The War on the Poor - News from the Front: Department of Housing and Urban Development v. Rucker

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THE WAR ON THE POOR—NEWS FROM THE FRONT: DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT V. RUCKER

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I. INTRODUCTION

Blame it on Johnson. He may have launched the “War on Poverty” but it appears that the only sentiment surviving from that era is that “war” makes for a terrific metaphor for political projects. The substantive goals of the Johnson era War on Poverty—the belief that hard-core poverty and America cannot co-exist without the former diminishing the latter and that, therefore, the eradication of such poverty is a worthy and attainable goal1—these ideas appear to have vanished from the American political landscape. Instead, we are presented with cuts in social services, public housing, Medicare, and various other safety nets for the poor. In addition, the cost of housing relative to real wages at the bottom of the economic ladder has made it extremely difficult for the working poor to afford any housing at all.2 But as much or more as this about-face in political philosophy, it has been a second metaphorical war that has presented one of the most sustained attacks on the poor. I am, of course, referring to the “War on Drugs,” a war that was started when Johnson’s other “war” was won and which soon outstripped it in terms of its political opportunities.3

For the last three decades of the twentieth century, the War on Drugs has presented politicians with an apparently cost-free source of political capital. There seems to have been universal agreement that drugs are “bad” and that all

1. See e.g. Michael Harrington, The Other America: Poverty in the United States 164 (MacMillan 1962).
2. See e.g. Barbara Ehrenreich, Nickel and Dimed: On (Not) Getting by in America 169-70 (Metropolitan Books 2001).
3. However, just like Vietnam, the War on Drugs may be unwinnable.
right-thinking persons are against them (whatever that means in a society in which tobacco and alcohol are legal). Perhaps because intensifying the war against drugs was one of the few things that both Democrats and Republicans could agree on, it represented a handy bargaining chip for drumming up bipartisan support on more controversial subjects. And of course no one wanted to offer an opponent the opportunity to use the label “soft on crime” against him or her by expressing a concern for civil liberties that the drug war was eroding. As a result, during those years, Congress passed ever more draconian laws in the attempt to regulate drugs. And, rather than acting as a brake on a runaway Congress, the courts have, for the most part, abdicated their responsibility to function in this role by rubberstamping whatever interpretation eager prosecutors have cared to offer, even when these prosecutors were clearly not disinterested parties.

Not surprisingly, the brunt of these laws has fallen on the poor. It is, for the most part, the poor not the middle class who fill the nation’s jails and prisons on drug charges (although there is no shortage of drug use in the middle and upper classes). Well-heeled addicts have the opportunity to go to treatment. They can afford good lawyers. They can pay for their own or their children’s college tuition. They do not depend on food stamps or public assistance in order to survive and are thus unaffected by withdrawals of such assistance. No withdrawal of public housing assistance may be added to the list. This past Term, the Court upheld one more deprivation that will apply only to the poor in Department of Housing and Urban Development v. Rucker. There the Court held that a public housing authority (“PHA”) may evict an entire family from public housing because one member has been accused of involvement in illegal drug activity.

Ironically, at the time this case was decided, the respondents in the Rucker case were not the only families experiencing the heartbreak of a family member

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4. See e.g. Craig Horowitz, Drugs Are Bad: The Drug War Is Worse, N.Y. Mag. 22-33 (Feb. 5, 1996).
5. Of course, to the extent that innocence may not always matter or be able to be proven, sometimes the penalties fall on those with no connection to drugs. See e.g. Lynn M. Faltrow, The War on Drugs and the War on Abortion: Some Initial Thoughts on the Connections, Intersections and Effects, 28 S.U. L. Rev. 201, 237-38 (2001) (noting innocent victims of drug war laws in several contexts); Carol M. Bast, The Plight of the Minority Motorist, 39 N.Y.L. Sch. L. Rev. 49 (1994) (noting burden on innocent minority motorists); Tamara R. Piety, Student Author, Scorched Earth: How the Expansion of the Doctrine of Civil Forfeiture Has Laid Waste to Due Process, 45 U. Miami L. Rev. 911 (1991) (forfeiture can result in loss of property to innocent people); see Too Many Convicts, The Economist 9 (Aug. 10, 2002) (increase in jail population partly a result of increase in mandatory minimum sentences for drug crimes).
7. Horowitz, supra n. 4.
8. Id.
9. Cf Marchwinski v. Howard, 309 F.3d 330 (6th Cir. 2002) (holding that state law authorizing suspicionless drug testing of welfare recipients, and conditioning benefits on agreement to same, not violative of Fourth Amendment).
with a drug problem. Only a couple of months before the opinion was released, Noelle Bush, the President's niece and daughter of Florida Governor Jeb Bush, was arrested for forging a prescription for Xanax, a powerful anti-anxiety agent, and attempting to obtain Xanax with that forged prescription. Forging a prescription is a felony. However, Ms. Bush was offered the opportunity to go to treatment, which, if she managed to successfully complete it, would mean that she could avoid jail and a criminal record. Unfortunately, Ms. Bush has been found in violation of the conditions of this reprieve several times. Somehow, though, it seems unlikely that it will be “three Strikes and you’re out” for Ms. Bush. But whatever happens to Ms. Bush, Jeb Bush will not lose his house over it or be turned out of the governor’s mansion (which is a species of “public” housing). But that is exactly what the United States Supreme Court has said the Oakland Housing Authority (“OHA”) may do to Pearlie Rucker. The Court held that Rucker can be turned out of her home because her mentally-disabled daughter who, arrested for public intoxication, was found to have drug paraphernalia in her possession. For Rucker, Willie Lee, Barbara Hill, and Herman Walker, the “One Strike and You’re Out” policy, inaugurated under the Clinton administration, was invoked by the OHA, and the respondents’ claim that they lacked knowledge of the drug-related activity was deemed no defense by the OHA.

