons (such as non-payment):

> [E]viction often increases material hardship, decreases residential security, and brings about prolonged periods of homelessness . . .

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55. *Id.* at 399 (arguing that a duty to police relatives' behavior "should not be imposed upon a familial relationship where trust is an essential component to the health of the relationship").

56. Stronger still, tenants are tasked with preventing even the impression of impropriety, given that landlords and PHAs are permitted to instigate eviction proceedings on the basis of their own determination of criminal activity, which may well be based on evidence that falls far short of what would be needed to secure a conviction in a criminal court. *See supra* Section II.C.

57. Saghir, *supra* note 52, at 397; Cavanagh & Williams, *supra* note 52, at 180 ("*Rucker* forces us to accept the idea that we will put those who are least able to fight—in this case, low-income grandmothers and grandfathers—on the front line of our war on drugs.").

58. The affirmative duty imposed on tenants to monitor and control the behavior of household members and guests can be characterized as a form of "third party policing," since it coerces tenants into assuming "responsibility for correcting misconduct." Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 117 (2012) (describing effects of third-party policing by landlords effected through public nuisance ordinances); *see also* Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO. J. ON POVERTY L. & POL'Y 1, 18–20 (2015) (discussing "third-party policing" in the context of the One-Strike Rule).

59. For a long list of cases involving tenants facing eviction for third-party criminal activity (thus excluding those tenants who are evicted for their own criminal activity) under the One-Strike Rule, see Adam P. Hellegers, *Reforming HUD's One-Strike Public Housing Evictions Through Tenant Participation*, 90 J. CRIM. L. & CRIMINOLOGY 323, 330–32 n.41 (1999). There is no reason to think this list would not be considerably longer if it were compiled today. In addition, while these "innocent tenants" are probably the clearest example of tenants who would not have been evicted but for One Strike policies, it is reasonable to assume they are not the only ones.

> it can result in job loss, split up families, and drive people to depression and, in extreme cases, even to suicide . . . and it decreases one's chances of securing decent and affordable housing, of escaping disadvantaged neighborhoods, and of benefiting from affordable housing programs.[60]

Eviction is typically a high-cost occurrence for any household, and there is no principled reason to suspect that tenants who face eviction for criminal activity form an exception to the rule—in fact, because tenants receiving federal housing assistance are by definition low-income (and often extremely low-income) households, and there may be pending criminal charges against a household member relating to the activity that underlies the eviction, tenants that face eviction under the One-Strike Rule may well be worse off, on average, than tenants evicted for other reasons.[61]

In addition to the costs associated with any eviction, tenants evicted from federally subsidized affordable housing for criminal activity are burdened with the cost of losing their federal assistance. Federal law prohibits tenants who have been evicted for drug-related criminal activity from receiving assistance in the form of a Section 8 Voucher for three years.[62] In addition, many PHAs and private landlords reject applicants who have been evicted for criminal activity of any kind, often without regard to how recent the eviction was or the nature or severity of the (alleged) criminal activity.[63] This means that an eviction for criminal activity under the One-Strike Rule effectively results in low-income tenants being barred from access to federally subsidized affordable housing, leaving them at the mercy of private landlords when seeking a new home. Those who do find a new home are considerably worse off due to having lost access to federal assistance. Those who do not find a new home are forced to stay with friends or relatives (who may be subject to the One-Strike Rule themselves, and thus be put at risk by opening their homes), in shelters, or on the street.[64]

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60. Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 91 (2012). Although Desmond's research focuses on low-income tenants who do not receive federal assistance, many of the concerns his work raises carry over, not in the last place because tenants evicted for criminal conduct will normally find themselves barred from receiving federal assistance. *Cf.* Dickinson, *supra* note 58, at 13 n.50.

61. CTR. ON BUDGET & POL'Y PRIORITIES, *supra* note 7, at 2 (noting that up to 70 percent of households receiving assistance are extremely low-income).

62. 24 C.F.R. § 982.553(a)(1) (2017). Note that under these regulations a PHA may in its discretion readmit an applicant if the person who engaged in drug-related criminal activity has successfully completed a supervised drug rehabilitation program or if the circumstances that led to the eviction no longer exist, e.g., when the offending household member has since died or is currently imprisoned. *Id.*

63. MARIE CLAIRE TRAN-LEUNG, SARGENT SHRIVER NAT'L CTR. ON POVERTY L., WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 3–4 (2015) (noting that housing providers "appear to rely heavily on quick, bright-line rules of acceptable and unacceptable alleged criminal activity" and "frequently err on the side of denying assistance to individuals who have had even minimal contact with the criminal justice system").

64. *See* Dickinson, *supra* note 58, at 16–18 (describing how eviction of tenants for criminal activity raises the specter of homelessness); Stinson, *supra* note 1, at 472 ("Eviction from public housing is often . . . a sentence of homelessness") (internal quotation marks omitted) (citing United States v. Robinson, 721 F. Supp. 1541, 1544 (D.R.I. 1989)).

4. The Rule Imposes Penalties Without Fault on Innocent Tenants

The One-Strike Rule permits landlords and PHAs to evict tenants who have engaged in criminal activity themselves—call these tenants "guilty tenants"—as well as innocent tenants, who face eviction for the criminal activity of others.[65] The Rule imposes an additional burden on innocent tenants.[66] To start, innocent tenants may be unfamiliar with signs of criminal activity because they do not engage in it themselves. Therefore, they may be unable to comply with the affirmative duty imposed by the One-Strike Rule because they do not recognize the criminal behavior of offending household members and guests. As one commentator notes:

> In families all over America, there are children, spouses, and relatives who have drug problems. In many circumstances, other family members may not be aware of the problem and consequently, there is no way to address it . . . Even if the family is aware, it may be unable to control the individual.[67]

The often-insurmountable costs associated with a failure to comply can be practically unavoidable for innocent tenants because ensuring compliance with the One-Strike Rule by all covered persons can be difficult, if not outright impossible. This direct affront to the precept that "ought" implies "can" is arguably itself a cost to innocent tenants.[68]

Second, the One-Strike Rule is costly for innocent tenants in particular, as it prevents them from raising equitable defenses available to tenants in ordinary eviction proceedings. When a landlord or PHA seeks to evict a tenant for violation of the terms of the lease, some jurisdictions allow tenants to proffer an equitable defense when the lease violation is due to circumstances outside of their control. If successful, this enables the tenant to retain possession of the unit despite the violation.[69] For example, prior to the enactment of the One-Strike Rule, the

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65. *See supra* Section II.B; *cf.* Nelson H. Mock, Note, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 TEX. L. REV. 1495, 1504–08 (1998) (noting indifference of courts toward questions of guilt and innocence under One-Strike Rule).

66. The separate concern that strict liability regimes, which allow for a finding of liability without a finding of individual guilt, are inherently suspicious is addressed in *infra* Section III.C.2.

67. Jim Moye, *Can't Stop the Hustle: The Department of Housing and Urban Development's "One Strike" Eviction Policy Fails to Get Drugs Out of America's Projects*, 23 B.C. THIRD WORLD L.J. 275, 291 (2003).

68. *See, e.g.*, Saghir, *supra* note 52, at 396 (arguing that affirmative duty to prevent third-party crime is unfair because "not all residents are capable of ensuring that a member of the resident's household, guest or other person does not engage in criminal activity."); Mock, *supra* note 65, at 1518 (arguing that "accountability should not extend beyond the reasonable capacity of tenants to protect themselves from eviction"). For a general discussion of why the inability to perform a certain act entails that an individual does not have a (moral) duty to perform that act, and why it is unfair to expect someone to perform an act they cannot perform, see David Copp, *'Ought' Implies 'Can', Blameworthiness, and the Principle of Alternative Possibilities*, *in* MORAL RESPONSIBILITY AND ALTERNATIVE POSSIBILITIES: ESSAYS ON THE IMPORTANCE OF ALTERNATIVE POSSIBILITIES 265, 271–75 (Michael McKenna & David Widerker eds., 2003).

69. *See* Michael Zmora, Note, *Between* Rucker *and a Hard Place: The Due Process Void for Section 8 Voucher Holders in No-Fault Eviction*, 103 NW. L. REV. 1961, 1986–87 (2009).

