PERMANENTLY EXCLUDED

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New York City Housing Authority (NYCHA) deprives hundreds of residents of their housing every year without affording them due process. Based on the allegedly undesirable behavior of one household member, NYCHA can begin a termination of tenancy action against an entire family. Using the threat of termination as leverage, NYCHA coerces the tenant of record into permanently excluding the "undesirable" occupant, barring them from living with or visiting their family. The excluded family member is given no notice of the termination action and no opportunity to contest their permanent exclusion.

This Note contends that authorized occupants in NYCHA housing have due process rights which mandate notice and the opportunity to be heard before they lose their home. NYCHA does not currently recognize such rights. But, as this Note will show, authorized occupants have a property interest in public housing. NYCHA's practice of permanent exclusion deprives them of that interest. This Note suggests alternatives for NYCHA to consider instead of relying on permanent exclusion as a means of crime reduction. Ultimately, the goal of this Note is to push NYCHA to live up to its mission: to provide decent and affordable housing to low-income New Yorkers.

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Introduction

In August 1996, Donnel Robinson, a sixteen-year-old resident in a New York City Housing Authority (NYCHA) apartment, was arrested for drug possession. Though the charge was later dismissed and his record sealed, in March 1997, Donnel's mother, Tawana, received a notice that NYCHA was recommending that her tenancy be terminated. The reason? Donnel's alleged drug possession. Tawana, unrepresented by an attorney, arrived at her termination hearing a few months later. Immediately before the hearing, NYCHA's attorney presented her with a stipulation of settlement mandating that Donnel be permanently excluded from the apartment, barred from living there or from visiting his mother. To avoid her own eviction, Tawana signed. Later that year, when NYCHA inspected Tawana's apartment, they found Donnel. He had spent the night with his mother so that he could attend a nearby doctor's appointment the next morning. Inspectors found no evidence of drugs in the apartment—but that made no difference. NYCHA informed Tawana that they were again recommending her tenancy be terminated, this time for violating the permanent exclusion stipulation.[1]

In the twenty years since Donnel was permanently excluded, his experience has been repeated time and again across the city. In another case, NYCHA forced a mother to exclude her fifteen-year-old son because he had been arrested for marijuana possession. After she violated the permanent exclusion agreement by allowing him to

[1] This comes from *Robinson v. Finkel*, 748 N.Y.S.2d 448, 451–53 (Sup. Ct. 2002).

visit for Thanksgiving, NYCHA moved to evict her and the rest of her family.[2] Brother and sister Iris and Hector Monsegur were permanently excluded from their NYCHA home after they were convicted of selling heroin. Though they served their prison time and are now both employed, they are not allowed to visit their mother, who still lives in NYCHA housing. As Hector said of NYCHA, "with them, it's one strike and they give me life."[3]

These families, and hundreds more,[4] have come up against NYCHA's practice of permanent exclusion. Under NYCHA policy, the housing authority can terminate the tenancy of anyone who engages in "non-desirab[le]" conduct or whose family member engages in such conduct.[5] While the term non-desirable includes more than criminal activity, arrests provide NYCHA with an easy way of identifying residents potentially engaged in non-desirable conduct.[6] As an alternative to evicting an entire family, NYCHA may offer the tenant of record the chance to save her tenancy by permanently excluding the non-desirable family member.[7] These exclusion orders, which persist indefinitely, bar the family member from living in or

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[2] Manny Fernandez, *Barred from Public Housing, Even to See Family*, N.Y. TIMES (Oct. 1, 2007), http://www.nytimes.com/2007/10/01/nyregion/01banned.html.

[3] *Id.*

[4] *See* Batya Ungar-Sargon, *NYCHA Questioned on Policy of Banning Arrested Residents*, CITY LIMITS (June 2, 2015), http://citylimits.org/2015/06/02/nycha-questioned-on-policy-of-banning-arrested-residents (explaining that between 2007 and 2014, NYCHA permanently excluded 4698 residents because of alleged criminal activity).

