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HOUSING IS HARM REDUCTION: THE CASE FOR THE CREATION OF HARM REDUCTION BASED TERMINATION OF TENANCY PROCEDURES FOR THE NEW YORK CITY HOUSING AUTHORITY

Megan Stuart*

INTRODUCTION

This is a fictional account of a woman struggling with an addiction, but her story is all too real. This person injects drugs as often as she can afford and her life allows. She has been homeless off and on over the last few decades, but now resides with her family in a New York City Housing Authority apartment. Her attempts at sobriety have been unsuccessful, but she has seen many of her friends get sick with HIV and hepatitis and remains concerned about her health. She hears about a program where she can get clean needles and injection supplies in exchange for dirty ones. After enrolling there, she is offered treatment, counseling and medical services, some of which she uses, some of which she does not. One day, she is arrested with drugs. After she is released with a court date, the police forward a copy of the arrest report to NYCHA, which begins the process of evicting her and her family from their apartment. Now, her family must decide whether to risk appearing before a judge who can evict everyone in the household or agree to never let this woman who struggles with addiction back in the apartment. Either way, it is almost inevitable that she will be back on the streets and even further from recovering from her addiction.

Currently, the policy of the New York City Housing Authority (“NYCHA”) is to evict individuals who have been arrested for substance use.¹ This is contrary to the wealth of public health informa-

* J.D., City University of New York School of Law (2009). Many, many thanks to Professor Sarah Valentine for her valuable guidance in writing this article and mentorship throughout law school. Thanks also to Tanya Kessler for her comments early on. Finally, I would like to thank Abby Katz, for her help formulating the connections between housing and harm reduction and for her unwavering support.

¹ NYCHA MANAGEMENT MANUAL, CHAPTER VII: TERMINATION OF TENANCY 5 (2006) [hereinafter NYCHA MANAGEMENT MANUAL]. The standard NYCHA lease provides that “[a]ny violent or drug-related criminal activity on or off the Leased Premises or the Development” is grounds for eviction, as is “[a]ny drug-related criminal activity on or off the Leased Premises, engaged in by the Tenant, any member of the Tenant’s household, or any guest or other person under the Tenant’s control.” NYCHA RESIDENT LEASE AGREEMENT, (12)(r)(ii); (30)(b) (2007), available at http://home2.nyc.gov/html/nycha/downloads/pdf/rc_lease.pdf.

tion available on the importance of harm reduction measures in reducing the transmission of HIV, the devastating effects of eviction from public housing on individuals and the benefits of harm reduction programs. This Note argues that based upon these findings, NYCHA must modify its termination of tenancy procedures for drug users.² Specifically, NYCHA should exercise the discretion it has under federal laws and regulations to create policies and procedures that reflect the importance of stable, affordable housing for all residents, regardless of their substance use, by incorporating harm-reduction-based policies for termination of tenancy procedures. These policies should take into account public health knowledge about effective ways to reduce HIV and other disease transmission, as well as the vital importance of stable housing for both individual substance users and the communities in which they reside.

Preventing evictions and homelessness for drug users is not simply an issue of balancing the need to protect a community from crime on one hand and an individual's due process rights on the other. Such a balancing test obscures the real issues at stake and forecloses inquiry into the broader social implications of crime prevention and evictions as well as the symbiotic relationship between community safety and eviction prevention. Community safety is fundamentally linked to the health of individuals, which is linked to their housing status, and this is why the focus should be shifted away from pitting individuals against communities and towards policies and procedures that benefit both. Further, it is important to have eviction policies based upon prevention rather than protection. Too often calls to reform eviction procedures focus upon the need to protect "innocent" family members from eviction based upon the actions of their criminal children.³ These reforms are

² In New York, the first step in evicting a tenant who is legally residing in an apartment is to terminate her tenancy. Once this is done, a landlord must go to Housing Court to get a judgment for possession, which then allows him or her to evict the tenant. See N.Y. REAL PROP. ACTS. §§ 220–238 (McKinney 1992). For a discussion of the inequity of these proceedings, see Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699 (2006).

³ E.g., Sarah N. Kelly, Note, *Separating the Criminals from the Community: Procedural Remedies for "Innocent Owners" in Public Housing Authorities*, 51 N.Y.L. SCH. L. REV. 379 (2006-07); Barbara Mulé & Michael Yavinsky, *Saving One's Home: Collateral Consequences For Innocent Family Members*, 30 N.Y.U. REV. L. & SOC. CHANGE 689 (2006); Robin S. Golden, *Towards a Model of Community Representation for Legal Assistance Lawyering: Examining the Role of Legal Assistance Agencies in Drug-Related Evictions from Public Housing*, 17 YALE L. & POL'Y REV. 527 (1998); Michael A. Cavanagh & M. Jason Williams, *Low-Income Grandparents as the Newest Draftees in the Government's War on Drugs: A Legal and*

fundamentally flawed because they presume that someone should be evicted and are not based on the premise that housing is a human right, and how “innocent” one may be is irrelevant.

Section One illustrates the relationship between harm reduction and public health through the history of Needle Exchange Programs (“NEP”) in New York. This section concludes by looking at the public health research about the correlation between stable housing and the reduction of the spread of HIV. Section Two briefly explores the history of federally subsidized public housing and the structure of public housing in the United States. Section Three details the termination of tenancy procedures of NYCHA, including the grounds for drug-related termination and the administrative procedures mandated by law and stipulation. This section concludes by examining how termination of tenancy procedures actually operate and illustrates why the current policies and practices are inadequate for dealing with the reality of drug use and are thus dangerously in opposition to public health discourse. Finally, this Note concludes by proposing procedures that integrate the purpose of public housing and harm reduction so that NYCHA procedures do not compound the problems state and city-sponsored NEPs are trying to solve by suggesting modifications to the current termination of tenancy procedures, including an actual and individualized evaluation of the resident behavior’s impact on neighbors, and when appropriate, referrals to services in lieu of eviction. These policies would create mechanisms by which NYCHA residents could be given fair opportunities to preserve their housing and ultimately improve their communities.

I. HARM REDUCTION AND PUBLIC HEALTH

Shortly before the arrest, she had started going to a place where she could hand over used needles and get new ones, no questions asked. The program also offers health care and HIV tests, and she occasionally takes advantage of these services. Since she had been living in an apartment rather than on the street, it was much easier to get to the program. She was concerned about getting sick from using other people’s needles, so it was nice that she had the option of having access to her own. The program also offers rehab, and it was good to know this was an option for when she is ready.

A. Needle Exchange Programs

The first NEP⁴ provided intravenous drug users (“IDUs”) with clean syringes was started by drug users in Amsterdam in 1984 to reduce the spread of hepatitis B.⁵ Since then NEPs have expanded to the United States and as of 2005 have been available in 28 states and Washington, D.C.⁶ NEPs are premised on the idea that “[f]or injecting drug users who cannot or will not stop injecting drugs, the once-only use of sterile needles and syringes remains the safest, most effective approach for limiting HIV transmission.”⁷ In addition to limiting HIV transmission by providing clean injection supplies,⁸ NEPs also attempt to reduce transmission through prevention education, access to medical care and social services. NEPs “recognize the urgency of reducing HIV infection rates among substance users who are not ready for drug treatment, who relapse after treatment.”⁹ Early in the HIV epidemic, researchers recognized the connections between HIV transmission and IV drug use.¹⁰ HIV infection that is the result of IV drug use has accounted for more than 36% of all cases.¹¹ In New York, the sharing of contaminated needles between IDUs and sex with infected IDUs resulted in almost 60% of all AIDS cases in the state in 1996, an increase of almost 20% in only six years.¹²

NEPs are part of a larger harm reduction-based treatment the-

⁴ Sometimes referred to as Syringe Exchange Program (“SEP”).

⁵ Sandra D. Lane et al., *Needle Exchange: A Brief History*, The Kaiser Forums, 1993, <http://www.aegis.com> (on left, select “Law,” then “Publications,” then “Journals-Misc,” then follow “1993 Publications” hyperlink, then follow “Needle Exchange: A Brief History” hyperlink).

⁶ The Henry J. Kaiser Family Foundation, *Sterile Syringe Exchange Programs*, 2005, <http://www.statehealthfacts.org/comparetable.jsp?ind=566&cat=11> (last visited Dec. 2, 2009).

⁷ NAT’L RES. COUNCIL AND INST. OF MED., *PREVENTING HIV TRANSMISSION: THE ROLE OF STERILE NEEDLES AND BLEACH 2* (Jacques Normand, et al. eds., 1995).

⁸ For a graphic and detailed description about why clean needles reduce the spread of disease, see CTRS. FOR DISEASE CONTROL, *A COMPREHENSIVE APPROACH: PREVENTING BLOOD-BORNE INFECTIONS AMONG INJECTION DRUG USERS, RISK BEHAVIORS ASSOCIATED WITH INFECTION BY HIV AND OTHER BLOOD-BORNE INFECTIONS*, <http://www.cdc.gov/idu/pubs/ca/risk.htm#drug> [hereinafter CDC COMPREHENSIVE APPROACH].

⁹ THE N.Y. STATE AIDS ADVISORY COUNCIL, *REPORT ON NEEDLE EXCHANGE PROGRAMS AND DEREGULATION OF NEEDLES AND SYRINGES 3* (1996), available at http://www.health.state.ny.us/diseases/aids/workgroups/aac/docs/needleexchange_programs.pdf [hereinafter 1996 NEP REPORT].

¹⁰ *Id.*

¹¹ CTRS. FOR DISEASE CONTROL AND PREVENTION, *FACT SHEET: DRUG-ASSOCIATED HIV TRANSMISSION CONTINUES IN THE UNITED STATES*, (2002), available at <http://cdc.gov/hiv/resources/factsheets/PDF/idu.pdf>.

¹² 1996 NEP REPORT, *supra* note 9, at 1.

ory and practice, premised on the idea that drug use is a frequent,¹³ common¹⁴ and shared experience.¹⁵ Instead of seeking to eliminate drug use, harm reduction focuses on minimizing or reducing the “personal and social harms and costs associated with drug use”¹⁶ A review of the literature on harm reduction sets out five basic principals:

1. Policies must be practical and focus on the consequences of harmful behavior rather than whether the behavior is morally right or wrong;
2. Alternatives to abstinence should be accepted;
3. Policies should be based on consumer input rather than ‘top-down’ policies;
4. Barriers to treatment should be reduced;
5. Harm reduction should be “based on compassionate pragmatism not on moral idealism.”¹⁷

These principals acknowledge that individuals are the primary agents in reducing the harm from their drug use.