This result adds to the list of outrages and losses that have been imposed on the poor, turning the so-called War on Drugs into a war on the poor. These losses operate to systematically close door after door on the various means by which one

11. Actually, for two of the respondents, Barbara Hill and Willie Lee, it is not clear their grandsons had a “drug problem.” These grandmothers were evicted because their grandsons allegedly smoked marijuana in the parking lot. They well may not be addicts.


16. I suppose it is possible that, had Jeb Bush lost the election, it could be said to have contributed to him losing his “public housing” to the extent that any one incident can “cause” an election result. However, he did not lose. And this issue did not even seem to be much of a liability for him, although he did catch some criticism on the issue of disparate treatment. See e.g. Peter Wallsten, Noelle Bush Case Sparks Legal Controversy <http://www.miami.com/mld/miamiherald/4130225.htm> (accessed Sept. 23, 2002); Goldberg, supra n. 14; Robert Hornstein, Treena Kaye & Daniel Atkins, Rules Differ When Bushes and Poor Encounter Drug Problems, 113 Fulton County Daily Rptr. 7 (Mar. 21, 2002).

17. See Rucker, 122 S. Ct. at 1232. It should be noted, however, that the OHA has dropped its unlawful detainer action against Rucker (but not the other respondents), because Rucker’s daughter is now incarcerated. Id. at 1232 n. 1.

18. See e.g. John F. Harris, Clinton Links Housing Aid to Eviction of Crime Suspects: Civil Libertarians Attack “One-Strike” Policy That Affects Defendants Not Yet Convicted, Washington Post A14 (Mar. 29, 1996). Although, as the title indicates, the article focuses on the objection that defendants who are not convicted of anything may be evicted; as it turns out, a defendant’s family members who are not even accused of anything may also be evicted. As one observer put it, this is not a “one-strike” policy, it is a “no-strike” policy. Id. (quoting Mark Kappelhoff, legislative counsel to the American Civil Liberties Union’s Washington national office).

might be able to escape from the vicious cycle of poverty. The last decade saw increases in penalties for drug convictions, as well as the denial of welfare benefits, student loans, and Pell grants to those convicted of a drug offense, and sometimes to those not even accused of a drug offense. This period also saw disparate drug enforcement in minority communities, including the disparate impact stemming from wide variation in the Federal Sentencing Guidelines for crack versus powder cocaine. All this as a result of the War on Drugs.

It continues to be true that this is a nation in which we have a two-tiered response to the problem of drug addiction. For the affluent, especially celebrities, it is treatment and a request for privacy. Under this approach, drug and alcohol addiction is a regrettable occurrence, but one that can happen in the best of families. In these cases, the appropriate thing to do is (apparently) respect the family’s “privacy” and to forgive “youthful errors.” Thus, Governor Bush asks the media to respect his family’s privacy, President Bush refused to answer questions about his own alleged drug use, and the coverage of his daughters’ brushes with the law for underage drinking and DUI inspired some to cry foul over the media’s intrusion into the personal lives of the families of public figures.

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20. See e.g. Paul Finkelman, The Second Casualty of War: Civil Liberties and the War on Drugs, 66 S. Cal. L. Rev. 1389, 1398-99 (1993) (describing some penalties handed out in drug cases, stemming from possession of crack, as harsher than murder conviction during same time period because of the high mandatory minimum sentences for drug convictions).


22. Eric Blumenson & Eva S. Nilson, How to Construct an Underclass, or How the War on Drugs Became a War on Education, 6 J. Gender Race & Just. 61, 68-72 (2002) (describing how drug related expulsions, denial of student loan eligibility, and Pell grants are remedies failing hardest on the poor and those most in need of a means to survive outside of the illegal drug trade). This excellent article is the second exposé of the costs of the War on Drugs undertaken by Professors Blumenson and Nilson. Their first, Policing for Profit, exposed the distortion in law enforcement objectives and enforcement activities, not to mention outright corruption, that arises out of the forfeiture laws and the provision that much of the money seized may be returned to the seizing agency. See Blumenson & Nilson, supra n. 6.

23. Blumenson & Nilson, supra n. 22, at 75.

24. “Joseph McNamara, former San Jose police chief, put it succinctly: ‘The drug war has become a race war.’” Paltrow, supra n. 5 (describing drug testing of pregnant women disproportionately conducted on African-American women) (quoting Horowitz, supra n. 4); Bast, supra n. 5 (describing how stops to look for drugs disproportionately target minority motorists).


27. Potter, supra n. 12.


29. Id.

It is a truism that having a politician in the family can wreak havoc on the whole family’s mental health. Witness the drug and alcohol addictions of Betty Ford, Kitty Dukakis, the death of George McGovern’s daughter, Terry, and the well-publicized travails of the Kennedy family. Like politics or being in the public eye, however, poverty is also a known risk factor for substance abuse problems. But the drug problems of the poor are not considered a “private” family matter, or an illness requiring treatment and applause to the addict for the courage to seek treatment. Instead, drug addiction among the poor is treated as a public problem resulting from moral failure and lack of adequate supervision. Instead of treatment, the poor, by and large, are “treated” to jail and prison. And the addict is not the only sufferer. The whole family suffers when one member is an addict. Still, whatever losses and hardships are imposed on a family by virtue of the addict’s disease (and they are often devastating), they are rendered even more onerous by holding the whole family responsible for the activities of one of its members and depriving it of housing.