[5] NYCHA, A HOME TO BE PROUD OF: A HANDBOOK FOR RESIDENTS 13 (2017), http://www1.nyc.gov/assets/nycha/downloads/pdf/nycha-tenant-handbook-2017.pdf. Prohibited conduct includes drug activity and "[b]ehavior that is considered to endanger the peaceful occupation of other residents." *Id.*; *see also* NYCHA, MANAGEMENT MANUAL CHAPTER IV, APPENDIX B – TERMINATION OF TENANCY – NON-DESIRABILITY ACTIONS 4–6, http://eshare.nycha.info/RFQ/Property%20Management%20RFP%20Documents/RFP-66734/RFP%2066734%20-%20Exhibit%20D/Management%20Manual/Management%20Manual%20Chapter%20IV%20-%20APPENDIX%20B.pdf (last visited July 20, 2020) (listing the different categories of non-desirability, which include a tenant who poses "[a] danger to the health and safety of the tenant's neighbors," "[c]onduct on or in the vicinity of the Authority premises which is in the nature of a sex or morals offense," a tenant who is "[a] source of danger or a cause of damage to the employees, premises or property of the Authority," a tenant who is "[a] source of danger to the peaceful occupation of other tenants," or a tenant who engages in "[a] common law nuisance").

[6] *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 833–34 (2015) (describing public housing authorities' use of arrest records); Ungar-Sargon, *supra* note 4 (stating that for NYCHA, "a mere arrest . . . is enough to trigger eviction or permanent exclusion").

[7] *Permanent Exclusion – Frequently Asked Questions*, NYCHA, http://www1.nyc.gov/site/nycha/residents/permanent-exclusion-faq.page (last visited Mar. 23, 2020).

even visiting the apartment.[8] Once permanently excluded, former residents are often pushed into housing instability and homelessness.[9]

Permanent exclusion is only a possible outcome if a resident other than the tenant of record—authorized occupants or unauthorized occupants—allegedly engaged in the non-desirable conduct.[10] The tenant(s) of record is the household member who signed the lease with NYCHA.[11] Authorized occupants are family members who did not sign the lease but nonetheless are recognized by NYCHA as lawful permanent occupants.[12] Unauthorized occupants, by contrast, are not permitted to reside in a NYCHA apartment.[13]

The choice NYCHA offers tenants in these situations is no choice at all. Faced with the prospect of losing their home—likely the only place in the city that they can afford[14]—many tenants are forced to tear apart their families. Tenants are no longer able to protect the interests of their family as one unit; instead, NYCHA coerces them into choosing between staying together as a family or keeping their home. In so doing, NYCHA pits the interests of the resident facing exclusion against those of the rest of his family.

NYCHA claims that permanent exclusions are targeted at "dangerous" residents.[15] In practice, however, residents face permanent

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[8] *Id.*

[9] *See* Ann Cammett, *Confronting Race and Collateral Consequences in Public Housing*, 39 SEATTLE U. L. REV. 1123, 1136 (2016) (explaining that those who are forced from their homes because of permanent exclusion are unlikely to find shelter).

[10] *See* NYCHA, GUIDELINES ON HANDLING OF TERMINATION CASES, EXCLUSION OF VIOLENT OR DANGEROUS INDIVIDUALS AND THE LIFTING OF EXCLUSIONS 1 [hereinafter NYCHA GUIDELINES], http://www1.nyc.gov/assets/nycha/downloads/pdf/law-ansf-case-handling-guidelines.pdf (last visited July 20, 2020) (explaining that NYCHA can use permanent exclusion as a possible solution in situations where "[a] member of the household or someone else under the tenant's control may have committed the dangerous conduct").

[11] NYCHA, MANAGEMENT MANUAL CHAPTER I: OCCUPANCY 136 (2017), http://eshare.nycha.info/RFQ/Property%20Management%20RFP%20Documents/RFP-66734/RFP%2066734%20-%20Exhibit%20D/Management%20Manual/Management%20Manual%20Chapter%20I.pdf.

[12] *Id.*

[13] *Id.* at 149.

[14] *See* JUSTIN R. LA MORT, MOBILIZATION FOR JUSTICE, TESTIMONY REGARDING NYCHA DEVELOPMENT AND PRIVATIZATION 4 (Oct. 30, 2018), http://mobilizationforjustice.org/wp-content/uploads/NYC-Housing-NYCHA-Privatization-Housing-10.18.pdf (describing NYCHA as the "housing of last resort for some of the most vulnerable tenants in the city"); *see also* NICHOLAS DAGEN BLOOM, PUBLIC HOUSING THAT WORKED: NEW YORK IN THE TWENTIETH CENTURY 214 (2008) (detailing how, in the 1980s, NYCHA became "housing of the last resort").