Harm reduction is most often associated with interventions such as needle exchange, condom distribution, methadone maintenance and “housing first” programs, which are predicated on the notion that no one should be denied basic needs such as medical care and housing simply because they choose to use drugs.¹⁸ Harm reduction traces its history to policies related to illegal drugs in Europe and public health campaigns in the United States.¹⁹ Beginning in Europe in the 1970s and 1980s, governments created policies that were “designed to render drug use safer and thereby reduce the harm associated with illicit drug use—including the transmission of diseases like AIDS or hepatitis, and the risks of overdose.”²⁰ These policies resulted in the creation of NEPs, methadone clinics and the relaxation of laws criminalizing drug possession.²¹ Though not focused on illegal drugs, the United States

¹³ CDC COMPREHENSIVE APPROACH, *supra* note 8, at 5.

¹⁴ B. Ann Hilton et al., *Harm Reduction Theories and Strategies for Control of Human Immunodeficiency Virus: A Review of the Literature*, 33(3) J. ADVANCED NURSING 357, 358, 360 (2001).

¹⁵ CDC COMPREHENSIVE APPROACH, *supra* note 8, at 6–7.

¹⁶ *Supra*, note 14 at 358.

¹⁷ *Id.*

¹⁸ See Don McVinney, History of the Harm Reduction Movement 10 (Nov. 15, 2005) (unpublished PowerPoint presentation), <http://www.harmreduction.org/article.php?list=type&type=72>.

¹⁹ See Lane, *supra* note 5.

²⁰ Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 175 (1999).

²¹ CTRS. FOR DISEASE CONTROL AND PREVENTION, HIV PREVENTION AMONG INJEC-

adopted a harm reduction approach to smoking and drinking in the 1960s by creating minimum drinking age laws and alcohol and cigarette labeling warning of the negative effects on pregnant women.²²

The Center for Disease Control and Prevention supports harm reduction programming, including NEPs.²³ Contrary to their detractors' arguments, harm reduction programs do not increase drug use,²⁴ negatively impact drug treatment programs²⁵ or increase the presence of drug paraphernalia on the street.²⁶ Most importantly, harm reduction programs reduce the spread of disease both between IDUs and their sexual partners. The British Columbia Ministry of Health notes that harm reduction strategies adopted by the government address the concerns of communities about drug use in their neighborhoods, including public intoxication and discarded drug paraphernalia.²⁷

The first NEP in New York started in 1988 as a 14-month pilot program promulgated through emergency regulations by the New York State Commissioner of Health.²⁸ Though the program had only 317 participants, researchers observed a decrease in HIV risk behaviors.²⁹ After the end of this program, the State Health Commissioner approved emergency HIV prevention regulations, allowing some organizations to possess and provide hypodermic syringes to drug users without a prescription.³⁰ This regulation, which became permanent in 1993,³¹ required that the "authorized syringe exchange operations take place within the context of a

TION DRUG USERS (2007), <http://web.archive.org/web/20080315061519/http://www.cdc.gov/idu/default.htm>.

²² McVinney, *supra* note 18, at 9–11.

²³ E.g., CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 6, at 1.

²⁴ John K. Watters et al., *Syringe and Needle Exchange as HIV/AIDS Prevention for Injection Drug Users*, 271 J. AM. MED. ASS'N 115, 119 (1994).

²⁵ See Jael Wolk et al., *The Effect of a Needle and Syringe Exchange on a Methadone Maintenance Unit*, 85 BRIT. J. ADDICTIONS 1445, 1445–49 (1990); Robert Brooner et al., *Drug Abuse Treatment Success Among Needle Exchange Participants*, 113 PUB. HEALTH REP. 129 (Supp. I 1998).

²⁶ See Kathy J. Oliver et al., *Impact of a Needle Exchange Program on Potentially Infectious Syringes in Public Places*, 5 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 534 (1992).

²⁷ B.C. MINISTRY OF HEALTH, HARM REDUCTION: A BRITISH COLUMBIA COMMUNITY GUIDE 18 (2005), www.health.gov.bc.ca/prevent/pdf/hrcommunityguide.pdf [hereinafter B.C. CMTY GUIDE].

²⁸ THE N.Y. STATE AIDS ADVISORY COUNCIL, REPORT ON SYRINGE ACCESS IN NEW YORK STATE, 1, 1 – 2 (2005) [hereinafter REPORT ON SYRINGE ACCESS].

²⁹ *Id.*

³⁰ N.Y. COMP. CODES R. & REGS. tit. 10, § 80.135 (2009).

³¹ *Id.*

comprehensive harm reduction program.”³² Echoing much of the public health literature, the State Health Commissioner concluded that these regulations were necessary; “[f]or those users who cannot get into or complete drug treatment and for those who are unwilling to enter treatment, the goal of preventing HIV infection in the context of their drug addiction must be addressed if the HIV epidemic is to be controlled.”³³

In 1995, the New York State Legislature introduced a bill to amend state law to allow for the sale and possession of needles and syringes.³⁴ The Legislature found that “promoting access to sterile hypodermic needles and syringes to reduce the transmission of HIV and other blood-borne infections among injecting drug users and [their sex partners and children].”³⁵ The Legislature also found “compelling evidence that the availability of clean hypodermic syringes and needles significantly reduces the transmission of HIV . . . [and] New York’s law banning non-prescription sale and possession of hypodermics is, therefore, a major contributor to the HIV/AIDS epidemic.”³⁶ The bill amended the New York Public Health Law to make lawful the distribution of needles by health care facilities, pharmacies and NEPs to people over 18,³⁷ and for people over the age of 18 to possess needles obtained through these newly lawful distribution methods.³⁸ In 2000, the State Health Commissioner expanded the State’s syringe access program to allow licensed pharmacies and health care providers enrolled in the Expanded Syringe Access Program to provide syringes and needles to people over 18.³⁹

These programs have been found extremely effective in reducing HIV transmission among IDUs and their sex partners. The pro-

³² REPORT ON SYRINGE ACCESS, *supra* note 28, at 2.

³³ 15 N.Y. Reg. 22 (Oct. 13, 1993) (adopting N.Y. COMP. CODES R. & REGS. tit. 10, § 80.135 as an emergency rule). In 1993, the statistics for HIV transmission and IV drug use were staggering. New York State had 38% of all the drug-related AIDS cases in the United States, more than any other state. *Id.* at 25. Of the state’s male AIDS cases, 40% were a result of IV drug use, compared to a national average of 19%. *Id.* Eighty-one percent of heterosexually transmitted cases were from an IDU male. *Id.* Finally, 77% of children born with AIDS had a parent who was an IDU. *Id.*

³⁴ S. 1998, 218th Sess., 1995 N.Y. Legis. Digest S135 (a proposed bill amending the Public Health Law, the General Business Law and the Insurance Law, in relation to the sale and possession of hypodermic syringes and needles).

³⁵ REPORT ON SYRINGE ACCESS, *supra* note 28, at 1.

³⁶ *Id.* at 1.

³⁷ N.Y. PUB. HEALTH LAW § 3381(c) (McKinney 1995).

³⁸ N.Y. PUB. HEALTH LAW § 3381(6)(a) (McKinney 1995).

³⁹ 10 N.Y. COMP. CODES R. & REGS. tit. 10, §80.137 (2009) (*See* “Historical Note”: This regulation was filed as an emergency measure in 2000).

vision of clean injection supplies and the health and education services provided as part of the NEP has decreased risky injection behavior by as much as 60%.⁴⁰ Other research on New York's NEPs show that HIV transmission rates among program participants have only a 2% per year infection rate versus a 4 to 8% rate in non-syringe exchange users.⁴¹

Though NEPs were initially targeted to heroin users, NEPs now also serve a variety of drug users with many different kinds of programs, including HIV testing and mental health services.⁴² The benefits of NEPs are especially important for crack-using IDUs.⁴³ Research has shown that people who use both crack and injection drugs (i.e. heroin and crack) are more likely than non-crack-using IDUs to share injection supplies, such as needles, and are more likely to go to shooting galleries.⁴⁴

Harm reduction strategies are an important public health tool because they "save lives and improve quality of life by allowing drug users to remain integrated in society. The alienation and marginalization of people who use drugs often compound the reasons why

⁴⁰ Don C. Des Jarlais, et. al., *HIV Incidence Among Injecting Drug Users in New York City Syringe-Exchange Programs*, 90 AM. J. PUB. HEALTH 352, 357 (2000) (noting a decline of interviewed injection drug users reporting the use of needles used by others from 46% in 1990 to 28% in 1997).

⁴¹ N.Y. STATE DEP'T OF HEALTH, Prevention and Supportive Services, <http://www.health.state.ny.us/diseases/aids/about/prevsup.htm#harmred> (last visited Oct. 20, 2009).

⁴² See Lane, *supra* note 5; MMWR at 1167. See, e.g., Carol Lamus, Executive Director, New York Harm Reduction Educators, Message from the Executive Director, <http://nyhre.org/messagefromed.html> (last visited Sept. 29, 2009); N.Y. HARM REDUCTION EDUCATORS GROUP SCHEDULES, available at <http://nyhre.org/group/schedules>.

⁴³ Crack users likely make up a large portion of NEP consumers both because most other drug users are not polysubstance users and because crack is injected as well as smoked. One study found that of almost 1,500 crack users, just over 75% reported cocaine or crack injection while over 90% reported heroin injection in addition to crack injection. See Martin Y. Iguchi and Donald A. Bux, *Reduced Probability of HIV Infection among Crack Cocaine-Using Injection Drug Users*, 87 AM. J. OF PUBLIC HEALTH 1008, 1009 (1997) (discussing the relationship between crack use and HIV risk among injection drug users); see also Stephen E. Lankenau, et. al., *Crack Cocaine Injection Practices and HIV Risk: Findings from New York and Bridgeport*, 34 J. DRUG ISSUES 319, 320 (2004) (exploring the injection practices and HIV risks associated with crack injection).

⁴⁴ Shooting galleries are sites where the sale and congregate use of drugs takes place. This environment poses an increased risk of HIV infection because of the increased possibility of sharing infected paraphernalia or having sex with HIV infected users. See Clyde B. McCoy, et al., *Injection Drug Use and Crack Cocaine Smoking: Independent and Dual Risk Behaviors HIV Infection*, 14 ANNALS OF EPIDEMIOLOGY 536, 540 (2004).

they engage in unsafe drug use.”⁴⁵ An important aspect of harm reduction is the prevention of homelessness because of the correlations between HIV risk and homelessness.