II. THE FACTS

The cases and briefs do not recite much in the way of facts, but this much is known. All of the named respondents, Pearlie Rucker, Willie Lee, Barbara Hill, and Herman Walker are over sixty years old. With the exception of Walker, each had been living in public housing for more than ten years. Barbara Hill lived in public housing for approximately thirty years. Three of the four named respondents are grandmothers with grandchildren living with them. Pearlie Rucker’s household includes a great-grandchild.

The incidents giving rise to the eviction notices in three of the four cases involved alleged drug use and/or drug possession outside of the apartment itself. In Rucker’s case, her daughter Gelinda, also a resident of her apartment, is mentally disabled and an alcoholic. In light of Gelinda’s prior treatment for alcohol abuse, Rucker asserted it was her practice to search her daughter’s room periodically for evidence of drugs or alcohol. Rucker claimed that she had no

31. Hollis & Mahlburg, supra n. 28; Nadelmann, supra n. 30.
33. Nadelman, supra n. 30.
35. Hollis & Mahlburg, supra n. 28.
39. Id. at 30a, 35a, 41a.
40. Id. at 30a.
41. Br. of Respt. at 1, Rucker, 122 S. Ct. 1230.
42. Id. at 27.
43. Id. at 43a (affidavit of Pearlie Rucker).
indication from these searches that her daughter was using drugs or alcohol. Nevertheless, Gelinda was spotted drinking with an open container three blocks from the complex. A search of her person revealed cocaine and a crack pipe; she was arrested and charged with possession. Barbara Hill and Willie Lee's grandsons were caught smoking marijuana in the parking lot of the apartment complex after police responded to a report of "narcotics" use in the parking lot. Lee's grandson was charged with possession, and the Unlawful Detainer Complaint alleged that both admitted to smoking marijuana. All three respondents say that they took care to warn members of their household that drug use could result in eviction.

In contrast to the three grandmothers, the allegations relating to Herman Walker involved drug use or possession on the premises, although by whom is not entirely clear. Walker is disabled. He is partially paralyzed on the left side, walks with difficulty, and needs a cane and the periodic use of bottled oxygen. He cannot live on his own and requires the services of a home healthcare worker. That home healthcare worker was a woman named Eleanor Randle. On three separate occasions, OHA Police found persons other than either Walker or his caregiver, Randle, in the apartment and found drugs or drug paraphernalia either in these persons' possession or in the apartment. According to the Unlawful Detainer Complaint, twice a non-resident was seen in the apartment in a nightgown. The report states that women's clothing was found scattered throughout the apartment, and it appeared that these other women were living in the apartment, despite Walker's protests that they were not. Also, on one occasion, crack and four crack pipes were found in a box in Walker's bedroom.

Reviewing the above facts, it is tempting to conclude that Walker's case is factually distinguishable from that of the three grandmothers, and in many ways it is. But all four respondents faced a similar dilemma. Where would they go if they

45. Id.
46. Br. of Respt. at 1, Rucker, 122 S. Ct. 1230.
47. Id. at 13a. at 42a.
48. Id. at 1.
49. Id. at 18a.
50. Id. at 31a, 34a.
51. Br. of Respt. at 31a, 34a, 39a, 44a, Rucker, 122 S. Ct. 1230.
52. Id. at 36a.
53. Id.
54. Id. at 37a.
55. Id. at 39a.
56. Br. of Respt. at 37a-39a, Rucker, 122 S. Ct. 1230.
57. Id. at 37a.
58. Id. at 38a.
59. Id. at 39a. These facts are certainly suggestive of the possibility that Walker's apartment was being used as a crackhouse, with or without his consent (although it is difficult to imagine how it could be without his knowledge). After the third visit from the housing police and third notice of a violation, Walker fired Randle. One might ask what took him so long, but one has to consider the circumstances. If Walker was dependant upon Randle to assist him in his basic daily needs, he may have felt unable to confront her or afraid to do so. Alternatively, he may have been participating in the drug use that was apparently going on in his apartment. In which case, it would not be too surprising that he failed to fire Randle on the first notice.
were evicted? And, if the OHA succeeded in evicting the respondents, it would perforce also be evicting any children who lived with some of them. Where would these children go? This was apparently of little interest to the OHA.  

III. THE LEGAL CLAIM  

OHA’s leases include language, mandated by 42 U.S.C. § 1437d(l)(6), that, according to the Department of Housing and Urban Development (“HUD”), allow the public housing authorities the discretion to evict a tenant when a member of the household or a guest is accused of drug-related activity, regardless of whether the tenant knew or had any involvement in the alleged activity. The authorizing language existed as early as 1991, but it was apparently not until 1996, after then-President Clinton announced it in his State of the Union address, that HUD took the position that this language could be interpreted to permit the eviction of innocent tenants.  

To challenge this interpretation, the tenants had to negotiate a dizzying series of doctrinal moves through administrative law in order to state their claim. The tenants sued HUD, OHA, and the director of the OHA, claiming that the lease and agency policy which purported to authorize their eviction was in conflict with the Administrative Procedure Act (“APA”) because the lease, and the policy under which the OHA acted, were in conflict with the congressional intent reflected in the authorizing statute and, thus, the APA.  

Pursuant to Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., in analyzing such a claim a court must first determine if the statutory language in question is unambiguous. If it is, and if the agency’s regulation or policy is consistent with the unambiguous language, then the court will uphold the agency interpretation. If, on the other hand, the agency’s interpretation is inconsistent with that language, the agency’s interpretation will be struck down.  

Things get more interesting if a court concludes that it is unable to determine Congress’ intent from the language of the relevant statute. At that point, under Chevron, a court is to analyze whether an agency’s interpretation of the statute is
Because getting to this step involves concluding that congressional intent is ambiguous, the reasonableness inquiry is apparently a global one, that is, not whether it is reasonable given congressional intent, but whether it is reasonable period. An inquiry such as this, untethered to any particular criteria, seems to run the risk that the reasonableness standard represents no standard at all and that literally anything might go.