Supreme Judicial Court of Massachusetts had recognized a "special circumstances" defense under state law which "provide[d] relief from termination when special circumstances indicate that the tenant could not have foreseen the misconduct [of other household members] or was unable to prevent it by any available means, including outside help."[70] When asked whether this defense was available to innocent tenants receiving federal assistance after the Rule had been enacted and *Rucker* had been decided, the court held that the state law providing this defense had been preempted.[71] The narrowing of this otherwise available equitable defense represents a real cost to innocent tenants facing eviction.[72]

5. The Rule Imposes Costs on Non-Tenant Third Parties

The burdens imposed by the One-Strike Rule do not rest only on the shoulders of the tenants who are evicted or at risk of eviction, but also on the shoulders of various third parties. As noted, the Rule imposes an affirmative duty to monitor and control the behavior of other household members and guests, which is likely to strain the tenants' personal relationships.[73] The strain will, of course, also be felt by the other parties to these relationships—the tenants' children, grandchildren, parents, siblings, cousins, and friends. In addition, because vigilant tenants will have to refuse to let those relatives and friends they consider to be too high of a risk into their homes, these third parties may well find themselves without a place to stay, with a shelter or the street as their only options.[74] This problem is particularly acute when tenants are faced with the decision to either give up their home or remove an offending relative from the household—a particularly harsh dilemma when the offending household member is a child or grandchild struggling with addiction.[75] In such a case, the costs are not only immense for the tenant, but also for the household member who is forced to deal not just with addiction but also with the threat of homelessness.

B. Benefits of the One-Strike Rule

The burdens the One-Strike Rule imposes on tenants and third parties have been discussed at considerable length.[76] By contrast, the (real and alleged) benefits of the Rule have received less attention.[77] A fair evaluation of the One-Strike Rule

70. Spence v. Gormley, 439 N.E.2d 741, 753 (Mass. 1982).

71. Bos. Hous. Auth. v. Garcia, 871 N.E.2d 1073, 1079 (Mass. 2007).

72. *See* Timothy E. Heinle, *Guilty by Association: What the Decision in* Boston Housing Authority v. Garcia *Means for the Innocent Family Members of Criminals Living in Public Housing in Massachusetts*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 213, 229–39 (2009) (discussing impact of *Garcia* decision, which undercut previously available equitable defense).

73. *See supra* Section III.A.1.

74. In this way, the Rule does not just raise the specter of homelessness for tenants who are evicted under the Rule, but also for those who are denied a safe place to stay by tenants out of fear of risking their home. Dickinson, *supra* note 58, at 16–18

75. Saghir, *supra* note 52, at 403–05 (discussing Powell v. Franco, 684 N.Y.S.2d 226, 226 (N.Y. App. Div. 1999)).

76. *See* the works cited throughout *supra* Section III.A.

77. For an exception to the rule that scholarly attention has been focused on the burdens that the Rule imposes, see Mock, *supra* note 65, at 1509–16.

requires an assessment of both the benefits and burdens it creates, and of the allocation of those benefits and burdens. This sub-section will discuss the Rule's main benefits to other tenants—most notably, the reduction of crime in and near their homes that the Rule may achieve—and to third parties, such as landlords and PHAs—most notably, the reduction in expenses required to address the deterioration of their properties that the Rule may realize. As this section makes clear, these benefits, while real and non-negligible, are limited in scope due to the Rule being simultaneously *underinclusive* (by failing to provide a tool for addressing non-tenant criminal activity in public and affordable housing by individuals not affiliated with residents) and *overinclusive* (by permitting eviction even where there is no tangible benefit to others). The next sub-section will discuss the effectiveness of the One-Strike Rule as a device for shifting the costs of criminal activity from innocent residents to wrongdoers as well as the overall distributive effect of the Rule.

1. Benefits to Other Tenants

As noted, the One-Strike Rule is intended, first and foremost, to benefit other tenants in public-housing facilities, project-based housing, and in privately owned housing in the direct vicinity of the units occupied by Section 8 Voucher holders, by reducing the crime rates in and near their homes.[78] President Clinton championed the One-Strike Rule in 1996 because "[c]riminal gang members and drug dealers are destroying the lives of decent tenants."[79] If it in fact generates a substantial reduction in drug-related and violent crime in and near affordable housing, removal of offending tenants under the Rule would bring considerable benefit to other tenants. However, its effectiveness as a crime-reduction tool is far from clear.

First, the few attempts to empirically assess the effectiveness of the One-Strike Rule as a crime-reduction tool have been hampered by the fact that the Rule was not enacted in isolation, but instead has typically been introduced as part of a larger package of policies.[80] The limited data on the Rule's effectiveness that are available show that PHAs that enacted One-Strike criminal activity policies did often witness a noticeable reduction in crime rates on their premises. However, this result cannot be simply attributed to the policies when their enactment coincides with a vast increase in police presence in the same areas.[81] Thus, while evidence

78. *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002) (holding that "it was reasonable for Congress to permit no-fault evictions in order to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs"); 42 U.S.C. § 11901 (1999) (justifying the legislation which first introduced the One-Strike Rule on grounds of the Federal Government's "duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs").

79. Clinton, *supra* note 2, at 83.

80. Dzubow, *supra* note 5, at 68 (finding that "it is impossible to determine the effect of the 'One Strike' policies in isolation from other crime-fighting measures"); *cf.* John W. Barbrey, *Measuring the Effectiveness of Crime Control Policies in Knoxville's Public Housing*, 20 J. CONTEMP. CRIM. JUST. 6, 21 (2004) ("[I]t is impossible to separate the effects of the coinciding 1996 One-Strike policy, the increased law enforcement presence by external agencies . . . and the . . . level of grant funding that occurred during 1996.").

81. Dzubow, *supra* note 5, at 68.

of the Rule's negative effects on those who get evicted under it is abundant, evidence of its value to those whom it is supposed to benefit is hard to obtain.

Second, there are several principled reasons to doubt the Rule's effectiveness. As noted, it can be practically impossible to comply with the affirmative duty to prevent crime that the Rule imposes on tenants.[82] This impossibility severely limits the extent to which the Rule creates an incentive for tenants to do their part in preventing criminal activity, for they cannot be incentivized to do what they cannot do. In addition, the policy does not target the criminal activity of non-tenants, yet non-tenants may well account for much of the criminal activity in the direct vicinity of public housing facilities and other forms of affordable housing.[83] As the saying goes, it is an ill bird that fouls its own nest, and it appears likely that the "fouling" of criminal activity is at least to a considerable extent done by non-tenants.[84]

Third, in targeting all drug-related criminal activity, the Rule treats the mere use and possession of drugs as indistinguishable from distribution. Perhaps unsurprisingly, many of the cases cited involve simple possession.[85] Unlike distribution, possession and use of a controlled substance is a "victimless crime": It may harm the user, but as this harm is self-inflicted, the user is not a "victim" in the traditional sense.[86] It is unclear at best if the removal of mere users does much (if anything) to improve the quality of life of other tenants.[87] And while tenants who use controlled substances may be more likely to engage in other, non-drug-related criminal activity than non-users, the mere propensity to commit crimes that *do* have victims is not itself a threat to other tenants.[88]

Given that the One-Strike Rule makes it considerably easier to evict tenants who (or whose household members) engage in criminal activity, *some* deterrent effect can certainly be assumed. At the same time, the deterrence effectuated by the Rule appears limited. The One-Strike Rule is simultaneously *underinclusive*, in failing to address and therefore being toothless against any non-tenant criminal activity in and near affordable housing, and *overinclusive*, by targeting criminal activity that does not harm or threaten other tenants as well as by targeting "innocent tenants" who may not be able to comply. Thus, while there is little data available on the effectiveness of the Rule, and such data is difficult (if not impossible) to obtain given that One-Strike eviction policies have typically been adopted contemporaneously with other crime-reduction policies, there are

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82. *See supra* Section III.A.4.

83. Moye, *supra* note 67, at 288–89.

84. *See, e.g.*, Prince of Petworth, "*So where is the breakdown? Are the laws protecting young violent offenders too lenient?*", POPVILLE (Apr. 06, 2017, 2:45 PM), http://www.popville.com/2017/04/shaw-shooting-frustration-dc/ (alleging that perpetrators of recent shooting in Washington, D.C. neighborhood "are not even [the author's] neighbors, they're the people that lost their right to subsidized housing because of their criminal records, who now live in [Maryland] . . . [and who] drive here to hang out where the 5th and 7th St gangs were and pretend their old 'territory' is still theirs.").

85. *See supra* Section II.

86 *See, e.g.*, Douglas Husak, *For Drug Legalization*, *in* THE LEGALIZATION OF DRUGS: FOR AND AGAINST 74 (Douglas Husak & Peter DeMarneffe) (noting that, in contrast to other prohibitions, the criminalization of drug use cannot be explained by the injury it causes to victims because the actions of "[r]ecreational drug users need not harm or violate the rights of anyone").

87. Weil, *supra* note 42, at 176–78.

88. *See* Husak, *supra* note 86, at 67–68 (explaining how the "combination of strong demand and high price" leads drug users "to commit economic crimes to get the money to buy drugs").

principled reasons to believe that if this sort of data were available, it would show that the One-Strike Rule has brought at most modest benefits to other tenants in the form of reduced crime rates in and near their homes.