B. Housing Stability: (Public) Housing as Public Health

On January 20, 1934, New York City established NYCHA as the first public housing authority in the country.⁴⁶ Three years later, federally-subsidized public housing in the United States began with the passage of the 1937 Housing Act.⁴⁷ The Act empowered state and local governments to “alleviate present and recurring unemployment and to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation.”⁴⁸ Despite the fact that its roots lay in slum-clearance,⁴⁹ public housing has become the last bastion of affordable housing for low-income people. Though the language of the initial act has changed, the policy of the agency in charge of public housing, the Department of Housing and Urban Development (“HUD”), is still to “promote the goal of providing decent and affordable housing for all citizens”⁵⁰ and to assist states in remedying the shortage of affordable housing.⁵¹

Since its inception the composition of public housing has shifted from housing the unemployed middle class during the Depression, to housing some of the Nation’s poorest citizens.⁵² The average annual nation-wide income of a public housing resident is only \$12,569.⁵³ One of the few requirements HUD has for public

⁴⁵ B.C. CMTY. GUIDE, *supra* note 27, at 4.

⁴⁶ N.Y. CITY HOUS. AUTH., *About NYCHA: NYCHA at 70*, <http://www.nyc.gov/html/nycha/html/about/nycha70.shtml> (last visited Dec. 15, 2008).

⁴⁷ U.S. Housing Act of 1937, Pub. L. No. 412, § 1, 50 Stat. 888, (codified as amended at 42 U.S.C. §§ 1437 to 1437z-8 (2006)).

⁴⁸ 42 U.S.C. § 1437 intro. (2006). Notably, the policy on public housing is a subsection of the Public Health and Welfare title of the U.S. Code.

⁴⁹ *Id.*

⁵⁰ 42 U.S.C. § 1437(4) (2006). *See also* Thorpe v. Hous. Auth. of the City of Durham, 393 U.S. 268, 281 n. 37 (1969) (citing the Housing Act of 1949, Pub. L. 171, § 2, 63 Stat. 413 (1949)); Thompson v. Washington, 497 F.2d 626, 632 (D.C. Cir. 1973) (citing the U.S. Housing Act of 1937, Pub. L. No. 412, §§ 1, 2, 50 Stat. 888 (1937)); Rivera v. Reading Hous. Auth., 819 F. Supp. 1323, 1329, *aff’d*, 8 F.3d 961 (E.D. Pa. 1993).

⁵¹ *Id.*

⁵² *See* Lawrence M. Friedman, *Public Housing and the Poor: An Overview*, 54 CA. L. REV. 642, 648 (1966). *Cf.* HUD Fact Sheet, *supra* note 44.

⁵³ NAT’L CTR. FOR HEALTH CARE FOR PUB. HOUS. RESIDENTS, DEMOGRAPHIC FACTS: RESIDENTS LIVING IN PUBLIC HOUSING (2008), available at <http://www.healthandpub->

housing authorities' ("PHA") written admission policies is that the policy target "extremely low income families."⁵⁴ This targeting of families who could not otherwise afford housing shows that housing is a national priority.

Just as housing extremely low-income families is a goal of national policy, so too should be, keeping people housed. Both the eviction process and homelessness have devastating impacts on individuals and the communities in which they reside. "Eviction is a forcible, violent experience in which property is lost and damaged and lives are disrupted. Because the housing market is so tight, low-income people who are evicted are likely to become homeless, which severely compounds the trauma of eviction and displacement."⁵⁵ In 2003, 19% of New York City's total shelter population had been recently evicted.⁵⁶ Preventing eviction is vital in protecting the health of the community and individuals because it is often the first step towards homelessness.

In addition to the emotional toll of eviction and the disruption it causes, homelessness also has devastating consequences on an individual's health. Homelessness causes social isolation, the loss of material resources, inadequate access to health care and makes it difficult to maintain basic hygiene.⁵⁷ Regardless of the type of housing an individual has, people whose housing is stable "are less likely to engage in risky behaviors and more likely to reduce HIV risk than their counterparts who are homeless/unstably housed."⁵⁸ Homeless or unstably housed people are two to four times more likely to use drugs, share needles, or engage in high-risk sex than stably housed people of the same demographics.⁵⁹ Even among people at the highest HIV risk level due to IV drug use those who are homeless are significantly more likely to contract

lichousing.org/pdfs/Demographics%20Fact%20Sheet.pdf (based upon HUD's January 2008 Resident Characteristics Report).

⁵⁴ 24 C.F.R. § 960.202 (2009).

⁵⁵ Scherer, *supra* note 2, at 708.

⁵⁶ This figure likely undercounts the displacement of recently evicted people because of the many barriers in obtaining emergency shelter and the exclusion of people who are temporarily residing with family members. *Id.* (citing N.Y. City family homelessness special master panel, family homelessness prevention report 24 (Nov. 2003)). *See Id.*

⁵⁷ Stephen Metraux et al., *Homelessness and HIV Risk Behaviors Among Injection Drug Users*, 81(4) J. URB. HEALTH 618 (2004).

⁵⁸ THE NAT'L AIDS HOUS. COAL., HIV/AIDS HOUSING: PREVENTING HIV TRANSMISSION (2008), <http://www.nationalaidshousing.org/PDF/preventinghiv.pdf>.

⁵⁹ Angela Aidala et al., *Housing Status and HIV Risk Behaviors: Implications for Prevention and Policy*, 9(3) AIDS & BEHAV. 251 (2005).

HIV.⁶⁰ The co-occurrence between HIV and homelessness or unstable housing is well documented.⁶¹ Research shows that the relationship is more than corollary and that housing status is implicated in HIV risk.⁶² Homelessness is associated with HIV risk because of the relationship between homelessness and poverty⁶³ and the loss of private space, which promotes the use of shooting galleries.⁶⁴

Also vital in the link between homelessness and HIV risk is the loss of social networks that is associated with homelessness. Many researchers have found that frequent changes in residence cause the disruption of social networks, communities, social services, and other resources on which people rely on for support, help and sobriety.⁶⁵ Additionally, “[d]epression and anxiety may result from housing transience or from the sense of vulnerability associated with living in unstable housing. In response, individuals may initiate, increase, or relapse into substance use.”⁶⁶ The increased risk is also due to the loss of a private space in which to use drugs. For those IV drug users with homes, most drug injection occurs at their residence.⁶⁷ The use of shooting galleries is more prominent when housing is unstable.⁶⁸ One study found that living in one’s own home decreased the chances of a user sharing needles, supplies and turning to shooting galleries.⁶⁹

⁶⁰ Richard J. Wolitski et al., *HIV, Homelessness, and Public Health: Critical Issues and a Call for Increased Action*, 11 AIDS & BEHAV. (SUPP. 2) S167 (2007).

⁶¹ The research indicates that there is a relationship between HIV status and homelessness; homeless IDUs are at a higher risk of HIV than their housed counterparts because homelessness is associated with risky IV drug use. Angela Aidala, *Inequality and HIV: The Role of Housing*, 34 PSYCHOL. & AIDS EXCHANGE 1 (2006). See also Dennis P. Culhane et al., *The Co-occurrence of AIDS and Homelessness: Results from the Integration of Administrative Databases for AIDS Surveillance and Public Shelter Utilisation in Philadelphia*, 55 J. EPIDEMIOLOGY & COMMUNITY HEALTH, 515 (2001); Trevor A. Corneil et al., *Unstable Housing, Associated Risk Behaviour, and Increased Risk for HIV Infection Among Injection Drug Users*, 12 HEALTH & PLACE, 79, 84 (2006).

⁶² Aidala, *supra* note 61.

⁶³ E.g., Hilary L. Surratt & James A. Inciardi, *HIV Risk, Seropositivity and Predictors of Infection Among Homeless and Non-homeless Women Sex Workers in Miami, Florida, USA*, 16 AIDS CARE, 594 (2004).

⁶⁴ E.g., Tim Rhodes et. al., *The Social Structural Production of HIV Risk Among Injecting Drug Users*, 61 SOC. SCI. & MED. 1026 (2005).

⁶⁵ Brian W. Weir et al., *Uncovering Patterns of HIV Risk Through Multiple Housing Measures*, 11 AIDS & BEHAV. S31, S32 (2007).

⁶⁶ *Id.* (internal citations omitted).

⁶⁷ Carl Latkin et al., *Your Place, and No Place: Behavior Settings as a Risk Factor for HIV-related Injection Practices of Drug Users in Baltimore, Maryland*, 22 AM. J. COMMUNITY PSYCHOL. 415 (1994).

⁶⁸ See Metraux et al., *supra* note 57, at 618.

⁶⁹ Jonny F. Andia et al., *Residential Status and HIV Risk Behaviors Among Puerto Rican*

Even NEPs, which as discussed above are proven sources of HIV prevention, are less effective among persons who are homeless or unstably housed. Apart from not obtaining clean injection supplies, these users also miss the other services provided by the programs.⁷⁰ Additionally, homelessness negatively impacts the HIV-related health of users already infected. Homelessness is often correlated to difficulties in entering HIV care, accessing regular HIV care, including optimal antiretroviral therapy and adherence to a treatment plan, all of which are important to lowering viral loads and reducing the risk of transmission.⁷¹

As “[t]he same ‘fundamental causes’ put persons at risk for both homelessness and HIV infection: economic and political contexts, inequality of opportunities and conditions, social processes of discrimination and exclusion,”⁷² stable housing and HIV prevention are fundamentally linked. Despite the high rates of HIV infection in some of New York’s poorest neighborhoods,⁷³ public housing policy has not incorporated any of the knowledge relating to HIV risk and homelessness. Instead, HUD has accepted the war on drugs as the only acceptable drug-related policy for public housing regardless of its relationship to increased homelessness and risk of HIV infection.

II. PUBLIC HOUSING: DRUGS, STRUCTURE AND DISCRETION

In 1989, the HUD Secretary stated that he was “determined that federal taxpayers will not be required to subsidize the rent of drug dealers and users or violent criminals.”⁷⁴ This statement echoed legislation passed the previous year that required housing authorities to include a lease provision that a “public housing tenant, any member of the tenant’s household, or a guest or other person under the tenant’s control shall not engage in criminal activity . . . on or near public housing premises . . . and such criminal activity shall be cause for termination of tenancy.”⁷⁵ This was later altered to provide a ground for eviction for “drug-related criminal

Drug Injectors in New York and Puerto Rico, 27(4) AM. J. DRUG & ALCOHOL ABUSE 719 (2001).