Beginning in 1997, the OHA began a proceeding in state court to evict Willie Lee, Barbara Hill, Pearlie Rucker, and Herman Walker. After the state court proceedings were filed, the tenants filed an action in federal district court against not only OHA, but also HUD, alleging that HUD’s interpretation of the statute did not require lease terms that would or could result in the eviction of tenants innocent of any wrongdoing. Moreover, they argued that even if the HUD interpretation was consistent with the APA, this interpretation of 42 U.S.C. § 1437d(l)(6) violates due process where the statute’s operation, through the HUD lease terms, could result in the eviction of a tenant innocent of any wrongdoing. The tenants asked for an injunction restraining OHA from terminating their leases where the tenant “had no knowledge and no reason to know of the drug-related criminal activity.” The district court granted this request.

On appeal of that decision, a Ninth Circuit panel held that OHA’s interpretation of the statute was correct. The panel found the language of Section 1437d(l)(6) unambiguous and that it permitted eviction of tenants who may be in violation of this lease provision, whether or not they were personally aware of any drug-related activity. However, rehearing en banc was granted and the en banc court reversed, holding that HUD’s interpretation was inconsistent with congressional intent and therefore “must be rejected” under Chevron.

IV. “HEADS I WIN, TAILS YOU LOSE”: THE SUPREME COURT’S DECISION

The Chevron test requires a reviewing court to first determine whether or not Congress has spoken directly to the matter in question. If Congress has spoken to the matter, its intent must be given effect. But the question is, how do you determine what the intent of Congress was? Supreme Court precedent has suggested two possibilities. In the first approach, labeled “textualism” by some observers and identified with Justice Scalia, a reviewing court is to confine itself to analyzing the statutory language, without resort to legislative history. On the
other hand, in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, the Court found it necessary and appropriate to resort to legislative history in order to interpret the congressional intent behind specific statutory language. The various opinions in *Rucker*, from the district court to the panel opinion of the Ninth Circuit to the en banc opinion, reflect this disagreement over the proper interpretative approach.

The Ninth Circuit, citing the Supreme Court in its recent decision striking down the attempts of the Food and Drug Administration ("FDA") to regulate tobacco, asserted that it was not enough to look at "'a particular statutory provision in isolation.'" Rather, "'the words of [the] statute must be read in their context and with a view to their place in the overall statutory scheme.'" Concluding that this context suggested that Congress did not mean to subject innocent tenants to eviction, the Ninth Circuit found that HUD's contrary interpretation was not entitled to any deference under *Chevron*.

The Supreme Court came to precisely the opposite conclusion. However, instead of resorting to legislative history or context, the Supreme Court concluded such resort was unnecessary where "'the plain language' was "'unambiguous." As is traditionally the case, the Supreme Court found it unnecessary to explain how it was that some language could be simultaneously "'unambiguous" and unambiguously found to be ambiguous by a majority of the Ninth Circuit sitting en banc. These are things that, apparently, esteemed jurists just do not discuss. But it is worth examining this language that was apparently so needlessly troublesome to the Ninth Circuit. The statute provides:

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

This sentence is not a model of clarity. But then so few statutes are. Their drafters are usually lawyers, not grammarians. Nevertheless, in the time-honored legal practice of knowing one thing and acting as if it is something else altogether, we act as if Congress could be said to have an intent and did put together this sentence in full awareness of the rules of grammar. Adopting this fiction, the Court concluded that reading this sentence as the en banc Ninth Circuit did—that is, that the words "or other person under the tenant's control" suggested that the operative concern for each of the categories was control and hence knowledge on

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80. *Id*.
81. *Id*.
83. 42 U.S.C. § 1437d(j)(6) (Supp. 2002). This language was adopted virtually verbatim by OHA in its leases. Thus, the interpretive issue is whether HUD and OHA's *interpretation* of this language, that it permits evictions of innocent tenants, is consistent with congressional intent.
the part of the tenant—ran “counter to basic rules of grammar.” Since the Court does not indicate which particular rule of grammar it is relying on, we just have to take its word for it that the Court’s grasp of the basic rules of grammar is better than that of the Ninth Circuit. But perhaps not. We can look at this more closely.

A. The Meaning of “Or”

The Court says the “disjunctive ‘or’ means that the qualification [under the tenant’s control] applies only to ‘other person.’” But this reads any significance out of the word “other.” However, there is another interpretation that makes sense of “other.” My dictionary offers several definitions of “or,” among which are the following:

(a) “an alternative; (b) the second of two alternatives (either right or wrong); (c) the first of two alternatives; (d) a “synonymous or equivalent expression (acrophobia or fear of heights).”

“Synonymous or equivalent expression.” It seems manifest that Congress was using the word “or” as a “synonymous or equivalent expression,” rather than in its disjunctive meaning. Why is this so obvious? Well, it is hard to understand why else the word “other” appears in this sentence. Had Congress meant simply to create a fourth category of persons who could place the tenant’s lease in jeopardy (after the tenant, a member of tenant’s household, or a guest), it could have drafted the sentence to read “or a person under the tenant’s control” instead of “other person under the tenant’s control . . . .”

The only reason this fourth class of persons exists is that otherwise it seems anomalous—rather like those elementary I.Q. tests that ask children to identify the thing that does not fit: violin, viola, tuba, or cello. Of course, you are meant to identify the tuba as not being a string instrument. Similarly, “a person under the tenant’s control” does not “fit” with the rest of the category unless we assume that the remaining persons in the list are “persons under the tenant’s control.”