[15] *Permanent Exclusion – Frequently Asked Questions*, *supra* note 7. NYCHA does not define "dangerous," giving itself wide latitude to decide who constitutes a danger to other residents, NYCHA employees, or NYCHA property.

exclusion for minor misdemeanor charges,[16] for youthful indiscretions,[17] or for simple drug possession.[18] Moreover, NYCHA often pursues termination of tenancy or permanent exclusion while criminal charges are pending and, at times, after they have been dismissed.[19] In both scenarios, NYCHA residents face the loss of their housing for conduct that they may not have committed and for which they will never be found guilty.

Residents facing permanent exclusion are given no chance to participate in the termination process. When NYCHA brings a termination action, it provides only the tenant of record with notice and the right to a hearing; only the tenant of record is a named party in the action.[20] The family member whose conduct underlies the termination action is not a party. Consequently, NYCHA termination actions often result in permanently excluding a family member without providing the excluded person a meaningful opportunity to be heard.

NYCHA's practice of forcing residents from their homes without providing them notice or the opportunity to be heard violates residents' due process rights. Specifically, NYCHA deprives its residents who are permanently excluded of an important property interest: their public-housing apartment. These residents have none of

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16 *See, e.g.*, Matos v. Hernandez, 912 N.Y.S.2d 49, 51 (App. Div. 2010) (overturning NYCHA's permanent exclusion of a resident convicted of two misdemeanors but who had otherwise never violated NYCHA's policies or rules).

17 *See, e.g.*, Tucker v. NYCHA, 14 N.Y.S.3d 324, 325 (App. Div. 2015) (discussing NYCHA's permanent exclusion of a sixteen-year-old for vandalizing laundry machines).

18 *See* Fernandez, *supra* note 2 (describing NYCHA's permanent exclusion of a fifteen-year-old for marijuana possession).

19 *See* MARGARET DIZEREGA, GREGORY "FRITZ" UMBACH & JOHN BAE, VERA INST. OF JUSTICE, REPORT TO THE NEW YORK CITY HOUSING AUTHORITY ON APPLYING AND LIFTING PERMANENT EXCLUSIONS FOR CRIMINAL CONDUCT 8 (2017), http://www.vera.org/downloads/publications/nycha-lifting-permanent-exclusions-for-criminal-conduct-v3.pdf (noting that NYCHA frequently makes permanent exclusion determinations before a criminal court reaches a final judgment or disposition); SERGIO JIMENEZ, BROOKLYN DEF. SERVS., TESTIMONY 5 (Apr. 24, 2017), http://bds.org/wp-content/uploads/BDS-testimony-on-Permanent-Exclusion-DOI-4.24.17.pdf (describing a client who faced the termination of her tenancy from NYCHA after her criminal case was dismissed); RUNA RAJAGOPAL, BRONX DEFS., WRITTEN TESTIMONY 5 (Apr. 24, 2017), http://www.bronxdefenders.org/wp-content/uploads/2017/04/1-24-17-Written-Testimony-BxD-Runa-Rajagopal-DOI-Report-on-NYCHA-Permanent-Exclusion.pdf (explaining that public-housing tenants may lose their home or have family members excluded before their cases are adjudicated in criminal court).

20 *See* NYCHA, MANAGEMENT MANUAL CHAPTER IV: TERMINATION OF TENANCY 10 (2016), http://eshare.nycha.info/RFQ/Property%20 Management%20RFP%20Documents/RFP-66734/RFP%2066734%20-%20Exhibit%20D/Management%20Manual/Management%20Manual%20Chapter%20IV.pdf (noting that only tenants of record receive notification letters and sit for interviews when termination actions are initiated).

the procedural protections that the Constitution guarantees before the government deprives an individual of their property.[21]

This Note is the first to argue that NYCHA's permanent exclusion policy deprives authorized residents of a property right without providing constitutionally required procedural due process.[22] This Note will first provide a brief background on the history and structure of NYCHA, followed by a discussion of NYCHA's approach to public safety. Second, this Note will analyze the procedural due process problem. It will explore whether *authorized* NYCHA occupants, other than the tenant of record, have a property interest in their apartment.[23] Concluding that they do, it will demonstrate how NYCHA's existing termination procedures are insufficient to protect authorized occupants' due process rights. Third, this Note will propose changes NYCHA and the federal government could make to remedy the procedural due process violations and improve public safety at NYCHA. Above all, this Note advocates that NYCHA abandon its practice of bringing termination actions against an entire family based on the allegedly undesirable behavior of one resident. When necessary,