⁷⁰ Don Des Jarlais et al., *Unstable Housing as a Factor for Increased Injection Risk Behavior at U.S. Syringe Exchange Programs*, 11(6) SUPP. 2 AIDS & BEHAV. S78 (2007).

⁷¹ Wolitski, *supra* note 60, at S168.

⁷² Aidala, *supra* note 61.

⁷³ See N.Y. CITY DEP’T OF HEALTH AND MENTAL HYGIENE, HEALTH DISPARITIES IN N.Y. CITY 11 (2004).

⁷⁴ David E. Anderson, *Kemp Proposes Drug-Related Evictions*, United Press International, Aug. 25, 1989, available at Lexis, Nexis Library, UPI File.

⁷⁵ 42 U.S.C. § 1437d(l)(5) (1988).

activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control. . . ."⁷⁶

Despite the final language in the HUD regulations, the legislative history of the 1988 amendments reflects a concern for discretion and reasonableness:

The Committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.⁷⁷

Fortunately for NYCHA residents, in the 1970s NYCHA entered into the *Tyson-Randolph* Consent Decrees; these bar NYCHA from evicting tenants solely because of the actions of family members.⁷⁸

Though HUD requires the above-mentioned lease provisions, HUD regulations only have five grounds for mandatory eviction. Under HUD regulations, a tenant must be evicted from public housing when PHA determines that any household member has ever been convicted of methamphetamine production on the premises of a federally-assisted housing project.⁷⁹ Additionally, a tenant must be evicted when the tenant fails to provide required recertification information, fails to sign HUD forms, fails to move to a differently sized unit within a specified timeframe or cannot establish citizenship status for any household member.⁸⁰

In addition to the required lease provisions that resulted from the 1990 legislation, other relevant mandatory lease provisions provide that drug-related criminal activity on or near the PHA is grounds for termination⁸¹ as is drug use that interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.⁸² The HUD Handbook also allows for eviction when a household member is illegally using a drug *or* an owner determines that a pattern of illegal drug use interferes with the

⁷⁶ 24 C.F.R. § 966.4(l)(5)(i)(B) (2009).

⁷⁷ S. REP. NO. 101-316, 2d Sess., at 179 (1990).

⁷⁸ *Tyson v. NYCHA*, 369 F. Supp. 513 (S.D.N.Y. 1974) (resulting in the *Tyson* Consent Decree, No. 73 Civ. 859, and the *Randolph* Consent Decree, No. 74 Civ. 1856). For a history of the NYCHA consent decrees, see note 134.

⁷⁹ 24 C.F.R. § 966.4(5)(I)(a) (2009).

⁸⁰ HUD, HUD HANDBOOK § 8-5 (2003) [hereinafter HUD HANDBOOK].

⁸¹ 24 C.F.R. § 5.858 (2009); 24 C.F.R. § 5.859 (2009).

⁸² 24 C.F.R. § 5.858 (2009); 24 C.F.R. § 5.855 (2009).

health, safety, or right to peaceful enjoyment by other residents.⁸³ Despite the required inclusion of the lease provisions in all housing authority leases, these provisions do not require the local authority to evict on those grounds.

Though HUD requires lease provisions that target drug users, it does not require a Housing Authority to take any particular action against drug users. HUD regulations clearly state that if a provision permits, but does not require action, it is discretionary.⁸⁴ HUD requirements are a very small part of PHA actions as HUD was designed to allow local PHAs the “maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public.”⁸⁵ Despite the fact that local PHAs receive virtually all of their operating subsidies from the federal government, they have wide latitude in setting their policies, practices and regulations. HUD merely dictates the minimum amount of action a PHA must take and then directs the local authority to act appropriately.⁸⁶

The HUD regulations do not presume that drug use automatically adversely affects the health or safety of neighbors; this allows local housing authorities to recognize that individual drug use has little, if any, actual impact on neighbors. As written, the regulations allow PHAs to place the burden on tenants to show that they are not a threat to the health or safety of others. However, the language also allows for policies that shift the burden away from tenants. As a result of the discretion given to local PHAs, NYCHA’s policies and procedures, in theory, grant tenants an extensive process and detailed grounds for eviction. However, these policies and procedures have incorporated much of the hard-lined drug policy championed by HUD, and like many due process requirements, the process actually afforded tenants is often very different than that outlined on paper.

⁸³ HUD HANDBOOK, *supra* note 80.

⁸⁴ 24 C.F.R. § 5.852(a) (2009).

⁸⁵ U.S. Housing Act of 1937, 42 U.S.C. § 1437(a)(1)(c), *supra* note 47; *see also* *Vandermark v. NYCHA*, 492 F. Supp. 359, *aff’d*, 663 F.2d 436 (3rd Cir. Pa. 1981).

⁸⁶ *E.g.*, *HUD v. Rucker*, 535 U.S. 125, 129 (2002) (“In deciding to evict for criminal activity, the [public housing authority] shall have discretion to consider all of the circumstances of the case” *Id.*, citing 42 U.S.C. § 1437d(1)(6) (1994 ed, Supp V.)); 24 C.F.R. § 5.858 et. seq. (2009) (providing that a PHA may evict drug criminals); 24 C.F.R. §§ 5.315, 5318 (2009) (PHA shall promulgate pet rules but limits of rules are at the PHA’s discretion).

III. NEW YORK CITY HOUSING AUTHORITY

Currently, NYCHA residents are among the poorest New Yorkers. Nearly 30% (178,554 households with 403,581 authorized tenants)⁸⁷ of New York's 1.4 million low-income people live in public housing,⁸⁸ making NYCHA New York City's largest landlord and the nation's largest housing authority.⁸⁹ In addition to being the largest landlord in both New York State and City, NYCHA also has the largest stock of affordable housing, with NYCHA apartments constituting 8.4% of the City's rental apartments and housing 4.9% of the City's population.⁹⁰ Despite the origins of public housing, half of public housing residents live below the poverty line with an average family income of only \$22,905.⁹¹ Because NYCHA rents are capped at 30% of a household's income,⁹² the average monthly rent is only \$397.⁹³ Working families account for 46.3% of NYCHA households, 11.8% of NYCHA families receive public assistance, and 41.9% of households receive other government subsidies.⁹⁴

The fair market rent for an efficiency apartment in New York City is \$1,095, almost three times as much as the average NYCHA apartment.⁹⁵ Due to the high cost of living, when the poverty line is adjusted for the cost of housing, New York State has the second-highest percentage of residents living in poverty.⁹⁶ As housing costs rise by as much as 40%,⁹⁷ almost 80% of working poor families in

⁸⁷ NYCHA, ABOUT NYCHA: FACT SHEET, <http://www.nyc.gov/html/nycha/html/about/factsheet.shtml> (last visited Dec. 18, 2009) [hereinafter NYCHA FACTS]. This number likely undercounts the numbers of New Yorkers living in public housing as it only includes authorized residents. For a discussion of tenants doubling-up with friends or family see N.Y. STATE OFFICE OF THE STATE COMPTROLLER, PUBLIC HOUSING AT THE CROSSROADS: BRICKS, MORTAR, AND PUBLIC POLICY AT THE NEW YORK CITY HOUSING AUTHORITY, *available at* <http://www.osc.state.ny.us/osdc/rpt899/rpt899.htm> (last visited Dec. 15, 2009).

⁸⁸ CMTY SERV. SOC'Y OF NEW YORK AND UNITED WAY OF NEW YORK CITY, MAPPING POVERTY IN NEW YORK CITY: PINPOINTING THE IMPACT OF POVERTY, COMMUNITY BY COMMUNITY 4 (2009), http://www.cssny.org/userimages/downloads/Mapping_booklet.pdf.

⁸⁹ NYCHA FACTS, *supra* note 87.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 24 C.F.R. § 5.628(a)(1) (2009).

⁹³ NYCHA FACTS, *supra* note 87.

⁹⁴ *Id.*

⁹⁵ HUD, HUD FINAL FY 2008 FAIR MARKET RENT DOCUMENTATION SYSTEM, SUMMARY FOR NEW YORK, NY HUD METRO FMR AREA, <http://www.huduser.org/datasets/fmr/fmrs/2008summary.odn> (last visited Oct. 16, 2009).

⁹⁶ See DEBORAH REED, POVERTY IN CALIFORNIA: MOVING BEYOND THE FEDERAL MEASURE, PUBLIC POLICY INSTITUTE OF CALIFORNIA 21 (2006), *available at* http://www.ppic.org/content/pubs/cacounts/CC_506DRCC.pdf.

⁹⁷ See generally DIANA PEARCE, WOMEN'S CENTER FOR EDUCATION AND CAREER AD-

the State are spending more than one-third of their income on housing.⁹⁸ Because of the lack of affordable housing in New York City, the loss of a NYCHA apartment often leads to homelessness. As one judge noted, evicting tenants from NYCHA apartments for minor crimes or violations “amounts to relegating to homelessness large numbers of African-Americans and Hispanics and to making correctional facilities the new mode of public housing.”⁹⁹

A. *NYCHA Grounds for Eviction: Non-Desirability and Drug Use*

Even if she had not been arrested, NYCHA might still have tried to evict her and her family because of her drug use. She knows it is illegal, but it is an addiction that she is having trouble controlling. What angers her is that if she had just been an alcoholic instead of a drug addict, she would not be at risk for eviction because alcohol is not illegal. Even when she has been arrested for other things, it has always been just to feed her addiction and NYCHA uses these arrests as evidence of drug use. And anyway, she doesn’t bother anyone. She keeps to herself and none of her neighbors have complained about anything that she has done.

NYCHA’s Management Manual (“NYCHA Manual”) allows for the eviction of residents deemed “non-desirable,”¹⁰⁰ which is defined as engaging in “conduct or behavior of the tenant or any

VANCEMENT, THE SELF SUFFICIENCY STANDARD FOR THE CITY OF NEW YORK 2004 (2004), available at http://www.wceca.org/publications/NYC_Standard.pdf.

⁹⁸ See CTR. FOR AN URBAN FUTURE, SCHUYLER CTR. FOR ANALYSIS AND ADVOCACY, MORE HARD TIMES FOR NEW YORK’S WORKING FAMILIES 2 (2006), available at http://www.nycfuture.org/images_pdfs/pdfs/002-FINAL2.pdf.

⁹⁹ Bruce Balestier, *Judge Blasts City Agency Over Eviction*, N.Y.L.J. Apr. 26, 2000.