While it is no doubt a legal fiction that any person in this list (including the tenant herself if she is an addict) is “under the tenant’s control,” it seems reasonable, at least as a rebuttable presumption, to assume that a tenant can control herself, the members of her household, and her guests. If we view the list in this way, it seems obvious that this assumption is the only one that makes sense of the word “other.” To the extent that we can attribute any particular intelligible
"intent" to Congress, it seems as if in drafting this provision Congress meant to identify, in addition to the tenant herself, all of the people over whom the tenant could be said to exert any authority or influence, even if only that of putting the offender out. As the Court observed in Brown & Williamson, context is important. And, according to the en banc Court of Appeals, it was this recitation of context that the Ninth Circuit en banc majority felt required reading into the statute a congressional intent to exempt tenants who could prove that they were either ignorant of the illegal behavior despite their vigilance, or that vigilance and warnings had been ineffective.

However, the Supreme Court concluded that the Ninth Circuit's resort to congressional intent was error given that its own reading of the statutory language led it to conclude the language was clear and unambiguous. Ironically though, the Ninth Circuit had drawn its conclusion, about the importance of context, from the Supreme Court. It was in Brown & Williamson (upon which the Ninth Circuit relied), that the Supreme Court resorted to "context" to conclude that "drug" was a term that did not include nicotine, despite scientific evidence that nicotine was indeed a drug, because there context revealed to the Court that Congress had not intended to give the FDA regulatory authority over tobacco.

B. By "Any" Means

The second challenge to a reader's language skills occurred with the word "any" in the above statute. The Court interpreted the word "any" to plainly and unambiguously allow for the eviction of innocent tenants if a person within one of the statutory categories engaged in "[a]ny drug-related criminal activity." For the Court the operative word here was "any." As Chief Justice Rehnquist stated, "any" means even that activity of which the tenant is unaware because "the word 'any' has an expansive meaning—i.e., 'one or some indiscriminately of whatever kind.'"

But "any" is further modified by "criminal." The phrase in the statute is "any criminal activity." And while strict liability in criminal law is certainly not unknown, and indeed has arguably expanded in effect, if not in name, with the expansion of the civil forfeiture laws, criminal liability is generally understood to require mens rea. That is so integral a part of what is conceived to be the nature

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88. Query how reasonable or feasible this is with respect to minor teenagers and to Herman Walker's home health care worker on whom he apparently relied for assistance in performing the most basic functions of everyday life.
90. Rucker, 237 F.3d at 1119.
91. Rucker, 122 S. Ct. at 1234.
93. See Resp't Br. Ji. App. at 59a, Rucker, 122 S. Ct. 1230 (emphasis added).
of criminal responsibility that it may be that the Ninth Circuit thought it went without saying. Had Congress wanted to make clear that it intended no fault liability for the actions of others, it could not only have said so, as the Ninth Circuit pointed out, but alternate phrasing, to eliminate the word “criminal,” could have been used. For instance, the statute could have read, “activity involving illegal drugs.” The use of the word “criminal” makes the Ninth Circuit’s assumption that Congress did not intend to allow innocent tenants to be evicted, at the very least, plausible. It was certainly entitled to more discussion than the Supreme Court afforded it.

C. “Just in Case”—Legislative History

Despite what the “plain language” revealed to the Supreme Court (if not to the Ninth Circuit), it went on to compare the housing provision with the amendments made to the forfeiture provision in 21 U.S.C. § 881. Section 881 was amended in 1988 as part of the same legislative enactment to add “leasehold interests” to the interests that could be forfeited under the forfeiture laws. This provision has an innocent owner exception. The Ninth Circuit reasoned that since the two subsections were part of the same enactment, they should be read in pari materia. Once again, the Circuit Court apparently missed the obvious because, according to the Supreme Court, “the two sections deal with distinctly different matters.”

The “innocent owner” defense for drug forfeiture case was already in existence prior to 1988 as a part of 21 U.S.C. § 881(a)(7). All Congress did in the 1988 Act was to add “leasehold interests” to the property interests that might be forfeited under the drug statute. And if such a forfeiture action were brought against a leasehold interest, it would be subject to the pre-existing “innocent owner” defense. But 42 U.S.C. § 1437d(f)(6), with which we deal here, is quite a different measure. It is entirely reasonable to think that the Government, when seeking to transfer private property to itself in a [civil] forfeiture proceeding, should be subject to an “innocent owner defense,” while it should not be when acting as a landlord in a public housing project. The forfeiture provision shows that Congress knew exactly how to provide an “innocent owner” defense. It did not provide one in § 1437d(f)(6). . .

Well, to the uninitiated, that may sound entirely reasonable. However, there are a couple of problems. First, prior decisions of the Court have concluded that

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97. Of course without the word “illegal,” the statute would have again been rendered intolerably vague and in need of resort to “context” since the word “drug” could include prescription drugs, narcotic and non-narcotic, as well as nicotine and perhaps caffeine as well.

98. Furthermore, one could argue that “criminal” requires a conviction prior to eviction.


100. Rucker, 277 F.3d at 1121.


102. Id. (emphasis added).
public housing tenants do enjoy a "property interest" in their tenancies, at least to the extent that they may not be deprived of them without some due process protections.\textsuperscript{103} It was precisely these due process protections that Congress wished to avoid by placing "leasehold interests" in Section 881.\textsuperscript{104} As the dissenters from the en banc Ninth Circuit opinion observed, "Congress recognized that the forfeiture statute permitted the government to seize property without providing any procedural protections to the owner of the property"\textsuperscript{105} by cutting "through the usual drawn-out process of first notifying the drug dealers that they would be evicted and then battling them in court[ ]..."\textsuperscript{106} In 1988, it was true that property owners could have their property seized without notice. However, by 1993 that was no longer true. In \textit{United States v. James Daniel Good Real Property},\textsuperscript{107} the Court held that seizure of real property requires notice and an opportunity to be heard.\textsuperscript{108} Thus, by March, 2002, this was certainly not true anymore and it is difficult to conclude that the two sections should be read differently.