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[21] *See* U.S. CONST. amend. XIV, § 1 (prohibiting deprivations of property without due process). Recent legislative changes cast further uncertainty on the legality of NYCHA's permanent exclusion procedures. In June 2019, the New York State Legislature passed an expansive package of tenant protections, which included a requirement that "[n]o tenant or *lawful occupant* of a dwelling or housing accommodation shall be removed from possession except in a special proceeding." Housing Stability and Tenant Protection Act of 2019 § 12, N.Y. REAL PROP. ACTS. LAW § 711 (McKinney 2019) (emphasis added). This could suggest that an occupant—such as a NYCHA resident—cannot be removed from their home without being made a party to the action. However, the question of who is covered by "lawful occupant" has not yet been litigated. It is not clear whether courts will interpret the law to mean that all occupants, including family members, must be named in every eviction action. *See* N.Y. REAL PROP. LAW § 235-f(1)(b) (McKinney 2019) (defining occupant as "a person, other than a tenant or a member of a tenant's immediate family, occupying a premises with the consent of the tenant"). It is also unresolved whether courts will apply this law to NYCHA termination proceedings.

[22] A prior Note discussed NYCHA's permanent exclusion policy and trespass policy, which applies to non-residents in addition to residents. That Note argues that these policies violate constitutional due process requirements by depriving residents and non-residents of their "substantive right to freedom of association." Lauren J. Zimmerman, Note, *Exile Without Process: The New York City Housing Authority's Unconstitutional Trespass Notice Program*, 33 CARDOZO L. REV. 1253, 1267 (2012). Zimmerman's piece presents a different argument than this Note, which focuses on the deprivation of authorized residents' property interests.

[23] While unauthorized occupants may be subject to permanent exclusion, this Note only discusses the permanent exclusion of authorized occupants. Courts are clear that unauthorized occupants do not have a property right in a NYCHA apartment even if they live there. *See* Morillo v. City of New York, 582 N.Y.S.2d 387, 390 (App. Div. 1992) (holding that unauthorized occupants of city-owned buildings do not have a property interest).

NYCHA can pursue a termination against that resident, providing them with all necessary due process protections.

I
THE HISTORY AND STRUCTURE OF PUBLIC HOUSING

Since the early twentieth century, public housing has provided a critical service for low-income families. In the throes of the Great Depression, Congress passed the Housing Act of 1937[24] in order to "promote the goal of providing decent and affordable housing for all citizens."[25] This lofty ambition sought to bring relief to families crammed into substandard, dilapidated housing, and unsafe residences.[26] Since its genesis, public housing has expanded to serve 1.2 million households.[27] Of approximately 3300 local public housing authorities (PHAs) across the country administering public housing,[28] NYCHA is by far the largest.[29]

As of March 2019, across its 316 developments, NYCHA officially houses 170,740 families—totaling 381,159 residents—most of whom are among the city's poorest.[30] The average income of NYCHA families is $25,150.[31] NYCHA houses predominantly minority residents; its developments are approximately 46% Black, 45%

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[24] Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437 (2012)).

[25] 42 U.S.C. § 1437(a)(4).

[26] NAT'L LOW INCOME HOUS. COAL., A BRIEF HISTORICAL OVERVIEW OF AFFORDABLE RENTAL HOUSING 1–7 (2015), http://nlihc.org/sites/default/files/Sec1.03_Historical-Overview_2015.pdf.

[27] *HUD's Public Housing Program*, HUD.GOV, http://www.hud.gov/topics/rental_assistance/phprog (last visited Mar. 23, 2020).

[28] *Id.*

[29] *See* Donna Kimura, *Top Public Housing Authorities*, AFFORDABLE HOUS. FIN. (Apr. 1, 2010), http://www.housingfinance.com/developments/top-public-housing-authorities_o (listing NYCHA as having 180,263 public-housing units, over one hundred thousand more than the next largest PHA).