¹⁰⁰ Selections from the 1961 list of 21 non-desirable indications for tenant selection (many of which are now illegal):

1. Alcoholism resulting in behavior disturbing to others, neglected children, etc.
2. Record of past use of narcotics where there is no evidence of confirmed addiction
4. Record of poor rent payment or eviction for non-payment.
5. Highly irregular work history for any member of the family; unexplained gaps in work history.
6. Frequent separation of husband and wife.
7. One or both parents under 19 years of age
9. Birth of out-of-wedlock child or children to a member of the family, unless the person has since married and has lived continuously with his or her spouse as a family unit for the last two years.
10. Unmarried couple with or without children who have not lived together continuously as a family unit for the last two years.
11. Couple or single person with one or more children who are not their off-spring.
12. Family with minor children which does not include both parents,

person occupying the premises of the tenant which constitutes . . . a danger to health and safety of the tenant's neighbors," criminal acts, including drug use.¹⁰¹ Non-desirability is the mechanism by which NYCHA terminates drug users. Terminations based on non-desirability have been upheld when the underlying act is possession of a controlled substance based on heroin remnants in the apartment,¹⁰² as well as possession of a bag containing heroin residue and empty ziplock bags.¹⁰³ Often, NYCHA receives information that a tenant may be engaging in criminal or drug activity from the New York City Police Department.¹⁰⁴ Every arrest report in New York City contains a box that an officer must check if someone is arrested on NYCHA property or if a person gives a NYCHA address.¹⁰⁵ These reports are sent directly to the Housing Manager in the named property.¹⁰⁶ If the arrest leads to a dismissal, a conviction of a violation (not technically a crime) or adjournment in contemplation of dismissal, NYCHA's right to penalize a tenant for drug possession and sale is not affected, as the resolution of the criminal proceeding is not considered equivalent to a finding of innocence.¹⁰⁷

B. Termination of tenancy procedures—Theoretically

She is worried about being homeless and what will happen to her family. She meets with the Housing Manager and she explains what has happened. Despite their conversation, she gets a notice for a termination hearing. When she goes to the hearing she hopes that she can show the judge that she is trying to be sober, or at least not letting her addiction

unless the absent parent is hospitalized, in an institution, or is deceased

15. Unusually frequent changes in place of residence

18. Lack of furniture. . . .

NICHOLAS DAGEN BLOOM, PUBLIC HOUSING THAT WORKED: NEW YORK IN THE TWENTIETH CENTURY 277 – 78 (2008).

¹⁰¹ See NYCHA MANAGEMENT MANUAL, *supra* note 1, at 5. The lease provides that "[a]ny violent or drug-related criminal activity on or off the Leased Premises or the Development" is grounds for eviction, as is "any drug-related criminal activity on or off the Leased Premises, engaged in by the Tenant, any member of the Tenant's household, or any guest or other person under the Tenant's control, shall be cause for termination of tenancy." NYCHA RESIDENT LEASE AGREEMENT, (12) (r) (ii); (30) (b) (2007), available at home2.nyc.gov/html/nycha/downloads/pdf/rc_lease.pdf.

¹⁰² *In re Bradford v. NYCHA*, 824 N.Y.S.2d 350 (N.Y. App. Div. 2006).

¹⁰³ *In re Cruz*, 722 N.Y.S.2d 548 (N.Y. App. Div. 2001) (penalty of termination does not "shock our sense of fairness").

¹⁰⁴ See NYCHA MANAGEMENT MANUAL *supra* note 1, at 8.

¹⁰⁵ See *id.* at 6.

¹⁰⁶ See *id.* at 4.

¹⁰⁷ See *Simons v. NYCHA*, 648 N.Y.S.2d 18 (N.Y. App. Div. 1996).

affect her family as much. She hopes the judge will understand that even though she has been arrested for intent to sell, she is not a drug dealer. She hopes the judge will care that she was only convicted of a misdemeanor. She hopes the judge will care that she is in an NEP. Then again, maybe the judge won't care and her family should just kick her out to save the apartment.

After non-desirable information is received, the subsequent termination of tenancy procedure is governed by the Consent Decree from the case of *Escalera v. NYCHA*. *Escalera* was initially brought as a class action in 1967 by NYCHA tenants alleging violations of their due process rights under the Fourteenth Amendment and the U.S. Housing Act of 1937.¹⁰⁸ Before trial, NYCHA and the parties entered into a consent decree in which NYCHA agreed to “[p]rovide more specific notice of the reasons for the proposed termination action,” “[d]isclose to the Tenant at a hearing the evidence upon which the [Housing] Authority relies and afford the Tenant an opportunity to cross-examine witnesses,” and “[a]dvise the Tenant of the reasons (findings) for the decision to terminate the tenancy.”¹⁰⁹ In addition to providing these procedural safeguards, the *Escalera* Decree also created “a general outline of the procedures to be followed in the immediate future in processing proposed termination cases” which created four levels of decision-making.¹¹⁰

If, after receiving adverse information, the Housing Manager believes that a tenancy should be terminated, the Manager must schedule an interview with the Tenant to “discuss the problem(s) which may lead to termination of tenancy, seek to ascertain the facts involved and, when appropriate, try to assist the tenant by securing outside help.”¹¹¹ In non-desirability cases, Managers are instructed “to determine whether the tenant’s behavior has caused such an adverse impact on the project as to warrant termination proceedings.”¹¹² The NYCHA Manual specifies that for non-desira-

¹⁰⁸ *Escalera v. NYCHA*, 425 F.2d 853 (2d Cir. 1970). The Escaleras’ tenancy was terminated by a project manager without a hearing because the family owned a dog, in violation of the rules and regulations. Other class members’ tenancies were terminated after a request for administrative hearings, though without advance notice of the charges, the right to cross-examine and confront witnesses, an impartial hearing officer, and access to their tenant files. *Id.* at 859–60.

¹⁰⁹ *Escalera v. NYCHA*, 924 F. Supp. 1323, 1329 (S.D.N.Y. 1996) (citing the procedures required by the *Escalera* Consent Decree, No. 67 Civ. 4307).

¹¹⁰ *Id.*

¹¹¹ NYCHA MANAGEMENT MANUAL, *supra* note 1, at 14.

¹¹² *Id.* at 15. Housing Managers are further instructed to “not submit cases where the alleged perpetrator’s complicity cannot be established by the testimony of a cooperative eyewitness, by an admission of guilt or other evidence (such as certified court

bility cases, “the initial responsibility to determine whether the tenant’s behavior has caused such an adverse impact on the project as to warrant termination proceedings rest with the project [Housing] Manager.”¹¹³

If, after the interview, “all efforts to resolve the problem fail, including assisting the tenant in obtaining outside help, and the Manager decides that termination of tenancy should be pursued, the Manager submits the Tenant’s entire file and the [M]anager’s written recommendation, with reasons stated, to the Tenancy Administrator.”¹¹⁴ If termination is sought, the NYCHA Legal Department must notify the Tenant of his or her hearing rights, the charges against him or her and then send an official notice.¹¹⁵ The Office of Resident Review and Counseling (“ORRC”) reviews the Housing Manager’s recommendation and, if probable cause exists for eviction based on the facts and documentation submitted, ORRC refers the entire file to NYCHA’s Legal Department.¹¹⁶ To send the file to the legal department, ORRC needs only find “sufficient facts and documentation” in the case file.¹¹⁷ The Tenant is then given notice setting forth the specific grounds for the proposed termination action.

After receiving this notice, the Tenant is given a hearing in front of an impartial hearing officer. At the hearing, which must be on the record, both the NYCHA Attorney and the Tenant are allowed to introduce evidence, cross-examine witnesses, and subpoena documents and witnesses.¹¹⁸ The Hearing Officer makes a written decision based only on the evidence at the hearing that must “recommend a proper disposition of the case, such as eviction, social evaluation, probation, or a stay.”¹¹⁹ The Hearing Of-

dispositions), clearly connecting the objectionable act with the tenant or a family member.” *Id.* at 16.

¹¹³ *Id.* at 15. The NYCHA Manual states that at this interview it is the Manager’s responsibility to “document the tenant interview and that the tenant’s side of the story be brought out in the course of the interview.” *Id.* at 14. Interestingly, the Manual goes on to say that if “the Housing Manager does not feel that a finding of ineligibility is warranted, (s)he may not proceed again on the same grounds without another interview.” *Id.*

¹¹⁴ *Escalera*, 924 F. Supp. at 1329 (citing the procedures required by the *Escalera* Consent Decree, No. 67 Civ. 4307). The Tenancy Administrator is now the Office of Resident Review and Counseling (“ORRC”).

¹¹⁵ See NYCHA MANAGEMENT MANUAL, *supra* note 1, at 20.

¹¹⁶ *Escalera*, 924 F. Supp. at 1329 (citing the procedures required by the *Escalera* Consent Decree, No. 67 Civ. 4307).

¹¹⁷ NYCHA MANAGEMENT MANUAL, *supra* note 1, at 20.

¹¹⁸ *Escalera*, 924 F. Supp. at 1329 (citing the procedures required by the *Escalera* Consent Decree, No. 67 Civ. 4307).

¹¹⁹ *Id.*

ficer is not required, though may, take into account “extenuating circumstances presented at the hearing, the previous record of the tenant, and the tenant’s prognosis for future conduct, as evidenced by the Housing Authority’s files or other reliable sources.”¹²⁰ After the decision, the Tenant is allowed a written reply, which along with the decision, is submitted to NYCHA for its final review and determination of the action to be taken.¹²¹ If tenancy is terminated, then NYCHA must take the tenant to Housing Court to obtain a warrant of eviction.¹²²

C. *Termination of tenancy procedures—Reality*

She tries to get a lawyer but no one can take her case. She shows up for the hearing with other members of the household and is nervous. She has some documentation that she is enrolled in an NEP. After waiting for hours, the whole family is called to a back room with a number of tables, where they meet with a NYCHA lawyer. The lawyer says that if her family agrees to kick her out they won’t face eviction today. The lawyer does not care about the documents. He says that if they don’t sign the agreement, the judge will evict everyone today and by comparison, the agreement is a good deal. The lawyer quickly mentions that everyone can stay in the apartment but the woman who struggles with addiction. No visits. No Exceptions. Not even for holidays and birthdays. The lawyer again says that because she was arrested for drugs the judge will evict the entire family. The family is worried about their kids getting in trouble. The agreement says everyone must be on perfect behavior for a few years. One wrong move by anyone and the family is back to facing eviction. She can’t decide what to do and the lawyer keeps saying they all are going to be evicted. She doesn’t want to be back on the streets, but she doesn’t want to make her family go back to the shelter either. The family signs the form without anyone looking at the papers or finding out what is going on in their lives.