Given that the significance of the deprivation involved when removing public housing tenants from their homes was the rationale for recognizing that public housing tenants have a property interest of a sort in housing,\textsuperscript{109} it seems perverse to distinguish leaseholds from other property forfeited to the government on the ground that the government "already" owns it.\textsuperscript{110} The passage quoted by the dissent in the Ninth Circuit opinion makes it clear that the kinds of "leaseholds" Congress had in mind when it amended Section 881 was primarily, if not exclusively, the public housing leaseholds. And when you think about it, what other leaseholds would be of any use to the government? What use could the government get from taking over a leasehold where it was not already the owner of the property in some fashion?

As the above-quoted language makes clear, by adding leaseholds to Section 881, Congress sought to bypass the procedural protections afforded to public housing tenants, procedural protections that were extended \textit{in recognition} of the tenants' property interests in their leaseholds and substitute the (at that time) virtually process-free procedures offered to prosecutors in civil forfeiture.

\textsuperscript{103} See \textit{e.g.} Greene \textit{v. Lindsey}, 456 U.S. 444 (1982).
\textsuperscript{105} \textit{Rucker}, 237 F.3d at 1132 (Sneed, J., dissenting).
\textsuperscript{106} \textit{Id.} (quoting 134 Cong. Rec. E1965-02 (1988)).
\textsuperscript{107} 510 U.S. 43 (1993).
\textsuperscript{108} \textit{Id.} at 59.
\textsuperscript{109} See \textit{e.g. Escalera \textit{v. N.Y.C. Hous. Auth.}}, 425 F.2d 853, 861 (2d Cir. 1970) (even though public housing tenancy characterized as a "privilege," this is not necessarily dispositive for purposes of Fourteenth Amendment).
\textsuperscript{110} Note this argument may be seen as a variation on the relation-back doctrine. This is the legal fiction whereby the law declares you have not lost anything by forfeiture because it belongs to the government anyway, by virtue of the illegal act that justifies the forfeiture. Heads I win, tails you lose.
Once there was effectively little difference between the two methods of proceeding (or at least those differences have been minimized in this crucial respect), it is hard to see how this history provides a basis for concluding that HUD's policy is distinguishable. It is ironic that this has now become the justification for bypassing the substantive protection that, according to the dissent in the Ninth Circuit, was offered by way of compensation for the absence of procedural protections.\(^1\)

### D. When All Else Fails, Rely on Discretion

Finally, the Supreme Court found support in a point that Justice Ginsberg relied upon in a notorious 1996 case, *Bennis v. Michigan*\(^1\)—deference to another decisionmaker who is supposed to be entitled to broad discretion. In *Bennis*, the Court held that a Michigan forfeiture statute that permitted the forfeiture of a jointly owned car because of the husband's conduct with a prostitute was not constitutionally infirm because it failed to offer the wife and co-owner an innocent owner defense. The Michigan statute set up forfeiture proceedings as an equitable action and granted the presiding judge broad discretion to make whatever order seemed appropriate. For Justice Ginsberg, that discretion was decisive, as her concurrence provided the fifth vote necessary for a majority.\(^1\) In throwing in her lot with the majority to uphold Michigan's forfeiture law, she wrote, "[Michigan's] Supreme Court stands ready to police exorbitant applications of the statute."\(^1\) The possibility that others might view the facts of this case as presenting just such an "exorbitant" and unjust application of the statute apparently did not occur to her.

So, too, in the *Rucker* case the Court felt that some deference ought to be shown to the decisions of the PHA's because they may exercise their discretion to prevent unfairness in particular cases. Thus, according to the Court, we should not assume that they have not done so:

> The statute does not *require* the eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, . . . "the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action."\(^1\)

Presumably this means that *sometimes* this discretion will be exercised to allow innocent tenants to stay in their homes. But if the public housing authorities *need* not take this into account, why would they? And if they *do* consider it

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111. See *Wiercioch*, *supra* n. 104, at 1410 ("The use of leasehold forfeitures purportedly enabled law enforcement to remove, more quickly than allowed under standard eviction procedures, public housing tenants suspected of drug trafficking.") (emphasis added).
114. *Id.* at 457 (Ginsburg, J., concurring).
115. *Id.*
relevant to whether or not the innocent tenant gets evicted along with the guilty, why should it not always be relevant?¹¹⁷

On the other hand, the issue of discretion highlights a central problem. That is, how to effectively rid public housing projects of high profile crime when one is unlikely, in many cases, to be able to get hard evidence. In this regard, it has been suggested that measures such as these, with deference to the local PHA to make the judgment call on who “deserves” eviction and who must go for the good of the others, whether or not they “deserve it,” are necessary.¹¹⁸ Perhaps that is all that this Supreme Court decision allows—throwing the ball back into the PHA’s court. However, as has been previously noted, the problem with this solution is that there is no guarantee that everyone will agree with all of the substantive decisions, or more to the point, that the courts will. Whether or not one thinks this is a bad thing (there are some arguments that it is a good thing to diminish courts’ interference in such matters),¹¹⁹ past experience with the exercise of unrestrained discretion by the PHA resulted in racial discrimination, discrimination against persons with unpopular views or lifestyles, the poorest of the poor, and so on. It does not take much imagination to predict that unreviewed discretion will result in the resurgence of such practices.