2. Benefits to PHAs, Landlords, and Other Third Parties

A secondary purpose in enacting the One-Strike Rule was to prevent "the deterioration of the physical environment" of federally assisted housing as a result of drug-related and other criminal activity.[89] The idea is, presumably, that the Rule reduces expenses for landlords and PHAs by rendering it easier to evict tenants who—due to their criminal activity—directly or indirectly damage or otherwise devalue their properties. Many of the same considerations that cast doubt on the suggestion that the Rule effectuates benefits to other tenants carry over to this context: While there is little hard data, and some deterrent effect may be presumed, there are principled grounds to believe that the Rule brings at best limited benefits to landlords and PHAs, because the Rule is both overinclusive and underinclusive.[90]

While the Rule was not explicitly intended to bring benefits to third parties other than tenants, landlords and PHAs, it is worth noting that the Rule is unlikely to bring any unintended benefit to these parties. Insofar as the One-Strike Rule is an effective tool in deterring crime in or near affordable housing, it is not clear whether it merely serves to change the location of criminal activity, or if it actually reduces the overall crime rate. If the latter is the case, the Rule is an overall cost-saver, and even if this is not a directly intended effect, it may render the Rule a sound piece of social policy. If the former is the case, however, the Rule merely shifts the costs of the criminal activity from covered housing providers (who can evict offending tenants) to non-covered housing providers (who cannot evict the tenants with the same ease), so that the net benefit to third parties is zero. This phenomenon, which is known as "crime displacement," is a common side effect of increased policing efforts.[91] If, and to what extent, the One-Strike Rule serves to create mere crime displacement as opposed to crime reduction is a question that can ultimately only be decided on the basis of empirical data that are not presently available. But it seems likely that at least some of the crime is merely displaced. For one, offending tenants will move elsewhere, and may well take their criminal behavior with them.[92] And second, some of the tenants (and other covered persons) who are effectively deterred from engaging in criminal activity in or near their

89. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002).

90. *See supra* Section III.B.1.

91. *See, e.g.*, Shane D. Johnson, Rob T. Guerette & Kate Bowers, *Crime Displacement: What We Know, What We Don't Know, and What It Means for Crime Reduction*, 10 J. EXPERIMENTAL CRIMINOLOGY 549, 550 (2014) (providing overview of extant research on crime displacement).

92. One strand in crime displacement research focuses on the role of environmental familiarity in criminal activity, on the hypothesis that familiarity help facilitates crime, and that being prevented from acting within a familiar environment leads to crime reduction as opposed to crime displacement. Forced relocation of tenants through eviction may well temporarily prevent them from acting in a familiar environment (if they do not relocate within the same area), but will eventually lead to a new familiar area, and thus to displacement. If this theory of displacement is correct, then the *threat* of eviction—which, if effective, serves to discourage criminal activity in familiar areas—may serve to actually reduce crime, whereas actually evicting tenants merely displaces crime. *See id.* at 552–53.

homes may simply continue to engage in such behavior elsewhere.[93] Thus, considering its effect on other third parties besides landlords and PHAs does little to alter the overall evaluation of the Rule.

Given the considerations supporting skepticism about the Rule's effectiveness that carry over from the "other tenants" context and the likelihood that the Rule has a cost-shifting (as opposed to cost-reducing) character, there is good reason to conclude that the value of the One-Strike Rule to landlords, PHAs, and other third parties is limited at best. While, again, *some* deterrent effect can be presumed, the Rule is unlikely to bring considerable benefit to landlords, PHAs, and other third parties.

C. Allocation of Burdens and Benefits

So far, this section has argued that the One-Strike Rule imposes considerable burdens on tenants and third parties and likely creates only limited benefits to other tenants, landlords, PHAs, and other third parties. While empirical data is lacking, the argument so far supports the conclusion that the burdens are likely to outweigh the benefits. However, a simple weighing of the burdens that the Rule imposes on the one hand and the benefits it brings on the other does not provide a fully adequate assessment of whether the Rule is morally defensible. This kind of assessment must also take into account how the burdens and benefits are distributed within the population, for not every distribution of otherwise identical burdens and benefits is morally equivalent.[94]

1. The One-Strike Rule as a Cost-Shifting Device

As compared with a more flexible policy for responding to criminal activity by tenants, the One-Strike Rule shifts costs from non-offending tenants and housing providers to tenants who (or whose household members) engage in criminal activity. Whereas other tenants and housing providers bear the costs of the extended presence of neighbors and leaseholders who engage in criminal activity on the premises under a more flexible policy that makes it more difficult to evict offending tenants, the One-Strike Rule puts the costs associated with combating criminality entirely on the shoulders of tenants who engage in or are

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93. Even if familiarity of environment is an important factor in explaining the extent to which anti-crime measures lead to crime reduction as opposed to crime displacement, it is unlikely to constitute the entirety of the explanation. For one, some level of crime may be resistant to anti-crime measures. *Id.* at 553. In addition, even if the One-Strike Rule successfully prevents public housing facilities and other affordable housing from becoming a crime "hotspot," *id.* at 553–54, presumably there will often be other "hotspots" where the very same individuals can continue to engage in criminal activity—meaning that there is mere displacement, not reduction.

94. A utilitarian evaluation of policies assigns no significance to how burdens and benefits are allocated, and instead only considers whether policies generate the maximum satisfaction of preferences. *See* JOHN RAWLS, A THEORY OF JUSTICE 23 (2nd ed. 1999) ("The striking feature of the utilitarian view of justice is that it does not matter . . . how [the sum of satisfaction of the rational desires of individuals] is distributed among individuals any more than it matters . . . how one man distributes his satisfactions over time."). By rejecting the significance of how burdens and benefits are distributed, "[u]tilitarianism does not take seriously the distinction between persons." *Id.* at 24. Taking the "separateness of persons" seriously requires giving weight to how burdens and benefits are distributed.

believed to engage in criminal activity. In light of this effect, the Rule's allocation of burden and benefits may strike one as morally appropriate, as it may appear that under the Rule, the cost of combating crime in affordable housing is shifted from innocent bystanders and victims (other tenants, housing providers) to offenders (tenants engaging in criminal activity).[95]

The assessment of the allocation of burdens and benefits just given is, however, both incomplete and at least partially inaccurate. First, as noted, it is far from clear that the Rule actually reduces the costs of criminal activity in affordable housing for bystanders and victims to a substantial degree, and in fact there is reason to believe its beneficial effects are limited in nature.[96] Second, given its broad conception of "other covered persons" and low evidentiary burdens on landlords and PHAs, the Rule shifts the costs of crime prevention onto not just (i) actual offenders, that is, tenants who actually engage in criminal activity, but also to (ii) tenants whose household members and regular guests engage in criminal activity, and to (iii) tenants who (or whose household members and guests) are merely suspected of criminal activity, but who would never be convicted in a criminal court on the basis of the evidentiary record underlying their eviction.[97] Third, given the broad coverage of "criminal activity," the Rule imposes costs on tenants who (or whose household members) engage in victimless crimes such as recreational drug use, and these costs do not correspond to any discernable benefits to other tenants or housing providers.[98] For these reasons, conceiving of the Rule as a measure that shifts the costs of crime from victims and bystanders to offenders conflicts with several essential features of the One-Strike Rule. The Rule is a poorly designed device if its aim is to place the burden of crime prevention on the shoulders of offenders.

2. Imposing Burdens on the Least Well-Off

In addition to its shortcomings as a tool for shifting costs from the innocent to the guilty, the One-Strike Rule also conflicts with the precept that burdens on the least well-off members of society are harder to justify than burdens placed on those who are better off, both because the burdens of the Rule are placed on people in low economic brackets and because the Rule will predictably have a disparate impact on racial and ethnic minorities, women, and people with disabilities.[99]

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95. Insofar as it shifts the costs of combating crime from victims and bystanders to offenders, the Rule can be characterized as distributing costs in accordance with "moral desert." *See, e.g.*, *id.* at 273–77 (describing "common sense" idea that "the good [and bad] things in life . . . should be distributed according to moral desert").

96. *See supra* Section III.B.

97. *See supra* Sections II.B and II.C.

98. *See supra* Section II.A and III.B.1.

99. *See, e.g.*, Stinson, *supra* note 1, at 466 (noting that "the disproportionate impact of the drug laws upon minority groups is well documented, as is the disproportionate percentage of minorities living in public housing"); Dzubow, *supra* note 5, at 69–70 (noting how, given demographic make-up of public housing tenants, One-Strike Rule is likely to have a disproportionate impact on racial minorities); Anne Fleming, *Protecting the Innocent: The Future of Mentally Disabled Tenants in Federally Subsidized Housing after* HUD v. Rucker, 40 HARV. C.R.-C.L. L. REV. 197, 211–19 (2005) (discussing how strict liability for third-party crime impacts tenants with disabilities).