[30] NYCHA, NYCHA 2019 FACT SHEET 1 (2019), http://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Fact-Sheet_2019_08-01.pdf; *see also* N.Y. UNIV. FURMAN CTR., NYCHA'S OUTSIZED ROLE IN HOUSING NEW YORK'S POOREST HOUSEHOLDS 3 (2018), http://furmancenter.org/files/NYCHA_Brief_12-17-18.pdf [hereinafter FURMAN CTR., NYCHA'S OUTSIZED ROLE] (explaining that sixty-one percent of NYCHA's units house extremely low-income households, or those making less than thirty percent of the area median income). This data reflects the official number of residents; however, the total number of residents, including those who are unauthorized, may be around 600,000. *See* Luis Ferré-Sadurní, *Chelsea Apartment! Only $90 a Night! (Ignore the NYCHA Sign)*, N.Y. TIMES (Nov. 9, 2019), http://www.nytimes.com/2019/11/09/nyregion/airbnb-new-york-nycha.html (noting that unofficial resident estimates, based on anecdotes and trash volume, are near 600,000).

[31] *NYCHA Resident Data Book Summary*, DATA.GOV, cell K20 (last updated Feb. 12, 2020), http://catalog.data.gov/dataset/nycha-resident-data-book-summary-e58e4 (based on data as of January 1, 2019).

Hispanic, and 4% white.[32] For most of its residents, NYCHA provides a permanent home—families have spent an average of 23.5 years in NYCHA housing.[33] NYCHA residents stay so long, despite the crumbling conditions,[34] in large part because NYCHA provides the last affordable housing left in the city.[35]

The rest of this Part will proceed in two sections. The first Section will discuss federal strategies for addressing crime in public housing. The second Section will describe NYCHA's strategies, with a focus on NYCHA's permanent exclusion policy.

A. Federal Response to Crime in Public Housing

The 1970s and '80s marked a turning point in America's approach to crime and punishment. Before then, penal policy had largely centered on rehabilitation, but as crime rates skyrocketed and law-and-order rhetoric came to dominate the criminal justice agenda, the focus shifted from corrections to control.[36] The system of control was explicitly racialized as a way to replace the racial caste system that existed during the Jim Crow era.[37] Public-housing residents were not spared

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[32] PERFORMANCE TRACKING & ANALYTICS DEP'T, NYCHA, SPECIAL TABULATION OF RESIDENT CHARACTERISTICS 3 (2016), http://www1.nyc.gov/assets/nycha/downloads/pdf/Resident-Data-Summaries.pdf; *see also* Michelle Y. Ewert, *One Strike and You're Out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violates Due Process and Fair Housing Principles*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 57, 62 (2016) (explaining how public-housing developments across the country have become increasingly segregated); N.Y. UNIV. FURMAN CTR., HOW NYCHA PRESERVES DIVERSITY IN NEW YORK'S CHANGING NEIGHBORHOODS 3 (2019), http://furmancenter.org/files/NYCHA_Diversity_Brief_Final-04-30-2019.pdf ("[T]he Black and Hispanic population shares in most public housing developments were greater than those of the surrounding neighborhood.").

[33] *NYCHA Resident Data Book Summary*, *supra* note 31, at cell AF20.

[34] *See, e.g.*, Luis Ferré-Sadurní, *New York City's Public Housing Is in Crisis. Will Washington Take Control?*, N.Y. TIMES (Dec. 25, 2018), http://www.nytimes.com/2018/12/25/nyregion/nycha-hud-deblasio-carson.html (describing the lack of heat and presence of lead paint and rats prevalent in NYCHA developments).

[35] FURMAN CTR., NYCHA's OUTSIZED ROLE, *supra* note 30, at 3.

[36] For a detailed explanation of the decline in the rehabilitative framework, the increase in crime rates, and the corresponding shift in criminal justice policy, see DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); see also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 41–42 (2012), which examines the rising crime rates beginning in the 1960s and the increasing power of the conservative "'law and order' agenda."

[37] *See* ALEXANDER, *supra* note 36, at 22 (observing that mass incarceration, a "new system of control," began to develop "during the Civil Rights Movement itself, when it became clear that the old caste system [Jim Crow] was crumbling and a new one would have to take its place"). *But see* JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 29–32 (2017) (detailing examples of black community leaders, during the 1970s, pushing for harsher criminalization of drug addiction, along with expanded social services).

from either this punitive turn or its racial overtones. Rising crime rates in public-housing developments and the media's repeated emphasis on the worst incidents led to a federal crackdown on crime and undesirable behavior among public-housing residents.[38] Public housing, in large part because of its predominantly Black residents, became "the focal point of criminality" in neighborhoods across America.[39]