Based on the popularity of the “One Strike” program from a political perspective, and the enhancements and incentives extended to those PHAs that could show they vigorously enforced the policy, it seems unlikely that much discretion will be exercised. Indeed, it is the lack of need to exercise discretion that adds to the law’s administrative ease of application. However, as indicated the PHA’s have not had a particularly good record regarding the exercise of their discretion in the past.¹²⁰ Indeed, it was precisely on these grounds that the complained of due process protections were put in place when it was shown that the PHA were using that discretion to engage in discriminatory practices and to evict persons of whom they disapproved.¹²¹ Perhaps the Court thinks now they would do a better job? Or perhaps it is just that now the Court is happier to think it might be so and to thereby thrust the problems of the poor out of sight.

¹¹⁷. According to the Supreme Court, “no-fault” eviction is common. The Court cites nothing more than HUD’s own regulations asserting this as authority for this proposition. See id. (quoting 56 Fed. Reg. 51560, 51567 (Oct. 11, 1991)). In fact, landlord tenant law is an area that has been extensively regulated in most states to provide more protection to tenants from eviction without adequate notice or grounds, not less. But whether or not this is an accurate statement of the law as it applies to the arrangements between private landlord-tenants agreements, it is not at all clear that the government ought to be treated the same way as a private landlord any more than the government can be viewed as just another “employer” for purposes of Section 1983.

¹¹⁸. William Maher, Wisdom Revisited: Judicial Intervention and the Exercise of Discretion in “Strict Liability” Public Housing Evictions, 8 J. Affordable Hous. & Community Dev. L. 218 (1999); Smyers, supra n. 61.

¹¹⁹. See Maher, supra n. 118, at 225.

¹²⁰. See Smyers, supra n. 61, at 577-87.

¹²¹. Id. at 579-84 (describing how PHA “desirability” and other policies were systematically used in discriminatory ways or resulted in arbitrary denials or exclusions).
E. "No Liability" Offers No Deterrence

Of course, expecting public housing authorities to prove each case to the standard applicable to a court of law may render the power to evict essentially null, or at least, ineffective, as the legislative comments to the amendments to Section 881 suggest. Without wide latitude to address these problems, so the argument goes, public housing tenants themselves will be victims of the drug dealers. It may be necessary to evict persons who, through no fault of their own, attract or shelter the people who are engaging in the illegal behavior that makes the projects virtually unlivable for others. “Strict liability maximizes deterrence and eases enforcement difficulties.” While it is obvious how strict liability might ease “enforcement difficulties,” it seems equally obvious that it does so because of the reduced need to evaluate circumstances, gather and weigh evidence, and to make tough choices—in other words, to exercise discretion. It hardly seems an argument in support of deferral to agency discretion to point to the ways in which a bright-line rule obviates the need to use such discretion.

Conversely, as easy as it is to see why strict liability might ease an agency’s enforcement burden, it is unclear how it could “maximize deterrence” if strict liability renders all efforts to avoid or deter an infraction equally unavailing. Why bother to search your daughter’s room or police your son’s friends or warn your guests about the “drug policy” in your house if it will not make any difference in the outcome? Well, of course people might do any of these things because they care about their children, are opposed to drug use, do not want to deal with the problems associated with drug use, and so forth. One might even say this is self-evident. “People who care about their children will do this regardless,” may be the retort. Exactly. So then what role does strict liability (or rather vicarious liability) play as a deterrent? If there are more pressing and urgent reasons that people would take measures to keep family members away from drugs, then it would seem that strict liability would play only a minor role—perhaps to those who care more about losing their housing than losing their children. This is especially true if the person who does everything to “maximize deterrence” has no guarantee of being treated any differently than one who turns a blind eye. Where is the incentive in strict liability to make any effort at all?

Of course it is unfair to say that the only ones affected would be those who care about their housing more than their children. If you care about both, it may be significant that there is a difference in the degree of control that you have over the fate of each. No one can really control another person, especially not an addict determined to use drugs. Governor Bush has not been able to control the behavior of his daughter any more than the fictional drug czar played by Michael Douglas in Steven Soderbergh’s Traffic was able to control the drug use of his

122. As previously noted, this policy is not really a “strict liability” policy. It is a no liability policy.
123. Rucker, 122 S. Ct. at 1235. (Of course the Court misspoke here. This is not really strict liability. It is vicarious liability.). Cf. Nelson H. Mock, Student Author, Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties, 76 Tex. L. Rev. 1495 (1998).
daughter. But what you can do, at least with adult children, spouses, aunts, cousins, grandmothers, and caretakers, is to put them out. Perhaps that is the only true incentive offered by strict liability. The non-user, faced with a user who cannot be controlled, may at least attempt to put the user out.

Of course, one is immediately struck by a dilemma. If the non-user tenant cannot control the user, can the non-user tenant even get the user to leave? And what about the parent who has adolescent children too young to leave home but too old to control effectively? And what about the frail elderly person, like Herman Walker, who needs help simply to survive and perform everyday functions? What control do the Herman Walkers of the world exert over the person who might be able to withhold their medication, their oxygen, or a trip to the bathroom? Precious little, it would seem. For persons like Herman Walker, strict liability simply casts them between the proverbial rock and a hard place—no way to avoid the user, and no way to escape the consequences of the user’s drug use.125

All of the respondents in the Rucker case appear to fit this profile.126 Pearlie Rucker’s daughter, the drug user, was severely mentally disabled and Rucker herself was sixty-three years old at the time the lawsuit on her behalf was begun.127 Herman Walker is disabled and dependent upon the caretaker who was the drug user. Barbara Hill and Willie Lee are elderly women raising their grandsons who were caught smoking marijuana in the parking lot. If there were facts beyond those cited in the opinion that suggest, appearances to the contrary, that the agency’s discretion was properly exercised in this case, they were not adduced in the documents filed below.128