As a general rule, burdens placed on the shoulders of those who are already worse-off are harder to justify than burdens imposed on those who are better-off.[100] This principle does not directly bear on shifting costs from one group of tenants in public housing or project-based housing (innocent neighbors) to another group of tenants (offenders) residing in the same or in nearby facilities, on the assumption that both groups will occupy comparable economic positions. However, the principle does bear on the appropriateness of shifting costs from neighbors and other nearby tenants in non-subsidized housing to Section 8 Voucher holders. There is no ground for assuming that these other tenants occupy similar economic positions as the voucher holders—after all, the vouchers serve to provide access to otherwise inaccessible units for low-income (and mostly, very low-income) households.[101] Therefore, insofar as the One-Strike Rule serves to shift costs from landlords and PHAs to offending tenants in public housing facilities and project-based housing and to Section 8 Voucher holders, it shifts costs from federally funded organizations and private landlords to low-income households. In both of the latter two scenarios, then, the One-Strike Rule serves to shift costs from comparatively better-off individuals and organizations to individuals and families occupying the lowest rungs on the socio-economic ladder. Transferring burdens onto the shoulders of those who are already among the worst off in society is, arguably, the opposite of what justice requires.

The tenants who are put at risk of eviction are not just at a disadvantage due to their economic position. In addition, as several commentators have noted,[102] the One-Strike Rule disproportionately affects a range of vulnerable populations, given that racial minorities, women, and people with disabilities are all overrepresented in all forms of federally funded affordable housing relative to the population as a whole.[103] Absent reason to believe otherwise, one can reasonably expect that the demographic make-up of the tenant population that fears and faces eviction under the One-Strike Rule will closely resemble the demographic make-up of the general tenant population occupying affordable housing. And insofar as there are reasons to believe that particular groups are more likely than others to be targeted under the Rule, those reasons support the view that minorities, women, and people with disabilities are *more* likely to be targeted, rather than less.[104] All

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100. *See* RAWLS, *supra* note 94, at 10–15, 52–93 (defending idea that justice requires making the position of the worst-off members of society as good as possible); *see also* Michael Weber, *Prioritarianism*, 9 PHIL. COMPASS 756, 756 (2014) (discussing view that "increases in welfare are worth less, in moral terms, the better off the recipient is in absolute terms"); Derek Parfit, *Another Defense of the Priority View*, 24 UTILITAS 399, 401 (2012) (defending idea that "we have stronger reasons to benefit people the worse off these people are").

101. *See* CTR. ON BUDGET & POL'Y PRIORITIES, *supra* note 7, at 2 (observing that "[t]wo-thirds of assisted households [in the federal housing programs'] are extremely low-income," meaning that the household income does "not exceed the higher of 30 percent of the local median or the federal poverty line.").

102. *See* Stinson, *supra* note 1, at 466; Dzubow, *supra* note 5, at 69–70; Fleming, *supra* note 99, at 211–19.

103. NAT'L LOW INCOME HOUS. COALITION, 2 HOUS. SPOTLIGHT 2–3 (Nov. 2012), http://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf.

104. For more on the disparate impact of the One-Strike Rule on these populations, see generally Michelle Y. Ewert, *One Strike and You're Out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violates Due Process and Fair Housing Principles*, 32 HARV. J. ON RACIAL & ETHNIC JUST. (forthcoming 2017).

these characteristics—belonging to a racial or ethnic minority, being a woman, and living with a disability—are protected by a range of federal anti-discrimination statutes,[105] and for good reason: People with these characteristics have historically been and presently continue to be the subject of disparate treatment and are therefore at a structural disadvantage.[106] Despite the existence of these statutes, these groups continue to be the subject of persistent discrimination when seeking a new home.[107] In virtue of having a disproportionate impact on groups that are already at a structural disadvantage, the One-Strike Rule places burdens on the shoulders of those who are least able to carry them. In doing so, the Rule offends basic precepts of justice.

IV. LESSENING THE IMPACT OF THE ONE-STRIKE RULE AT THE STATE AND LOCAL LEVEL

Like criticisms, proposals for reforming the One-Strike Rule are as old as the Rule itself.[108] Proposals for reform have generally focused on reform at the federal level, and understandably so: If the problem is a federal policy, then the best solution to the problem is reform of that federal policy.[109] While discussion of what shape reform at the federal level should take is valuable, there is strong reason to believe that the current administration is unlikely to enact any proposal that remedies the injustice of the One-Strike Rule. First, the administration's budget proposal that was released in March 2017 calls for a fourteen percent cut in the federal affordable housing budget and made clear that this cut is to be achieved by a reduction in direct rent subsidies in the amount of $300 million.[110] In addition, statements by Trump administration officials on drugs and crime are eerily reminiscent of the rhetoric of the Reagan and Clinton eras, during which the One-Strike Rule was crafted.[111] Finally, Ben Carson, current HUD Secretary, has

105. *See* 42 U.S.C. § 2000e-2(a) (2012) (prohibiting employment discrimination because of race, sex, and national origin); 42 U.S.C. § 12112(a) (2012) (prohibiting employment discrimination because of disability); 42 U.S.C § 3604(a) (2012) (prohibiting housing discrimination because of race, sex, or national origin).

106. *See, e.g.*, 42 U.S.C. § 12101(a)(2) (2012) (finding that "historically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem").

107. *See, e.g.*, U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012 xi (2012), https://www.huduser.gov/portal//Publications/pdf/HUD-514_HDS2012.pdf (noting that while "the most blatant forms of housing discrimination . . . have declined since the first national paired-testing study in 1977," other forms of discrimination persist, such as "providing information about fewer units" to tenants of a certain race or gender; and these "raise the costs of housing search for minorities and restrict their housing options.").

108. *See, e.g.*, Hellegers, *supra* note 59, at 351–59.

109. *See id.* (proposing amendment to 42 U.S.C. § 1437d).

110. Lauren McCauley, *Trump's Budget Draft Takes Axe to Low Income Housing Funds*, COMMON DREAMS (Mar. 9, 2017), https://www.commondreams.org/news/2017/03/09/trumps-budget-draft-takes-axe-low-income-housing-funds.

111. *See, e.g.*, Rachel Weiner & Sari Horwitz, *Sessions Vows Crackdown on Drug Dealing and Gun Crime*, WASH. POST (Mar. 15, 2017), https://www.washingtonpost.com/local/public-safety/sessions-vows-crackdown-on-drug-dealing-and-gun-crime/2017/03/15/08d831de-08f5-11e7-93dc-00f9bdd74ed1_story.html (noting that Attorney General Sessions believes that the "solution" to an (alleged) increase in crime is "to 'hammer' drug dealers and other criminals" and bring "back the drug abstinence campaigns of the 1980s and 1990s.").

expressed clear disdain for federal attempts to address unfairness in the provision of affordable housing,[112] and argued that reliance on public assistance "fosters dependency on 'elites.'"[113] In light of these proposals and attitudes, it seems highly unlikely that the current administration will do anything to protect tenants suspected of criminal activity, for such action will do nothing to curb the costs of federal housing assistance programs and goes directly against the "tough on crime" rhetoric that current officials are fond of.

Fortunately, there is at least some room for progress at the state and local level. The following section begins with a discussion of why the threat of federal preemption does not completely foreclose opportunities for remedial action at the local level. It then sets out three possible policies that could both survive a preemption challenge and bring meaningful change to the lives of tenants who live under the threat of eviction under the One-Strike Rule.

A. The Threat of Federal Preemption

Federal law regulates many aspects of affordable housing, but not all, and given that housing is an area of law traditionally left to the states, courts should, when possible, presume that state law is compatible with federal law.[114] While the threat of federal preemption looms large over any attempt to soften the blow of the One-Strike Rule at the state or local level, there is room for enacting some protective measures, including "good cause" laws, "right to cure" laws, and "civil Gideon" legislation creating the right to free legal counsel in landlord-tenant court.[115]

Under the Supremacy Clause, which provides that the laws of the United States "shall be the supreme Law of the Land," any state or local law that is found to be incompatible with federal law is considered to be preempted and therefore "without effect."[116] Federal preemption of state or local laws can be either express, by means of an explicit statutory or regulatory provision, or implied.[117] Implied preemption, in turn, comes in two varieties: Field preemption and conflict preemption. Under the theory of field preemption, a court can infer a congressional intent to preempt state law from the fact that a federal scheme of regulation of a field is so pervasive that there is no room left to supplement it at the state level.[118] Where Congress has not sought to occupy the field, federal law can nonetheless preempt state law when the two conflict. Conflict preemption, in turn, also comes in two kinds: Impossibility preemption and obstacle preemption. Under the theory of impossibility preemption, a court may infer that Congress intended to preempt

112. Ben S. Carson, *Experimenting with Failed Socialism Again*, WASH. TIMES (July 23, 2015), http://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish- (calling HUD rule imposing a duty to "affirmatively further fair housing" a "government-engineered attempt" to "legislate racial equality" on a par with the "failed socialist experiments" of the past).