In 1986, Congress passed the Anti-Drug Abuse Act, imposing harsher penalties for drug crimes.[40] Two years later, Congress amended the Act, adding civil penalties. One of these penalties was eviction from public housing if the tenant, a member of the tenant's household, or a guest engaged in criminal activity "on or near public housing premises."[41] For President Clinton, however, this was insufficient to curb the problem. In his 1996 State of the Union Address, he proclaimed: "[T]he rule for [public-housing] residents who commit crime and peddle drugs should be one strike and you're out."[42] Later that year, Clinton signed into law the Housing Opportunity Program Extension Act (HOPE), which removed the geographic limitation in the Anti-Drug Abuse Act Amendments.[43] After HOPE, PHAs had the authority to terminate the tenancy of anyone who themselves engaged in—or whose household members engaged in—criminal activity, regardless of where that activity occurred.[44]

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[38] *See* Kathryn V. Ramsey, *One-Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law*, 65 UCLA L. REV. 1146, 1149, 1168 (2018) (describing the disproportionately high crime rates in Chicago public housing and the media's overemphasis on violence and drugs in public housing); *see also* Robin S. Golden, *Toward 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, 542 (1998) (noting the rise of drug crime and violence in public housing in the 1980s).

[39] *See* Jeffrey Fagan, Garth Davies & Adam Carlis, *Race and Selective Enforcement in Public Housing*, 9 J. EMPIRICAL LEGAL STUD. 697, 699 (2012) (noting that, in the 1980s, "the high-rise towers of large, mostly black-occupied, public housing projects again came to symbolize drug and crime problems").

[40] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 21 U.S.C.).

[41] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300; *see also* ALEXANDER, *supra* note 36, at 53 (describing the evolution of federal drug policy in the 1980s).

[42] President William Jefferson Clinton, State of the Union Address at the U.S. Capitol (Jan. 23, 1996), http://clintonwhitehouse4.archives.gov/WH/New/other/sotu.html.

[43] *See* Pub. L. No. 104-120 § 9(a), 110 Stat. 834, 836 (1996) (codified as amended at 42 U.S.C. § 1437d(*l*) (2012)) (applying § 1437d(*l*) regardless of whether the action was on or off public housing premises).

[44] 42 U.S.C. § 1437d(*l*)(6) (2012); *see also* 24 C.F.R. § 966.4(*l*)(5)(i)(B), (iii)(A) (2020) (mandating that PHAs adopt leases giving them the authority to evict tenants for the drug-related activity or other criminal activity of the tenant, the tenant's household members, or guests); Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO. J. ON

These legislative developments established the framework for PHAs to implement one-strike eviction policies. Based on a 1997 survey of all 3190 PHAs—to which slightly over half responded—seventy-five percent had implemented one-strike lease terms.[45] The Oakland Housing Authority instituted a lease requiring tenants to "assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in . . . [a]ny drug-related criminal activity on or near the premise[s]."[46] Tenants were thus required to assume strict liability for any alleged conduct of their household members and guests. After the PHA brought eviction actions against several tenants for the drug activity of their family members, the tenants challenged HUD's guidance. The Supreme Court unanimously upheld PHAs' ability "to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity,"[47] thus affirming the legitimacy of the one-strike eviction regime.

B. NYCHA's Approach to Crime Control

One-strike eviction policies are a powerful enforcement tool for PHAs. Based on its one-strike eviction policy, NYCHA specifies that "[o]ne of [its] strategies for promoting resident safety is to bring administrative actions against tenants based on dangerous conduct, including violent crime and drug dealing, by the tenant or members of the household."[48] As a city agency, NYCHA is well-positioned to identify residents who are arrested or convicted of a crime. The New York Police Department (NYPD) automatically reports the arrest of anyone with a NYCHA address to the Housing Authority.[49] More-

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POVERTY L. & POL'Y 1, 3 (2015) (explaining that the One-Strike Rule enables PHAs to begin proceedings to evict tenants based on the activities of others in their household, even if the tenants had no knowledge of the alleged behavior).

45 U.S. DEP'T OF HOUS. & URBAN DEV., MEETING THE CHALLENGE: PUBLIC HOUSING AUTHORITIES RESPOND TO THE "ONE STRIKE AND YOU'RE OUT" INITIATIVE 2–3 (1997), http://www.ncjrs.gov/pdffiles1/Photocopy/183952NCJRS.pdf.

46 U.S. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 128 (2002) (alterations in original) (citation omitted).

47 *Id.* at 130.