Despite the appearance of due process outlined in *Escalera*, the reality of NYCHA’s termination of tenancy procedures is problematic. Instead of exercising discretion and making studied, informed decisions about whether tenants are actually non-desirable, and if so, what remedy is appropriate, NYCHA encourages and directs Managers to “refer almost all cases for a Termination Hearing even where the incidents do not rise to the standard for non-desirable conduct and do not even provide a basis for a Termination

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *E.g.*, *Romanello v. Hirschfeld*, 479 N.Y.S.2d 519 (1984); The New York City Civil Court Act gives Housing Court the jurisdiction to grant warrants of eviction. N.Y. CITY CIV. CT. ACT § 204 (2009).

Proceeding at all.”¹²³

Additionally, despite the language in *Escalera* that requires Housing Managers to make a determination of non-desirability, the NYCHA Manual requires Managers to submit tenant files to ORRC when a household member is arrested for any drug-related reason, except misdemeanor criminal possession in the fourth degree, which may also be submitted for termination if “there are other factors of an undesirable nature in the tenant record.”¹²⁴ This section of the NYCHA Manual, however, is woefully outdated and references statutes that have been repealed for decades.¹²⁵ The Managers are advised that as the Penal Law section number increases, so does the gravity of the offense.¹²⁶ Thus, because the Managers are not given a current list of statutes, only one drug-related criminal act is, under their logic, minor enough not to take action on. Therefore, the NYCHA Manual essentially instructs Managers to forward all tenant files with any drug arrest to ORRC without first making a determination of non-desirability.¹²⁷ Once a household is in the process of eviction, avoiding adverse action based on behavior that is not necessarily against NYCHA Rules and Regulations is extremely difficult.

Virtually all tenants facing eviction based upon behavior that threatens the health or safety of others will appear at their hearing *pro se*.¹²⁸ Organizations that receive federal legal services funding are prohibited from defending against eviction proceedings based upon a drug charge or drug behavior.¹²⁹ Thus, the vast majority of legal service providers in New York are barred from taking the case and tenants must go to their hearings unrepresented.¹³⁰

¹²³ Amended Verified Petition at 11 ¶ 41, *Robinson v. Martinez*, 748 N.Y.S.2d 448 (N.Y. Sup. Ct. 2001), 2001 WL 36042181.

¹²⁴ NYCHA MANAGEMENT MANUAL, *supra* note 1, app. B at 4–5.

¹²⁵ *E.g., id.* at 4 (citing N.Y. PENAL L. § 220.05 (repealed 1995)).

¹²⁶ *See id.*

¹²⁷ *See id.* at 2.

¹²⁸ In Housing Court, 97% of landlords are represented by counsel compared to only 12% of tenants. *See Scherer, supra* note 2, at 704. Because of this, most eviction proceedings are swift and tenants are not able or aware that they eviction may be prevented. *Id.* For a further discussion about the problems facing *pro se* tenants in Housing Court, see Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 L. & SOC'Y REV. 419, 421 (2001) and Mulé and Yavinsky, *supra* note 3.

¹²⁹ 45 C.F.R. § 1633.3 (2006).

¹³⁰ Even if Tenants facing eviction were eligible for representation, they would likely not receive it. A 1993 study found that fewer than 12% of tenants had counsel in their Housing Court eviction proceedings. Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS. 699, 704 (2006) (citing Community Training and Resource Center

One of the other fundamental problems of NYCHA's procedures is that many tenants whose tenancy NYCHA is seeking to terminate never receive a hearing. Instead, it is NYCHA's practice to have a settlement conference with the tenant on the first hearing date.¹³¹ At these conferences, NYCHA attorneys "encourage and influence unrepresented tenants to enter into stipulations of settlement immediately at the time of the scheduled hearing by misleading tenants to believe that they face eviction even when the termination of tenancy is not authorized by Termination Proceedings."¹³² Though many tenants sign the stipulations to avoid immediate evictions, the stipulations being offered before a hearing have terms harsher than a hearing officer may impose.¹³³ NYCHA then terminates tenants based on violations of the onerous stipulations terms.

NYCHA's process of placing tenants on probation for non-desirable acts of family members was born from the *Tyson-Randolph* Consent Decrees.¹³⁴ The *Tyson* Decree, which is in effect despite the Supreme Court's holding in *HUD v. Rucker*,¹³⁵ was negotiated to protect tenants from eviction who were not themselves accused of non-desirability.¹³⁶ Before the *Tyson* Decree was finalized, the district court held that the eviction of a family for the actions of a family member who does not, or no longer resides in the household, violated the First Amendment's right to association and that "[t]here must be some causal nexus between the imposition of the sanction of eviction and the plaintiffs' own conduct."¹³⁷ Under the

and City-Wide Task Force on Housing Court, Eviction and Homelessness: The Costs and Benefits of Establishing a Right to Counsel iv, (1993)). National studies have shown that less than 25% of low-income people's civil legal needs are met. *Id.*

¹³¹ Amended Verified Petition, *supra* note 123, at ¶ 43.

¹³² *Id.*

¹³³ The Hearing Officer "can only permanently exclude the offending household member, and cannot forbid visitation or order probation longer than one year." CITY-WIDE TASK FORCE ON HOUSING COURT, NYCHA TRAINING BY LISA BURRESS AND JACKIE BURGER (2008) (on file with author).

¹³⁴ See *Escalera v. NYCHA*, 924 F. Supp. 1323, 1335 n.9 (S.D.N.Y. 1996) (discussing *Tyson v. NYCHA*, 369 F. Supp. 513 (S.D.N.Y. 1974), resulting in the *Tyson* Consent Decree, No. 73 Civ. 859, and the *Randolph* Consent Decree, No. 74 Civ. 1856). *Tyson* was actually two related actions that were consolidated but produced two consent decrees: the *Tyson* Decree addressed substantive limitations on termination of tenancy for non-desirability; and the *Randolph* Decree addressed both administrative termination of tenancy procedures and substantive limitations on the disposition of cases based on non-desirability. *Robinson v. Finkel*, 748 N.Y.S.2d 448, 459 n.9 (N.Y. Sup. Ct. 2002).

¹³⁵ *HUD v. Rucker*, 535 U.S. 125 (2002).

¹³⁶ See *Escalera*, 924 F. Supp. at 1335 n.9.

¹³⁷ *Tyson*, 369 F. Supp. at 519.

Tyson Decree, NYCHA may place tenants on probation and may terminate their tenancy only if the ‘non-desirable’ person continues to reside in the household and the tenant fails to remove them.¹³⁸

Though these types of stipulations are permitted by the *Tyson-Randolph* Consent Decrees, “neither the *Escalera* nor the *Tyson-Randolph* consent decrees make any provision for stipulations in lieu of the hearing process outlined in the several decrees. . . [and they] have not been amended to prescribe for the resolution for the Termination of Tenancy proceedings by stipulation.”¹³⁹ In *Robinson v. Finkel*, the New York Supreme Court found that NYCHA’s termination of Ms. Robinson’s tenancy was arbitrary, capricious and contrary to law because the stipulation Ms. Robinson signed *pro se* was not an informed, knowing and voluntary waiver of her constitutionally protected due process rights.¹⁴⁰ The court was concerned that

¹³⁸ See *Escalera*, 924 F. Supp. at 1335 n.9 (discussing *Tyson*, 369 F. Supp. at 513, resulting in the *Tyson* Consent Decree, No. 73 Civ. 859, and the *Randolph* Consent Decree, No. 74 Civ. 1856).

¹³⁹ *Robinson v. Finkel*, 748 N.Y.S.2d 448, 461 (N.Y. Sup. Ct., 2002), *aff’d*, 764 N.Y.S.2d 94 (N.Y. App. Div. 2003).

¹⁴⁰ *Id.* at 464–65. After her teenage son was arrested for drug possession, NYCHA recommended that Ms. Robinson’s 21-year NYCHA tenancy be terminated. This recommendation came despite the fact that her son moved out of the apartment, and that his charges were dismissed. Having defaulted on her first hearing Ms. Robinson signed a stipulation of settlement containing the following terms:

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED between the New York City Housing Authority (hereafter referred to as ‘Authority’) and the Tenant in person as follows:

1. Upon conditions hereinafter set forth, the Tenant admits and consents to a final determination in the manner as set forth below.
2. The Tenant neither admits or denies that Donnel Robinson (dob 11/30/80) (hereinafter, ‘Offender’) were authorized to reside in the subject apartment.
3. The above entitled administrative proceeding shall be disposed of by a determination of PERMANENT EXCLUSION of Offender. The foregoing determination of PERMANENT EXCLUSION prohibits residence in and visitation to the subject apartment by Offender or in any other Authority property or premise in which the Tenant may subsequently reside.
4. As a further condition of this stipulation, tenant agrees to allow a representative of NYCHA to make unannounced visits to the apartment during the hours of 9:00 a.m and 7:00 p.m for the purpose of confirming tenant’s compliance with this stipulation. Tenant further agrees that a refusal to allow entry into the subject apartment by representatives of NYCHA for the above stated purpose, shall constitute a violation for the terms of this stipulation and may subject the tenant to additional penalties *including termination*.
5. In addition to the determination of PERMANENT EXCLUSION specified in paragraph 3 above, the Tenant is placed on GENERAL PROBATION FOR A PERIOD OF NO. 1 YEAR with the under-

Ms. Robinson had waived her due process rights and became subject to new terms of disposition. Additionally, the court found that:

[H]aving unrepresented tenants relinquish [their rights] through form stipulations, the Respondent Housing Authority has replaced a set of procedural requirements designed to provide due process of law, and substantive limitations on the power to evict for non-desirability [sic], with a process that is devoid of any procedural safeguards, circumvents the substantive limitations, and is not subject to judicial review from any contemporaneous record. This substitute process is not only not authorized by the several consent decrees and the Procedures, but is utterly inconsistent with their explicit purpose of providing public housing tenants with due process of law before their tenancy may be terminated by state action.¹⁴¹

This process, without a record to review or an impartial hearing officer, increases the risk that *pro se* tenants will involuntarily waive their rights. The court concluded by noting, “[c]ombating the drug crisis infesting the city’s housing projects is an important objective. It can, and should be, accomplished, however, without violating or disregarding due process rights of tenants.”¹⁴² On a fundamental level, the termination process is inadequate for providing stable housing because the issue to be resolved at every level of review is whether the tenant’s file or evidence can support a finding of termination based on non-desirability, not whether the tenant should actually be evicted.