113. Lorraine Woellert & Kyle Cheney, *Ben Carson on Key Housing Issues*, POLITICO (Jan. 12, 2017 05:21 AM), http://www.politico.com/story/2017/01/ben-carson-housing-233507.

114. *See infra* Section IV.A.1.

115. *See infra* Sections IV.B.1 through IV.B.3.

116. U.S. CONST. art. VI, cl. 2; Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

117. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

118. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

state law when it is impossible to comply with both federal and state law.[119] Alternatively, under the theory of obstacle preemption, a court may infer an intent to preempt when, even though compliance with both federal and state law is technically possible, enforcement of a state statute will frustrate the achievement of the purpose of the federal statute or regulation, so that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[120]

When Congress legislates in areas that have traditionally been committed to the authority of the states, courts generally presume that Congress did not intend to preempt the exercise of the States' police power in the area.[121] Given this presumption, federal statutes and regulations are to be construed in ways that avoid a finding of incompatibility with state or local law, unless the court finds a "clear congressional intent" to preempt regulation of the same matter by the States.[122] Landlord-tenant relations are traditionally within the scope of the States' police powers, and thus, the States "have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular."[123] Thus, the presumption against preemption applies to federal housing law, meaning that courts should, wherever possible, construe state and federal housing law so as to render them compatible. Given that the federal statutes governing public housing and the two Section 8 programs do not contain express preemption provisions,[124] the presumption of compatibility should apply to any aspect of the landlord-tenant relation not expressly covered by federal law, and it should serve as the starting point when courts are evaluating protective measures for vulnerable tenants living in federally subsidized affordable housing.[125]

Courts across the country have upheld state and local measures that help low-income tenants, such as bans on source of income discrimination (which protect Section 8 Voucher holders against being rejected on the basis of being a program recipient)[126] and rent control measures (which protect tenants against steep

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119. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–143 (1963).

120. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

121. *See, e.g.*, *Maryland,* 451 U.S. at 746; *Rath Packing*, 430 U.S. at 525; *Rice*, 331 U.S. at 230.

122. *Rice*, 331 U.S. at 230.

123. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982).

124. On the absence of an express preemption provision in the Section 8 statute, 42 U.S.C. § 1437f (2012), see, e.g., Comm'n on Human Rights & Opportunities v. Sullivan Assocs., 739 A.2d 238, 246 (Conn. 1999) ("On its face, 42 U.S.C. § 1437f contains no express preemption clause."). On the absence of an express provision in the Public Housing statute, 42 U.S.C. § 1437d (2012), see, e.g., Hous. Auth. of Covington v. Turner, 295 S.W.3d 123, 126–28 (Ky. Ct. App. 2009) (finding that "there is no prohibition in the federal law against affording a public housing tenant the right to remedy the breach").

125. *See, e.g.*, Hosford v. Chateau Foghorn LP, 145 A.3d 616, 622–23, 633 (Md. 2016) (discussing presumption against preemption in context of state statute governing eviction of tenants from affordable housing).

126. *See* Bourbeau v. Jonathan Woodner Co., 549 F. Supp. 2d 78, 87–89 (D.D.C. 2008); Timkovsky v. 56 Bennett, LLC, 881 N.Y.S.2d 823, 831 (N.Y. 2009); Montgomery Cty v. Glenmont Hills Assocs. Privacy World at Glenmont Metro Centre, 936 A.2d 325, 334–39 (Md. 2007); *Comm'n on Human Rights*, 739 A.2d at 245–46; Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1111–15 (N.J. 1999); Att'y Gen. v. Brown, 511 N.E.2d 1103, 1105–07 (Mass. 1987); Edwards v. Hopkins Plaza Ltd. P'ship, 783 N.W.2d 171, 175–79 (Minn. Ct. App. 2010). Most courts upholding laws prohibiting discrimination on the basis of source of income found that, because Section 8 vouchers constitute a "source of income" within the meaning of the state's anti-discrimination statute, such laws do limit owner discretion, but "state and local law may [nevertheless] properly provide additional protections for recipients of Section 8 rent

increases in rent when they seek to renew their lease).[127] These rulings are undoubtedly valuable to tenants who receive housing assistance, but they do not bear directly on the question of how to protect tenants against eviction under the One-Strike Rule. Unfortunately—yet unsurprisingly—the record on measures that do provide more immediate protections for tenants against the One-Strike Rule is considerably more mixed, as the next sections will show. Nonetheless, there is room for enacting such measures.

B. Realistic Protective Measures

1. "Good Cause" Laws and Their Analogues

Various state and local governments have enacted laws under which tenants in rent-controlled properties can only be evicted for "good cause."[128] These laws typically prohibit eviction for all reasons except those explicitly enumerated in the applicable provision.[129] Courts have generally held that such "good cause" eviction laws are not preempted by federal housing legislation, even though these

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subsidies even if those protections could limit an owner's ability to refuse to participate in the otherwise voluntary program." *Timkovsky*, 881 N.Y.S.2d at 831 (citing Kosoglyadov v. 3130 Brighton Seventh LLC, 54 A.D.3d 822, 824 (N.Y. App. Div. 2008)); *see also Bourbeau*, 549 F. Supp. 2d at 87–89; *Glenmont Hills*, 936 A.2d at 336; *Comm'n on Human Rights*, 739 A.2d at 245–46; *Franklin Tower*, 725 A.2d at 619; *Brown*, 511 N.E.2d at 1107. By contrast, the court in *Edwards* reasoned that, given that participation in the Section 8 program is voluntary, and because prohibiting owners and landlords from rejecting applicants and refusing to renew leases of existing tenants on the basis of their wish to cover part of their rent with a Section 8 voucher makes participation in the program mandatory, such actions must not be prohibited by the state's anti-discrimination statute. 783 N.W.2d at 175–79; *see also* Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272, 1282–83 (7th Cir. 1995) (suggesting in dicta that Section 8 vouchers should not be considered to be "source of income" within the meaning of Wisconsin anti-discrimination statute because opposite holding would make federal program mandatory). This way of avoiding a finding of conflict preemption is in practice a gutting of the state's anti-discrimination statute.

127. *See* Rosario v. Diagonal Realty, LLC, 872 N.E.2d 860, 863–65 (N.Y. 2007), *cert. denied*, 552 U.S. 1141 (2008); Mott v. N.Y. State Div. of Hous. & Cmty Renewal, 211 A.D.2d 147, 151–54 (N.Y. App. Div. 1995); *see also* Topa Equities, Ltd. v. City of L.A., 342 F.3d 1065, 1069–72 (9th Cir. 2003) (dismissing federal preemption challenge against local rent control measure under the National Housing Act, 12 U.S.C. § 4122(a) (2012)).

128. *See* Andrea B. Carroll, *The International Trend Toward Requiring Good Cause for Tenant Eviction: Dangerous Portents for the United States?*, 38 SETON HALL L. REV. 427, 465–72 (2008) (discussing trend towards adoption of state and local "good cause" eviction laws covering private landlords across the United States). Note that under HUD regulations, PHAs and landlords leasing to Section 8 Voucher holders can evict tenants only for "good cause"; however, the standard for what constitutes "good cause" under the regulations explicitly incorporates the One-Strike Rule. 24 C.F.R. § 247.3(a) (2017) (covering non-section 8 subsidized housing, providing that "a landlord may not terminate any tenancy in a subsidized project except . . . [for] (1) Material noncompliance with the rental agreement; (2) Material failure to carry out obligations under any state landlord and tenant act, (3) Criminal activity by a covered person . . . or alcohol abuse by a covered person . . . [or for] (4) Other good cause."); 24 C.F.R. § 982.310(a) (2017) (providing that an "owner may not terminate the tenancy except . . . [for] (1) Serious violation . . . or repeated violation of the terms and conditions of the lease; (2) Violation of federal, State, or local law that imposes obligations on the tenant in connection with the occupancy or use of the premises; or (3) Other good cause."). The federally created "good cause" standard therefore does not protect tenants against the unjustly imposed costs of the One-Strike Rule.

129. *See, e.g.*, N.J. STAT. ANN. 2A:18-61.1 (2017); MASS GEN. LAWS 121B § 32 (2017).

laws limit the discretion that landlords and PHAs enjoy under the federal regime.[130] As such, these laws have the potential to soften the blow of the One-Strike Rule. While courts across the country have rejected a range of appeals to "good cause" laws by tenants facing eviction under the One-Strike Rule, a close conceptual analogue of such a statute may both provide protection to tenants in criminal activity eviction cases and be capable of surviving a federal preemption challenge.