48 NYCHA, A HOME TO BE PROUD OF, *supra* note 5, at 17; *see also* 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 1627-7.1 (2020) (requiring housing authorities to "create and maintain an environment conducive to the good health, safety, morals, welfare and comfort of authority tenants").

49 NYCHA, MANAGEMENT MANUAL CHAPTER IV, APPENDIX B, *supra* note 5, at 8 ("The NYCHA Police Department receives reports of current arrests. Pertinent identifying information is then forwarded to the Housing Manager of the project concerned."); *see also* Emily Ponder Williams, *Fair Housing's Drug Problem: Combatting the Racialized Impact of Drug-Based Housing Exclusions Alongside Drug Law Reform*, 54 HARV. C.R.-

over, NYCHA has its own police force. Established in 1952, it quickly grew to become the fourth largest police force in New York State by 1966.[50] NYCHA's Housing Police ultimately merged with the NYPD, but there continues to be a public-housing unit within the department.[51]

Having a dedicated police force at public-housing developments increases public-housing residents' risk of arrest. NYCHA residents are subjected to "vertical patrols"—police officers continuously monitoring the stairwells and hallways of public-housing developments.[52] In addition to having NYPD officers, NYCHA also encourages its residents to form "Resident Watch" groups to patrol their developments.[53] Because of this heightened surveillance, activities that would appear innocent in other parts of the city become arrestable offenses on NYCHA property.[54] Given the racial makeup of NYCHA,[55] the aggressive policing of public-housing developments has a disparate impact on Black and Latinx New Yorkers.[56] Together, these factors

C.L. L. REV. 769, 775 (2019) (noting that the NYPD reports to the NYCHA any arrestee with a Housing Authority address, regardless of whether or not they actually live there).

50 BLOOM, *supra* note 14, at 189, 192; *see also* N.Y. PUB. HOUS. LAW § 402(5) (McKinney 2019) (vesting NYCHA with the authority to establish a specific housing police force).

51 *See* BLOOM, *supra* note 14, at 263 (describing Mayor Rudolph Giuliani's eventual success in merging the forces despite failure by two previous mayors); NYCHA, A HOME TO BE PROUD OF, *supra* note 5, at 17 ("The Housing Bureau is the division of the New York City Police Department (NYPD) responsible for maintaining safety in NYCHA developments.").

52 Michael Schwirtz, *Public Housing Patrols Can Mean Safety or Danger*, N.Y. TIMES (Nov. 21, 2014), http://www.nytimes.com/2014/11/22/nyregion/housing-patrols-can-mean-safety-or-peril-to-residents.html. These patrols can put NYCHA residents at a high risk of police violence. In 2014, for example, a police officer shot an unarmed man in the stairwell of a NYCHA development in East New York. *Id.*

53 NYCHA, A HOME TO BE PROUD OF, *supra* note 5, at 17. The Housing Bureau of the NYPD works with the resident patrols to target crime. *See Housing*, N.Y.C. POLICE DEP'T, http://www1.nyc.gov/site/nypd/bureaus/transit-housing/housing.page (last visited Apr. 2, 2020) (describing the working relationship between the Housing Bureau and "resident patrols, community groups, and development managers").

54 *See* BLOOM, *supra* note 14, at 192 ("Policing that extended into the projects likely had the effect of bringing more crime to the attention of officers."); N.Y. LAWYERS FOR PUB. INTEREST, NO PLACE LIKE HOME: A PRELIMINARY REPORT ON POLICE INTERACTIONS WITH PUBLIC HOUSING RESIDENTS IN NEW YORK CITY 10 (2008), http://www.prisonlegalnews.org/media/publications/no_place_like_home_new_york_lawyers_for_the_public_interest_2008.pdf.pdf (showing, based on a survey of 106 residents in one NYCHA development, that many of the residents were regularly stopped by NYPD officers for legally insufficient reasons including "sitting outside" or no reason at all).

55 *See* PERFORMANCE TRACKING & ANALYTICS DEP'T, *supra* note 32, at 3 (providing the demographic makeup of NYCHA developments).

56 *See* Davis v. City of New York, 959 F. Supp. 2d 324, 362, 364 (S.D.N.Y. 2013) (denying New York City and NYCHA summary judgment on a claim of racially discriminatory policing and concluding that it is reasonable to infer that the "NYPD

mean that NYCHA residents, and especially minority residents, are arrested at higher rates than other city residents; these arrests then trigger the NYCHA's ability to terminate their entire families' tenancies.