F. Uncivil Regulation

Finally, regarding the tenants’ argument that their due process rights were violated because there had been no finding of culpability, the Supreme Court distinguished the precedents the tenants cited, asserting that these cases dealt “with the acts of [the] government as sovereign.”129 The Court said, “[t]he situation in the present case is entirely different. The government is not attempting to criminally punish or civilly regulate respondents as members of the general populace.”130 It is not? Surely the intent of Congress was to “civilly regulate” the general populace to the extent that drug use in public housing affects more than just the residents there. It seems fair to say that this regulation is

125. For additional arguments that the one-strike policy is bad beyond the inequity of punishing those not at fault, see Barclay Thomas Johnson, The Severest Justice Is Not the Best Policy: The One-Strike Policy in Public Housing, 10 J. Affordable Pub. Hous. & Community Dev. L. 234 (2001).
126. It is not clear from the Rucker court opinions and briefs whether the grandsons of Willie Lee and Barbara Hill are minors.
128. Reasonable people might disagree about Herman Walker’s situation since his apartment appeared to be in use as a crack house.
129. Rucker, 122 S. Ct. at 1236.
130. Id.
simply part of the overall attempt to “civilly regulate” drug use on several fronts at once. The Court itself recognized this in distinguishing those efforts as they relate to property owners versus mere tenants. The challenged section at issue here was part of the Anti-Drug Abuse Act of 1988, which was not by any means limited to public housing residents or promulgated with the government’s role as landlord foremost. Rather, the Act reflects the government acting as sovereign to shape the conditions of civil life. This is no regularly recognized part of the duty of a private landlord.

V. CONGRESS SPOKE, IS THE COURT LISTENING?

In concluding the opinion, Chief Justice Rehnquist proclaimed that, pursuant to Chevron, “Congress has directly spoken to the precise question at issue” and, therefore, the respondents could be evicted “regardless of whether the tenant knew, or should have known, of the drug-related activity.” Yes, Congress has indeed spoken. But if one characterizes the “precise question at issue” as whether or not penalties ought to be imposed on persons innocent of any wrongdoing, it appears that the Court misheard. In reforming the civil forfeiture laws that obviated the perceived “distinction” noted between forfeitures of leaseholds and evictions, Congress had this to say about the propriety of visiting punishment on the innocent: “[A] meaningful innocent owner defense is required by fundamental fairness.” That was one of the purposes of the Civil Asset Forfeiture Reform Act (“CAFRA”), to make the innocent owner defense “uniform” and applicable to all forfeitures.

On the other hand, one could say that the problem is a disagreement over what fundamental fairness requires. Congress considered and passed CAFRA in the wake of cases like Bennis in which the Supreme Court offered its view that an innocent owner defense was not required by fundamental fairness, at least not when it came to “equitable,” in rem forfeitures. Whether or not one regards the loss of tenancy rights in public housing as the equivalent of the loss of a home one owns (and those that place a great weight on the concept of property will probably disagree), it seems fairly clear here that what we have is a disagreement over what constitutes “fundamental fairness.” The Court’s attempt to characterize its actions as merely effectuating the will of Congress is thus disingenuous.

VI. CONCLUSION

In short, none of the arguments offered by the Supreme Court to uphold HUD’s interpretation of this statute compel its result. Both textualism and resort

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131. See James Daniel Good Real Prop., 510 U.S. at 54.
133. Rucker, 122 S. Ct. at 1236 (internal citation and quotation marks omitted).
134. Id. (emphasis added).
136. Id. CAFRA was enacted as the Civil Asset Reform Act of 2000.
137. Bennis, 516 U.S 442.
to legislative history can, as demonstrated, support the opposite result. Nevertheless, the Court has cleared the way for public housing authorities to evict innocent persons from public housing. There is no question that public housing in many areas has become the proverbial den of thieves and a hotbed of crime and violence, much related to, but not exclusively so, the drug trade. Both the public housing authorities and public housing tenants have an interest in remedying this situation—perhaps no one more than the residents themselves. But the residents have had little say, although many of them support the “One Strike” policy\textsuperscript{138} because of the deplorable conditions existing in many projects. Whether they would generally support evictions such as the ones in this case is unclear. People are often eager to apply strictly to others a rule that seems unfair when applied to themselves. But, however they feel, one thing is clear: they have little in the way of options.

Judge Hawkins summed up the situation nicely in the Ninth’s Circuit’s majority opinion:

> Many of our nation’s poor live in public housing projects that, by many accounts, are little more than illegal drug markets and war zones. Innocent tenants live barricaded behind doors, in fear for their safety and the safety of their children. What these tenants may not realize is that, under existing policies of the Department of Housing and Urban Development . . . , they should add another fear to their list: becoming homeless if a household member or guest engages in criminal drug activity on or off the tenant’s property, even if the tenant did not know of or have reason to know of such activity or took all reasonable steps to prevent the activity from occurring.\textsuperscript{139}

> It is not as if the costs of drug use are not high enough already for a family in which one member has a drug problem. Just ask Governor Bush or former Senator McGovern. Drug use and abuse by a family member can and often does become a family tragedy. For the poor who are dependent upon public housing, there now may be no shelter from the storm.

\textsuperscript{138} At least as applied to those who are actually committing crimes such as drug dealing. See e.g. Adam P. Hellegers, Student Author, Reforming HUD’s “One Strike” Public Housing Evictions through Tenant Participation, 90 J. Crim. L. & Criminology 323, 325 (1999).

\textsuperscript{139} Rucker, 237 F.3d at 1116.