Prior to the Supreme Court's decision in *Rucker*,[131] courts in various jurisdictions held that the "good cause" requirement at minimum protects innocent tenants against eviction for criminal activity by other household members and guests.[132] "Good cause" requirements do not provide protection against all costs that are unjustly imposed on them by the One-Strike Rule, as courts have interpreted these laws primarily as providing protecting against eviction for the criminal activity of other covered persons where tenants were unaware of and unable to prevent that activity. These laws thus do not protect tenants who face accusations of criminal conduct that are not based on evidence that could secure a conviction in criminal court, or accusations of criminal activity that does not harm other tenants, such as recreational drug use. Although typical "good cause" laws would have left many of the costs imposed by the One-Strike Rule in place even pre-*Rucker*,[133] they would nonetheless help to mitigate those costs—if they could survive a federal preemption challenge. However, post-*Rucker*, courts have by and large declined to rule in favor of tenants facing eviction for criminal conduct on grounds of an absence of "good cause," finding instead that insofar as a state law requirement of "good cause" prohibits eviction, state law is preempted by the federal statutes governing affordable housing with respect to criminal activity evictions.[134]

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130. *See, e.g.*, Barrientos v. 1801-1825 Morton LLC, 583 F.3d 1197, 1207–15 (9th Cir. 2009); Hous. Auth. of Bayonne v. Mims, 933 A.2d 613, 617–21 (N.J. 2007); Maglies v. Estate of Guy, 936 A.2d 414, 419–21 (N.J. 2007); Carter v. Md. Mgmt. Co., 835 A.2d 158, 162–69 (Md. 2003); E. Carolina Reg'l Hous. Auth. v. Lofton, 767 S.E.2d 63, 69–71 (N.C. Ct. App. 2014), *aff'd on other grounds*, 789 S.E.2d 449 (N.C. 2016).

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

132. *See, e.g.*, Spence v. Gormley, 439 N.E.2d 741, 745–46 (Mass. 1982) (holding that "when termination is based on prohibited conduct by a tenant's household member, [good] 'cause' requires that there be some connection between the tenant and the conduct underlying the termination," so therefore, "if the tenant can show that she could not have foreseen and prevented [the prohibited conduct], there is no 'cause' to evict her"); Charlotte Hous. Auth. v. Patterson, 464 S.E.2d 68, 72 (N.C. Ct. App. 1995) (holding that "good cause for eviction does not exist when a public housing tenant is not personally at fault for a breach of the criminal activity termination provision of a public housing lease by a member of the tenant's household"); Woodland Manor Apts. v. Flowers, 39 Pa. D. & C.4th 202, 209 (Ct. C.P., Lehigh Cty. 1998) ("[W]here, as here, a public housing tenant is not personally at fault–by commission or omission–for the drug-related activity of a member of her household or guest, no good cause exists for termination of the lease and eviction."); *see also* Del. Cty. Hous. Auth. v. Bishop, 749 A.2d 997, 1002 (Pa. Commw. Ct. 2000) (holding that the legislative history of 42 U.S.C. § 1437f supports the conclusion that when a tenant either "had no knowledge of the criminal activity or took reasonable steps to prevent it . . . good cause to evict . . . [does] not exi[s]t").

133. *See supra* Section III.A.

134. *See, e.g.*, Bos. Hous. Auth. v. Garcia, 871 N.E.2d 1073, 1079–80 (Mass. 2007) (holding that although "Massachusetts Law still requires 'cause' before a public housing tenancy may be terminated," state law is preempted insofar as tenants can appeal to their lack of knowledge of or control over the criminal activity of other covered persons to establish lack of "good cause"); Hous. Auth. of Norwalk v. Brown, 19 A.3d 252, 255–56 (Conn. App. Ct. 2012) (finding "good cause" for eviction even though tenant's drug use occurred off-premises).

Whereas appeals to explicit state-created "good cause" requirements have mostly been unsuccessful when tested by a federal preemption challenge, conceptually related state statutes that invest courts with discretion to assess the equity of a request to evict tenants for criminal activity may provide a viable alternative. In *Hosford v. Chateau Foghorn LP*, Maryland's Court of Special Appeals recently reversed a grant of summary judgment for a landlord who sought to evict a tenant under the One-Strike Rule for possession of a small amount of marijuana for medicinal purposes by appeal to a state statute that, while eschewing explicit imposition of a "good cause" requirement, is nonetheless highly similar to such laws in its operation.[135] Under Maryland law, a tenant can be evicted for breaching a lease only when the court determines that the breach was "substantial" and "warrants an eviction."[136] The *Hosford* court found that this statutory language vests courts with the discretion "to weigh all of the relevant factors before declaring a forfeiture and evicting the tenant," and these factors include "the actual loss or damage caused by the violation at issue, the likelihood of future violations, and the existence of alternative remedies."[137] Under this approach, the eviction of, say, a tenant for possession of a single marijuana plant may well be found "unduly harsh" and therefore inequitable.[138]

Recognizing that neither the "express" nor the "field" preemption theory applies in the landlord-tenant context, the *Hosford* court held that state laws that "provide the tenant with additional protections" over and above those provided by federal affordable housing law, such as the statute at issue in this case, are preempted only when they "cause major damage to clear and substantial federal interests embedded in the federal law"[139]—that is, when they present an obstacle to achieving the aims of the federal regime. The federal interests underlying the One-Strike Rule, which the court identified as "ensuring that federally-subsidized housing remains a safe and drug-free environment" and "preserving a landlord's ability to initiate eviction actions against tenants that threaten the former goal," are not harmed by investing courts with the discretion to weigh equitable factors in determining whether a breach of the lease terms by way of criminal activity is sufficiently substantial to warrant eviction.[140] The court held that a proper balance between federal interests and state law is struck when courts presume "that drug-related criminal activity is a breach that normally warrants eviction" while permitting that "this presumption may be rebutted by equitable factors that arise in a given case."[141]

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135. Hosford v. Chateau Foghorn LP, 145 A.3d 616, 617–18 (Md. Ct. Spec. App. 2016). The Maryland Court of Special Appeals tied the requirement imposed by Maryland law and a "good cause"-standard together in an earlier case, Grady Mgmt., Inc. v. Epps, 98 A.3d 457, 470 (Md. Ct. Spec. App. 2014), where the court held that the requirement imposed by Maryland's statute "does not . . . impose on a landlord seeking to terminate a project-based subsidized lease a 'more stringent' demonstration of good cause than necessary." *See also Hosford*, 145 A.3d at 632–33.

136. MD. CODE ANN., REAL PROP. § 8-402.1(b)(1) (West 2017).

137. *Hosford*, 145 A.3d at 624 (citing Brown v. Hous. Opportunities Comm'n, 714 A.2d 197, 203 (Md. 1998)) (emphasis omitted).

138. *Id.* at 633–34 (vacating grant of summary judgment to landlord and remanding case to trial court for weighing of equitable factors).

139. *Id.* at 621, 623 (internal quotation marks and citation omitted).

140. *Id.* at 633.

141. *Id.*

The Maryland statute at issue in *Hosford* contains only the bare-bones assertion that a breach be "substantial" enough to "warrant eviction"[142]—the more demanding interpretation it received in *Hosford* is entirely judge-created.[143] As such, a law that mirrors the Maryland statute may not provide tenants with the protections they need in other jurisdictions even if the law in question contains the exact same language.[144] However, a state statute that *explicitly* directs judges in landlord-tenant courts to consider factors such as "the actual loss or damage caused" by the breach of a lease provision that prohibits criminal conduct, "the likelihood of future violations, and the existence of alternative remedies"[145] can potentially go a long way toward mitigating the costs that the One-Strike Rule imposes on vulnerable tenants. In particular, it would address the issue of penalizing tenants for crimes that do not harm other tenants,[146] and could potentially put a brake on evictions for criminal conduct of persons other than the tenants, where, e.g., tenants have the option of removing the offenders from the household, which can be a less costly alternative to eviction of the entire household.[147]

Maryland's highest state court, the Court of Appeals, granted certiorari in *Hosford* and affirmed the decision of the Court of Special Appeals on August 28, 2017.[148] By agreeing that the statute as construed by the Court of Special Appeals is not federally preempted, the Court of Appeals helped pave the way for other jurisdictions to develop a law modeled on that interpretation—that is, a law that explicitly directs landlord-tenant courts to consider the equitable factors listed in *Hosford*. Legislation along these lines presents a highly promising option for action at the state or local level that can be both effective in lessening the impact of the One-Strike Rule and capable of surviving a federal preemption challenge.

2. "Right to Cure" Laws

A second type of law that can potentially protect tenants against the injustice of the One-Strike Rule is a "right to cure" law, which gives tenants who, according to their landlords, have breached the terms of their lease a definite period during which they are granted the opportunity to remedy the circumstances underlying the

142. MD. CODE ANN., REAL PROP. § 8-402.1(b)(1) (West 2017).

143. *Hosford*, 145 A.3d at 633.