NYCHA justifies its practice of forwarding tenant files with drug arrests to ORRC by equating the arrest for the sale of drugs

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- standing that ANY violation of the Rules, Regulations, Policies and/or Procedures of the Authority shall constitute a violation of this stipulation and will subject the Tenant to additional penalties, *including termination*. This period of PROBATION will commence when this stipulation is approved by the Members of the Authority.
6. The tenant further agrees that the contents of this stipulation shall constitute a public record and that NYCHA may make public, information which is limited to the offender. [Paragraphs 7 and 8 deal with change of apartments and locks.]
 9. The foregoing determination shall have the same force and effect as a decision and disposition by the Hearing Officer.
 10. This stipulation shall be subject to the approval of the Members of the Authority. In the event that the Authority shall fail to approve the stipulation, then the matter shall be restored to the administrative hearing calendar for a hearing and this stipulation shall be null and void and without prejudice to either party hereto.”

Id. at 452.

¹⁴¹ *Id.* at 462.

¹⁴² *Id.* at 464 (citing *Brown v. Popolizio*, 569 N.Y.S.2d 615, 623 (N.Y. App. Div. 1991)).

with a threat to the safety of the tenant's neighbors.¹⁴³ This logic however, is contrary to NYCHA's own understanding of drug use on its property, the reality of the criminal justice system and the public health knowledge available. It is necessary for NYCHA to implement referral procedures to prevent eviction of tenants who are substance users and to recognize that the substance use by tenants who are NEP participants is, by virtue of their NEP participation, not a threat to the health or safety of others. Tenants participating in NEP should not be evicted on the grounds of substance use.

IV. BEST PRACTICES FOR NYCHA'S TERMINATION OF TENANCY PROCEDURES FOR DRUG USERS

Your client meets with the Housing Manager about the arrest. The manager listens to what happens and seems to understand that your client is not a drug dealer. He asks questions about your client's trips to rehab and the other programs the client attends. The client explains that she is involved with an NEP. The manager provides your client with referrals to other services in case she wants them. The Manager explains that NYCHA is not seeking eviction because the client is 'doing something' about her addiction.

The modification of existing practices to accommodate NEP participants is not new. After the State Board of Health created the most recent NEP, the police were arresting NEP participants for the trace amount of drugs in their used needles¹⁴⁴ because possessing trace amounts of drugs violates the Penal Law.¹⁴⁵ As the New York NEP regulation¹⁴⁶ does not exempt participants from criminal liability, it instead acknowledges that participants will have used needles; participants "are apparently expected to violate the Penal Law."¹⁴⁷ Based on this expectation, the district court found the need to resolve the conflict between the New York Penal and Public Health Law.¹⁴⁸ The court noted "[i]t would be bizarre to con-

¹⁴³ See *Brown*, 569 N.Y.S.2d at 616–17.

¹⁴⁴ E.g., *Roe v. City of New York*, 232 F. Supp. 2d 240, 240 (S.D.N.Y. 2002); *L.B. v. Town of Chester*, 232 F. Supp. 2d 227, 227 (S.D.N.Y. 2002).

¹⁴⁵ N.Y. PENAL LAW § 220.03 (McKinney 2006); "In [*People v.*] *Mizell* the New York Court of Appeals found that Penal Law § 220.03 applies even to unusable quantities of drug residue because that application would serve the statute's purpose of reducing illegal drug use" and not "increasing the incidence of drug abuse by the removal of penal sanctions for the unlawful possession of dangerous drugs." *Roe*, 232 F. Supp. 2d at 255 (quoting 1972 N.Y. Legis. Doc. No. 10, at 58).

¹⁴⁶ N.Y. COMP. CODES R. & REGS. tit. 10, § 80.135 (1992).

¹⁴⁷ *Roe*, 232 F. Supp. 2d at 252.

¹⁴⁸ *Id.*

clude that the Legislative intent was to permit the creation of needle exchange programs in order to remove dirty needles, while at the same time frustrating that goal by making the essential steps of participation illegal.”¹⁴⁹ The court concluded that to give effect to the purpose of the Public Health Law, it must be read liberally, while the criminal law should be read narrowly.¹⁵⁰ Thus, the court concluded that for NEP participants, “there is no criminal liability under Penal Law Section 220.03 for possession of a controlled substance based upon the drug residue remaining in the used needle or syringe.”¹⁵¹ This is important for NYCHA termination of tenancy procedures because, as discussed above, housing is as important for health outcomes as returning dirty needles is to the prevention of HIV.

Both federal policy and NYCHA’s history illustrate that NYCHA is empowered to, and should, exercise discretion when seeking to evict tenants.¹⁵² After the federal one strike policy¹⁵³ was enacted, the HUD Secretary advised housing authorities that they “should be guided by compassion and common sense” and to apply the one strike rule responsibly not rigidly.”¹⁵⁴ HUD advised housing authorities to consider multiple factors when evicting a resident including “the seriousness of the violation, the effect that eviction of the entire household would have on household members not involved in the criminal activity, and the willingness of the head of household to remove the wrongdoing household member from the lease as a condition for continued occupancy.”¹⁵⁵ Although HUD emphasized discretion, the regulations also instructed authorities to factor in the degree to which the housing

¹⁴⁹ *Id.* at 257. The district court also accepted as true, evidence that shows that HIV/AIDS reduction is made less effective with criminalization because users share and reuse needles. *Id.* at 258.

¹⁵⁰ *Id.* at 255.

¹⁵¹ *Id.* at 260.

¹⁵² See William F. Maher, *Wisdom Revisited: Judicial Intervention and the Exercise of Discretion in ‘Strict Liability’ Public Housing Evictions*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 218, 223 (1999).

¹⁵³ See Section II.

¹⁵⁴ Renai S. Rodney, *Am I My Mother’s Keeper? The Case Against the Use of Juvenile Arrest Records in One-Strike Public Housing Evictions*, 98 N.W. U. L. REV. 739, 752 (2004) (citing a letter from Mel Martinez, HUD Sec’y (Apr. 16, 2002)).

¹⁵⁵ Letter from Michael M. Liu, Assistant Sec’y, HUD, to Public Housing Directors (June 6, 2002) (*available at* <http://www.hud.gov/offices/pih/regs/rucker6jun2002.pdf>). See also Letter from Carole W. Wilson, Associate General Counsel for Litigation, HUD, to Charles J. Macellaro, Charles J. Macellaro, P.C. (Aug. 15, 2002) (*available at* <http://www.hud.gov/offices/pih/regs/rucker15aug2002.pdf>) (repeating HUD’s position that a PHA is not required to apply or consider the discretionary factors, but is free to do so if it wishes).

project suffers from “rampant drug-related or violent crime[;] the seriousness of the offending action [and] the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action.”¹⁵⁶ These factors punish those with addiction problems who live around other drug users. Given the importance of housing for all and the public health benefits of preventing homelessness and reducing HIV transmission, NYCHA should amend its termination of tenancy procedures. The new procedures must require an actual determination of non-desirability before the file is advanced to the legal department and NYCHA must offer treatment and service referrals in lieu of eviction.

A. *Integrating Public Health Models with NYCHA Termination of Tenancy Procedures*

As it stands, a tenant can be placed on probation or termination without anyone actually making a determination of non-desirability. When a tenant’s file is forwarded because of an arrest, the Manager has not made a determination of non-desirability.¹⁵⁷ At the hearing stage, if the Tenant accepts a stipulation, no one from NYCHA is making a determination about whether the behavior at issue actually constitutes non-desirability.¹⁵⁸ After the process concludes, a tenant is often punished for behavior that *no one* has found to be in violation of the rules and regulations.

The mandatory forwarding of tenant files that have drug arrests should be stopped. If NYCHA considers it necessary for Housing Managers to forward tenant files for criminal activity, it should only be after the case results in a conviction or a plea of guilty. If a drug-related arrest does not lead to a conviction, the Manager should not initiate any steps in the termination process unless there is other information indicating non-desirability.¹⁵⁹ In cases

¹⁵⁶ HUD v. Rucker, 535 U.S. 125, 134 (2002) (citing 42 U.S.C. § 11901(2) (1994) and 66 Fed. Reg. 28803 (May 24, 2001)).

¹⁵⁷ NYCHA MANAGEMENT MANUAL, *supra* note 1, at 21; *see also* Robinson v. Finkel, 748 N.Y.S.2d 448, 451 (N.Y. Sup. Ct. 2002) (forwarding a tenant’s file based on the arrest of her son where the Housing Manager had not made a determination of non-desirability).

¹⁵⁸ *See Robinson*, 748 N.Y.S.2d at 461 (involving the signing of a stipulation that resulted in Ms. Robinson losing her procedural and substantive rights, and NYCHA not being required to make a determination of non-desirability).

¹⁵⁹ This paper is limited to modifying existing procedures while recognizing the best, though unrealistic solution would be to rethink the entire process. If larger changes were to be made, I would look towards the applicant denial appeals process in St. Paul, Minn. In St. Paul,

[a]n applicant denied housing by the St. Paul Public Housing Agency in Minnesota is entitled to appeal the adverse decision. The applicant can

where there is a conviction and the file is forwarded, ORRC should evaluate the case and make a determination about whether the tenant's alleged behavior constitutes non-desirability. In all other cases, the Housing Manager should make that determination. In evaluating whether the person is non-desirable and actually poses a threat to the health or safety to other residents, there must be a consideration of what conduct is at issue, what type of drug was involved and what, if anything, the tenant is doing to mitigate the effects of his or her drug use.

Evaluating the Tenant's behavior is important in determining non-desirability, as the key issue is the impact the behavior has on others.¹⁶⁰ If the Tenant is using drugs in the privacy of an apartment or off the property completely, it is unlikely that the Tenant's drug use would affect neighbors. This is also likely true for illegal behavior associated with drug use. If in addition to drug crimes, a tenant is arrested for misdemeanors or non-violent felonies off the property, it, too, is unlikely that neighbors' health or safety is adversely affected by such actions. Although neighbors and Managers might prefer to evict drug users, drug use, in-and-of-itself, does not affect neighbors to the extent that it would meet what should be a relatively high burden for termination.