144. The same can be said about state statutes that prohibit evicting tenants when "the forfeiture is unconscionable," such as the North Carolina statute at issue in E. Carolina Reg. Hous. Auth. v. Lofton, 767 S.E.2d 63, 67 (N.C. App. 2014). The court in *Lofton* also construed the state statute at issue, N.C. GEN. STAT. § 42–26 (2017), as giving landlord-tenants courts discretion to consider equitable factors, and held that under this interpretation, the state statute was not preempted. 767 S.E.2d at 70–71. However, given the difficulty of proving unconscionability, see Anne Fleming, *The Rise and Fall of Unconscionability as the 'Law of the Poor'*, 102 GEO. L.J. 1383, 1436 (2014) (noting that while doctrine of unconscionability has "survived," it "did not flourish" and is no longer a doctrine geared towards protecting "the poor"), a state law modeled on the North Carolina statute would provide at best highly uncertain benefits to tenants.

145. 145 A.3d at 624 (citation omitted).

146. *See supra* Section III.B.1.

147. Thus, this sort of measure would go some way toward addressing the concern that tenants are penalized despite not being at fault, see *supra* section III.A.4, although the remedy indicated in the text shifts the costs completely onto non-tenant third parties (viz., whoever is removed from the household), and is therefore clearly an imperfect solution, see *supra* section III.A.5.

148. Chateau Foghorn LP v. Hosford, No. 73, 2017 WL 3699643, at *27 (Md. Aug. 28, 2017).

breach.[149] In theory, a "right to cure" law could provide tenants with a complete defense when facing eviction for criminal activity in all cases where the criminal activity can be discontinued. As long as the tenant (or an offending household member) refrains from engaging in criminal activity in a timely fashion, the breach of the lease has—technically, at least—been cured, and thus landlords and PHAs would be barred from evicting the tenant. This broad interpretation of a "right to cure" statute blunts the force of the One-Strike Rule almost entirely,[150] which would be good news from the perspective of those tenants who would otherwise be subject to the threat of eviction under the Rule, except for the fact that this directly invites a plausible preemption challenge: "The very ease of thwarting the landlord's right to evict for commission of . . . a crime [by appeal to a 'right to cure' law] would frustrate the purpose of an anticrime provision that permits eviction for 'any' criminal activity."[151] By directly frustrating the purpose of the federal law, the "right to cure" law would clearly stand as an obstacle to the federal regime, and therefore be preempted.[152]

Can "right to cure" laws be interpreted in a narrower way, allowing them to mitigate the costs imposed by the One-Strike Rule without undercutting the Rule entirely? While some courts have expressed incredulity at the idea that there is an available narrower interpretation,[153] other courts have had no trouble in finding an interpretation that renders the state's "right to cure" law and the federal regime consistent. In *Housing Authority of Covington v. Turner*,[154] the Kentucky Court of Appeals held that a tenant who faced eviction after drugs were recovered from the room in her apartment where her nephew stayed when he visited her was entitled to the opportunity to remedy the breach by refusing her nephew further entry to her apartment. The *Turner* court held that giving the tenant the right to cure the breach in a case such as this one does not defeat the purpose of the federal statute and in fact "may further the objective of discouraging illegal drug use on public

149. *See, e.g.*, D.C. CODE § 42-3505.01(b) (2017) ("A housing provider may recover possession of a rental unit where the tenant is violating an obligation of tenancy and fails to correct the violation within 30 days after receiving from the housing provider a notice to correct the violation or vacate.").

150. Scarborough v. Winn Residential L.L.P./Atlantic Terrace Apts., 890 A.2d 249, 257 (D.C. 2006) (holding that if "the idea of correcting criminal activity" requires only that "the tenant [does] not . . . engage in such activity again," then the One-Strike Rule is rendered "a virtual nullity").

151. *Id.*

152. *Id.* ("Applying the cure provision of D.C. CODE § 42–3505.01(b) would stand as a pronounced obstacle to the exercise of this authority. Not for nothing are lease provisions of the kind involved here described as manifesting a federal 'One-Strike Policy.'"); Milwaukee City Hous. Auth. v. Cobb, 860 N.W.2d 267, 276–77 (Wis. 2015) ("We hold that Wis. Stat. § 704.17(2)(b) is preempted . . . because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . A right to cure a lease violation that constitutes drug-related criminal activity conflicts with the federal Anti–Drug Abuse Act in two related respects. First, a right to cure past illegal drug activity is counter to Congress' goal of providing drug-free public housing. Second, a right to cure past illegal drug activity is in conflict with Congress' method of achieving that goal by allowing eviction of tenants who engage in drug-related criminal activity.") (internal quotation marks and citation omitted).

153. *See* D.C. Hous. Auth. v. Cherry, No. 03lt15931, 2004 D.C. Super. LEXIS 25, at *7 (D.C. Super. Ct. Jan. 20, 2004) (arguing that allowing tenants to insist on their right to remedy a breach when their breach consists in criminal activity "means that a tenant who murdered another tenant could not be evicted as long as he refrained from killing anyone else—or perhaps from committing other crimes—for 30 days," and concluding that "[t]his cannot be what the law is.").

154. Hous. Auth. of Covington v. Turner, 295 S.W.3d 123, 124, 128 (Ky. Ct. App. 2009).

housing premises."[155] After all, "a tenant who has been served with notice of the intent to evict" has thereby been given "clear knowledge of the provision," and in virtue of that fact the tenant "may be among the most likely of tenants to prevent the situation from recurring, thereby furthering the purposes of and objectives of the law."[156] In light of these observations, the court concluded that, first, there is no express preemption because "there is no prohibition in the federal law against affording a public housing tenant the right to remedy the breach"; second, there is "no irreconcilable conflict between the statutes" and therefore also no conflict preemption; and third, that "the application of the state statute does not defeat the objectives of the federal statute,"[157] and thus an obstacle preemption challenge must also fail.

The *Turner* opinion provides an indication of how a state or local "right to cure" law can be understood in a way that protects tenants against eviction under the One-Strike Rule without thereby standing as an obstacle to the federal regime. Whenever giving a tenant the right to remedy a breach due to criminal conduct is more likely to further the goal of keeping federally subsidized affordable housing free from drug-related and other crime than evicting them is, a tenant should be afforded the statutory period to address the underlying situation. The *Turner* scenario provides one example: The aim of keeping affordable housing drug- and crime-free is more likely to be furthered by letting the tenant—who is made acutely aware of the risk of eviction—stay when the person engaging in criminal conduct is not the tenant but instead a regular guest, provided the tenant is willing and able to refuse entry to the offender. The argument applies, *mutatis mutandis*, with equal force where the offender is a member of the household instead of a regular guest. In both cases, the tenant who has directly confronted the risk of eviction is more likely to ensure that her home will be free from criminal activity than a randomly selected unwarned new tenant, or so the thought goes.

Construed in this narrow way, a "right to cure" law provides only limited protection against the burdens the One-Strike Rule imposes. It can only protect tenants against eviction for the criminal activity of other household members and guests,[158] and instead of addressing the constant threat of eviction and the affirmative duty to police others who are close to them,[159] it doubles down on that threat to incentivize future compliance with the duty. It also does not address the costs imposed on non-tenant third parties.[160] Nonetheless, this sort of law does have the potential to decrease the number of tenants who are in fact evicted under the One-Strike Rule. Given that the greatest costs imposed by the Rule are those associated with actual eviction,[161] a narrowly construed "right to cure" law that is presumed to apply in criminal activity evictions and evictions for other reasons alike does hold out the promise of providing protections to some vulnerable tenants while being capable of surviving a federal preemption challenge. To ensure the former, however, existing "right to cure" laws likely require amendment so as to

155. *Id.* at 127.
156. *Id.*
157. *Id.*
158. *See supra* Section III.A.4.
159. *See supra* Sections III.A.1 and III.A.2.
160. *See supra* Section III.A.5.
161. *See supra* Section III.A.3.

make clear that they apply in criminal activity evictions, as well as setting forth their scope in such cases. Otherwise, there will be nothing stopping courts from interpreting them so broadly that preemption must be assumed.[162]

3. "Civil *Gideon*" Laws

A third, complementary measure with the potential to protect tenants against the injustice of the One-Strike Rule is to provide indigent parties with free counsel in landlord-tenant court—a measure often described as a "civil *Gideon*" law. Strengthening the legal rights of tenants is but one step toward mitigating the burdens imposed by the One-Strike Rule, for without the means to enforce these rights, reform may well achieve little in practice. Whereas the Supreme Court established in *Gideon v. Wainwright* that defendants in criminal proceedings are entitled to free legal assistance if they cannot afford an attorney,[163] there is no constitutionally guaranteed right to counsel for those who cannot afford it in civil matters.[164] As a result, across the country, the overwhelming majority of tenants in landlord-tenant disputes do not have the aid of legal representation.[165] Tenants who face the threat of eviction without the assistance of an attorney are considerably more likely to end up losing their home than tenants who are represented.[166] There is little reason to think that the prospects of unrepresented tenants who face eviction for criminal activity are substantially different than the prospects of unrepresented tenants who face eviction for other reasons.[167] In light of these facts, any attempt at improving the situation of vulnerable tenants by legislative action at the state or local level along the lines sketched in the preceding sub-sections should be accompanied by an effort to enact "civil *Gideon*" legislation, viz., legislation that gives low-income tenants the right to free legal assistance. Only by combining a strengthening of tenants' rights with a strengthening of their ability to enforce those rights can a meaningful improvement be realized.