The type of drug the Tenant is allegedly using is important because NYCHA has pleaded, and the *Escalera* court has accepted, that certain drug use does not, by its nature, constitute non-desirability.¹⁶¹ In petitioning the district court for a modification of the *Escalera* Consent Decree, NYCHA argued that the introduction of crack cocaine created a substantial change in drug trafficking and

present evidence of mitigating circumstances or rehabilitation to a panel of five members consisting of three current public housing residents and two staff members. The staff representatives include one housing manager and one social worker. This process is designed to ensure the decision is reflective of the community's wishes both to be rigorous about maintaining public safety but also in ensuring equal access to housing. Including current residents on the panel can also provide a unique perspective on mitigating circumstances surrounding a conviction and on the significance of evidence of rehabilitation. Moreover, a current tenant may have a relative – a nephew, sister, or child – who has been involved in the criminal justice system. It may be easier for a current tenant to keep an open mind when evaluating an applicant with a criminal record.

LEGAL ACTION CENTER, *SAFE AT HOME: A REFERENCE GUIDE FOR PUBLIC HOUSING* 12 (2004).

¹⁶⁰ NYCHA MANAGEMENT MANUAL, *supra* note 1, at 5.

¹⁶¹ *Escalera v. NYCHA*, 924 F. Supp. 1323, 1333–35 (S.D.N.Y. 1996) (discussing the differences between the crack addict of the 1980s and 90s and the heroin addict of the 1970s).

related issues that necessitated the bypassing of administrative procedures for some drug-related evictions.¹⁶² Specifically, NYCHA argued that the primary drug used by residents in the 1960s had been heroin but was now crack and that there was a fundamental difference between crack users and dealer and heroin users and dealers. The court accepted NYCHA's argument and made the following findings of fact:

72. Low-income heroin users and dealers, although they tend to commit other crimes to support their drug habits as do other drug users, are relatively docile when experiencing a heroin high. They generally 'are not combative, and the addict him or herself *does not really present a threat to the residency of public housing, to the tenants.* . . .'

. . . .

81. . . . '[t]he crack addict . . . is far more combative than the heroin addict of the mid 1970's.'¹⁶³

Thus, by its own admission, NYCHA has argued that some drug users, are not a danger or threat to others, and are thus not non-desirable.

Finally, in considering whether a tenant is non-desirable, NYCHA should look at what if anything the tenant is doing to mitigate the effects of substance abuse. Given the importance of housing for low-income people and those struggling with substance abuse, an eviction policy is the last place where the unrealistic goal of abstinence should be. Although the language in the NYCHA Manual is correct in theory, an eviction related to drug use should only occur when it significantly impacts others. A key factor in evaluating the impact is what the resident is doing to lessen the impact of his or her drug use.

As discussed in Section I, from a public health perspective, the enrollment in a NEP by its nature reduces the impact of substance use. Taking steps to reduce the spread of disease and maintaining one's health positively impact others. Additionally, the exchanging of needles reduces the dangerous disposal of needles. On a more individual level, participation in a program, whether a traditional recovery or harm reduction program, requires the individual to address and change his or her behavior in different ways. In promul-

¹⁶² *Id.* at 1333–34 (discussing how NYCHA was granted permission to bypass administrative proceedings to evict drug dealers under the special 'Bawdy House Law' available to private landlords and district attorneys). This is not to say that other addicts should be afforded less protection or process.

¹⁶³ *Id.* (internal citations to hearing testimony omitted) (emphasis added).

gating the NEP regulation,¹⁶⁴ the State Health Commissioner recognized that these programs provide HIV education and other appropriate prevention strategies to reduce risk behaviors associated with drug use and they also “act as a bridge to other health and human services for a population that is difficult to access and is generally underserved.”¹⁶⁵ Thus, the State Health Commissioner required NEPs to provide services in the context of a comprehensive harm reduction model.¹⁶⁶ Similar to the Housing First model¹⁶⁷ NYCHA’s termination of tenancy procedures that include referrals to drug treatment and consideration of tenant’s harm-reducing behaviors should recognize that individuals are “at different stages of recovery and that effective interventions should be individually tailored.”¹⁶⁸ Thus, the type of treatment the tenant is engaged with should not matter for the termination of tenancy procedures. The only important factor is what, if anything, the tenant is doing to reduce the harm of his or her drug use.

In promulgating the 1993 NEP regulation,¹⁶⁹ the State Health Commissioner found that “accessible, appropriate drug treatment on demand should be the highest priority within the harm reduction spectrum [but that] drug treatment cannot be the only HIV prevention strategy for addicts.”¹⁷⁰ The State Health Commissioner found that HIV prevention could not rely solely on treatment.¹⁷¹ Treatment alone is inadequate because drug addiction is chronic, and relapse is common even when the person is in treatment.¹⁷² Additionally, the ratio of IDU to treatment spots was four to one.¹⁷³ These comments encompass public health knowledge that harm reduction strategies are necessary not only for reducing the spread of disease, but also for supporting steps towards recovery.

Finally, NYCHA should adopt a policy of referring tenants who are not currently involved with drug treatment or harm reduction

¹⁶⁴ N.Y. COMP. CODES R. & REGS. tit. 10, § 80.135 (1992).

¹⁶⁵ 15 N.Y. Reg. 22, 25 (Oct. 19, 1993).

¹⁶⁶ *Id.*

¹⁶⁷ Pathways to Housing is an organization dedicated to ending homelessness for people who suffer from psychiatric disabilities. The Housing First model, developed by Pathways to Housing, of services separates housing from treatment and does not condition the former on the latter. *See, e.g.*, Pathways to Housing, http://www.pathwaystohousing.org/content/our_model.

¹⁶⁸ Sam Tsemberis, et al., *Housing First, Consumer Choice, and Harm Reduction for Homeless Individuals With a Dual Diagnosis*, 94(4) AM. J. PUB. HEALTH 651, 652 (2004).

¹⁶⁹ N.Y. COMP. CODES R. & REGS. tit. 10, § 80.135 (1992).

¹⁷⁰ 15 N.Y. Reg. 22, 25 (Oct. 19, 1993).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

programs to service programs. As discussed above, the referral should be made to a variety of services so that the tenant may find the option that is best suited for his or her needs. Once the referral is made, the termination process should end. Currently, NYCHA provides a wide variety of social services and service referrals for residents facing “acute psychiatric emergencies, traumatic incidents, family crises, domestic violence, child abuse/neglect, elder abuse/neglect and substance abuse.”¹⁷⁴ For example, NYCHA has a special domestic violence program where victims of domestic violence placed in NYCHA apartments or those who are already tenants receive various supportive services.¹⁷⁵ Through the Domestic Violence Intervention, Education and Prevention Program, NYCHA provides case managers who “work with clients to identify their most urgent needs and provide information and services, safety planning, and referrals to other agencies for a broad range of comprehensive and supportive services.”¹⁷⁶ NYCHA once provided the same for drug users.

In 1988, the same year New York City created its first NEP, NYCHA created the Anti-Narcotics Strike Force (ANSF).¹⁷⁷ The purpose of the ANSF was to evict public housing tenants who were involved in the illegal distribution and sale of narcotics.¹⁷⁸ A few years later, NYCHA with federal funds, started a Drug Elimination Program (DEP), which was a combination of “enhanced police protection, drug treatment, drug prevention programs, youth and gang outreach, and community organizing.”¹⁷⁹ The DEP was created to reduce crime by reducing drug use and sales and strengthen control over NYCHA residents and projects.¹⁸⁰

A component of the DEP was drug-abuse intervention, prevention and treatment, targeting teens and post-partum women.¹⁸¹ Once a resident was in the program, the Department of Health prepared tenants for treatment, which was arranged by NYCHA.¹⁸²

¹⁷⁴ NYCHA, COMMUNITY PROGRAMS & SERVICES: SOCIAL SERVICES, http://www.nyc.gov/html/nycha/html/community/social_serv.shtml (last visited Oct. 30, 2009).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Jeffrey Fagan et al., *The Bustle of Horses on a Ship: Drug Control in New York City Public Housing* 9 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 05-89, 2005), available at <http://ssrn.com/abstract=716821>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 3.

¹⁸⁰ *Id.* at 3, 5.

¹⁸¹ *Id.* at 10. NYCHA hired community outreach workers to identify drug-addicted residents. *Id.*

¹⁸² *Id.* By the end of 1993, NYCHA had contracts with three treatment providers that provided services to 139 residents. *Id.* at 10–11. In the last six months of 1994,

Treatment was also offered to those not in the target population, and involved education and counseling.¹⁸³ In addition to providing treatment to targeted residents, the Drug Abuse Outreach Referral, and Placement Program received 801 referrals of tenants identified as having substance abuse problems during Termination of Tenancy proceedings from NYCHA management.¹⁸⁴ Together these programs created opposing policies: ANSF was receiving funds to target and evict tenants with drug arrests and the DEP was funded to intervene and prevent drug use.¹⁸⁵ Unfortunately for NYCHA residents, the policies and strategies of ANSF remain in effect while the harm reduction guiding of the DEP has fallen to the wayside. Because Managers are given little discretion in proceeding with termination proceedings, it is necessary that NYCHA adopt mechanisms by which residents with substance abuse problems are offered treatment instead of homelessness.

V. CONCLUSION

NYCHA's policies and procedures that seek to evict public housing residents who use drugs are dangerous not only to the individual faced with losing his or her home, but also to public health. To continue to prevent and reduce the spread of HIV, NYCHA's termination of tenancy procedures must incorporate harm reduction strategies so that drug users are not evicted solely because of their drug use, thereby increasing their risk of acquiring and transmitting HIV and other diseases. NYCHA's policies must be amended so that only residents who actually are a threat to other tenants face termination of tenancy. In making this determination, NYCHA must be required to examine the individual's behavior and factor in the individual's engagement in harm-reducing practices. Thus, NYCHA's policies must recognize that tenants who are in NEPs, despite the fact they are currently using drugs, are taking important steps in reducing the impact of their drug use and should be spared from eviction. Just as the district court in *Roe* directed the police to modify their arrest procedures for individuals with trace amounts of drugs as to not subvert the intent of the public health department, NYCHA too must modify their termination

NYCHA referred 355 postpartum or teen residents to contracted programs. *Id.* at 11. During this time, NYCHA also referred an additional 305 residents who were outside the target population, to other treatment services. *Id.* In 1996, NYCHA referred 310 targeted residents and 105 others for treatment. *Id.*

¹⁸³ *Id.* at 10.

¹⁸⁴ *Id.* at 11.

¹⁸⁵ *Id.* at 9-10.

of tenancy procedures to recognize the importance of NEP participation and not automatically render drug users homeless. Preventing homelessness and reducing HIV transmission and risk should become priorities for NYCHA and be viewed as improving conditions in public housing rather than making them worse.