In contrast to "good cause" and "right to cure" laws, a "civil *Gideon*" law, which ensures that all parties in landlord-tenant court have access to counsel, does not face a realistic federal preemption threat. Providing free legal representation to low-income tenants does not directly obstruct or conflict with the federal affordable housing regime, and given that Congress has not sought to occupy the entire legislative realm on the issue of housing,[168] a "civil *Gideon*" law can be

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162 *See* Scarborough v. Winn Residential L.L.P./Atlantic Terrace Apts., 890 A.2d 249, 257 (D.C. 2006).

163. 372 U.S. 335 (1963).

164. MATTHEW DESMOND, EVICTED 303 (2016).

165. *Id.* ("[I]n many housing courts around the country, 90 percent of landlords are represented by attorneys, and 90 percent of tenants are not.").

166. *See, e.g.*, Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of Representation before a Public Housing Eviction Board*, 26 L. & SOC. REV. 627, 650–52 (1992) (discussing the potential effect of providing free legal representation to all tenants in eviction proceedings); *see also* Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, 80 AM. SOC. REV. 909, 924–25 (2015) (noting potential beneficial impact of providing free legal representation in wide range of civil matters).

167. Given that the defense of ignorance of third-party criminal activity is no longer available post-*Rucker*, tenants' defenses in One Strike-evictions are likely to be a complicated matter. For an account of possible elements of these defenses, see *Litigating*, *supra* note 1, at 21–49.

168. *See supra* Section IV.A.

enacted at the state or local level without fear of federal preemption. The obstacles confronting efforts to enact this sort of law are practical, not legal, in nature.

There are several forms that a "civil *Gideon*" law can take. States can (a) increase funding for existing legal aid providers, so that local organizations have the resources to provide free legal counsel to all tenants appearing in landlord-tenant court, (b) expand their current system for appointing attorneys to criminal defendants to include attorneys for civil landlord-tenant disputes, or (c) create a mandatory pro bono scheme under which lawyers are required, as part of their state bar membership, to provide legal services to low-income individuals in landlord-tenant court free of charge.[169] Having a dedicated corps of attorneys who provide legal services to low-income tenants full-time through a legal aid service is likely to be the most effective of these three options—but it is also likely to be the most costly option.[170] Expanding existing systems of providing court-appointed counsel to cover civil cases is not free either, but given the low fees that court-appointed lawyers typically receive, it may well be less expensive than increasing the staff of legal aid services.[171] However, it is also less likely to create a system where tenants receive effective representation, for the same reason that an indigent criminal defendant is likely better served by an employee of a dedicated public defender corps than by a court-appointed lawyer.[172] Finally, while creating a mandatory pro bono scheme is likely to be the cheapest option (since the only costs associated with it go to enforcement, as opposed to compensation), it is at the same time likely to provide at best a weak guarantee that the legal needs of low-income tenants will actually be met.[173]

Which of these three approaches to providing free legal representation to low-income tenants should be pursued in any given jurisdiction will vary depending on what resources can be procured to fund the effort. Recent legislative efforts to create a right to counsel in landlord-tenant courts in New York City and

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169. Rachel Kleinman, *Housing* Gideon*: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1518–19 (2004).

170. For example, the Maryland Access to Justice Commission estimated that providing free legal counsel in all critical civil matters to the indigent in the state of Maryland would cost about $106 million, a figure exceeding the annual budget of Maryland's public defender offices. MD. ACCESS TO JUST. COMM'N, IMPLEMENTING A CIVIL RIGHT TO COUNSEL IN MARYLAND 10 (2011), http://www.mdcourts.gov/mdatjc/pdfs/implementingacivilrighttocounselinmd2011.pdf.

171. This is necessarily the case on the assumption that the fee paid per client to court-appointed attorneys is no greater than what a legal aid attorney would earn for similar services, given that the latter will be a regular employee of a state agency, meaning that the state would incur additional costs for overhead and employee benefits under the latter but not the former model.

172. Kleinman, *supra* note 169, at 1518 (explaining that in states "where any member of the bar can be appointed to defend an indigent client, the state cannot guarantee a lawyer with expertise in the particular area for which the client requires legal assistance" while "[i]n states where courts appoint attorneys who have voluntarily placed themselves on a list of those willing to take indigent cases, the compensation from the state for representing an indigent client is vastly lower than the compensation that the lawyers could earn from a paying client" and "[l]ow rates serve to reduce the pool of competent attorneys who are willing to take on these cases, and induce those who do to take on as many cases as possible in order to make a living.").

173. The problems facing a mandatory pro bono scheme are similar to those facing a system relying on court-appointed lawyers drawing from the entire pool of attorneys barred in a jurisdiction, viz., there is little chance that a client will be served by a lawyer with expertise in the manner. *Id.* In addition, such a scheme requires setting up mechanisms for ensuring and monitoring compliance, which, while possibly cheaper than paying appointed attorneys a fee, is not cost-free either.

Washington, D.C. both largely leave open how those responsible for implementation are to ensure that tenants receive adequate representation.[174] What method of implementation will be chosen in these cities can serve as a guide to efforts in other jurisdictions in the future; likewise, the successful campaigns to get these measures enacted may provide a mold for how to realize the right to counsel for low-income tenants elsewhere. Irrespective of which option is politically and practically feasible in any given jurisdiction, access to legal services for low-income tenants must be expanded in all jurisdictions if the current threat of eviction for criminal activity is to be reduced.

V. CONCLUSION

For decades, tenants in federally subsidized affordable housing have lived under the threat of eviction for criminal activity thanks to HUD's One-Strike Rule, which permits landlords and PHAs to evict tenants on the basis of allegations of criminal conduct by the tenant, the tenant's household members, and any regular guests, irrespective of whether the tenant was aware of the conduct or able to control it, and irrespective of whether these allegations are supported by evidence that could support a criminal conviction.[175] The One-Strike Rule imposes severe burdens on tenants and non-tenant third parties, while it secures only limited benefits for other parties.[176] The Rule is flawed as a device for shifting the cost of crime prevention from victims to offenders, and imposes unreasonably severe burdens on the most vulnerable members of society.[177]

While there is little hope of reform at the federal level, there is room for mitigating the harmful effects of the Rule at the state and local level. This paper has set out three measures for protecting tenants facing the threat of eviction under the One-Strike Rule: (a) a "good cause" law which explicitly sets out the equitable considerations landlord-tenant courts must take into account in deciding whether eviction is an appropriate remedy for criminal activity, (b) a narrowly construed "right to cure" law which explicitly covers evictions for criminal activity, and (c) a "civil *Gideon*" law which guarantees low income-tenants legal assistance in landlord-tenant court.[178] These measures are all capable of surviving a federal preemption challenge and can therefore provide a means for meaningful improvement of the situation of low-income tenants subject to the One-Strike Rule despite a lack of willingness to change the Rule at the federal level.

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174. *See* N.Y.C. CITY COUNCIL, PROPOSED INTRO. NO. 214-B, PROVISION OF LEGAL SERVICES IN EVICTION PROCEEDINGS (July 12, 2017), http://legistar.council.nyc.gov/View.ashx?M=F&ID=5313699&GUID=D2C83E0D-FBDE-44D2-B6C9-73417BF56A77; D.C. CITY COUNCIL, EXPANDING ACCESS TO JUSTICE ACT OF 2017, B22-0024, http://lims.dccouncil.us/Download/37180/B22-0024-Introduction.pdf. Both bills were signed into law in the summer of 2017. *See* RIGHT TO COUNSEL NYC COALITION, http://www.righttocounselnyc.org/ (last visited Sept. 4, 2017) (describing enactment of Intro 214-b); *D.C. Enacts Expanding Access to Justice Act of 2017*, NAT'L COAL. FOR A CIVIL RIGHT TO COUNSEL (July 12, 2017), http://civilrighttocounsel.org/major_developments/1031.

175. *See supra* Section II.

176. *See supra* Sections III.A and III.B.

177. *See supra* Section III.C.

178. *See supra* Section IV.B.