Once NYCHA receives an arrest report—which is an unreliable predictor of dangerousness or even conviction[57]—it can begin the termination process. The *Escalera* consent decree, the result of a class action against NYCHA in the late 1960s,[58] established the necessary procedures for NYCHA terminations to ensure that they comply with due process.[59] NYCHA must provide the tenant with access to their file, an evidentiary hearing before an impartial officer, and an opportunity to cross-examine adverse witnesses.[60] Importantly, because the burden of proof is lower than in criminal court,[61] NYCHA can hold

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regards crimes by African Americans in NYCHA housing as a source of greater concern than identical crimes by similarly situated non-African Americans, and treats similar crime levels more aggressively when they occur in NYCHA buildings containing a higher proportion of African Americans"); Declaration of Jeffrey Fagan at ¶ 9, Davis, 959 F. Supp. 2d 324 (No. 10 Civ. 699) (finding that over ninety percent of those stopped by police on NYCHA properties were Black or Latinx).

57 *See* NYS DIV. OF CRIMINAL JUSTICE SERVS., NEW YORK CITY ADULT ARRESTS DISPOSED (Apr. 17, 2020), http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nyc.pdf (showing that thousands of New Yorkers charged with felonies and misdemeanors ultimately have their cases dismissed, the charges withdrawn, or are acquitted); *cf.* Erin Durkin, *NYPD, de Blasio Blame Bail Reform for Crime Spike as Defenders Question Police Stats*, POLITICO (Mar. 5, 2020, 6:41 PM), http://www.politico.com/states/new-york/city-hall/story/2020/03/05/nypd-reports-spike-in-crime-as-public-defenders-question-the-stats-1265616 (recounting remarks by public defenders that despite NYPD's allegations of increased arrests this year, arraignments have fallen by twenty percent). For a discussion about racial disparities in arrest rates, see ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. OF JUSTICE, AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 7–8 (2018), http://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.

58 *See* Escalera v. NYCHA, 425 F.2d 853, 857 (2d Cir. 1970) (challenging the "constitutionality of the procedures used by [NYCHA] in three different types of actions (1) termination of tenancy on the ground of non-desirability; (2) termination of tenancy for violation of [NYCHA] rules and regulations; and (3) assessment of 'additional rent' charges under the [NYCHA] lease for undesirable acts by tenants").

59 *See* Grillasca v. NYCHA, 09 Civ. 6392 (NRB), 2010 WL 1491806, at *3 (S.D.N.Y. Apr. 7, 2010) (describing the procedures established in the *Escalera* consent decree); Golden, *supra* note 38, at 548 (same).

60 *See* FRITZ UMBACH, THE LAST NEIGHBORHOOD COPS: THE RISE AND FALL OF COMMUNITY POLICING IN NEW YORK PUBLIC HOUSING 112 (2011).

61 *See* NYCHA GUIDELINES, *supra* note 10, at 1 (stating that NYCHA's burden in termination proceedings is preponderance of the evidence); Jain, *supra* note 6, at 836 (noting that such proceedings are not restricted by the rules of criminal procedure); RAJAGOPAL, *supra* note 19, at 5 (explaining the reduced procedural and evidentiary protections afforded to tenants facing eviction as compared to defendants in criminal cases).

this termination hearing while criminal charges are pending or even if they have been resolved favorably.[62]

The procedures established in the *Escalera* consent decree apply only to the tenant of record. The initial notice of proposed termination names only the tenant of record.[63] Only the tenant of record has a right to an impartial hearing;[64] only the tenant of record has the right to present witnesses and evidence in support of her case.[65] In cases in which the tenancy is being terminated because of the criminal or non-desirable acts of someone else, the person whose conduct is at issue does not receive notice or have the right to an impartial hearing.

The lack of procedural protections for household members other than the tenant of record is exacerbated by an alternative NYCHA offers to tenants in lieu of terminating their tenancy: permanent exclusion of the non-desirable occupant.[66] Often, NYCHA will offer the tenant of record a permanent exclusion stipulation immediately before the hearing—when NYCHA's bargaining power is at its peak.[67] If the tenant of record refuses to sign the stipulation and instead proceeds with the termination hearing, the hearing officer can also decide to preserve the tenancy subject to the permanent exclusion of the offending household member.[68] Permanent exclusion is a common outcome for NYCHA's non-desirability cases; in 2019, 316

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62 *See* 24 C.F.R. § 966.4(l)(5)(iii)(A) (2020) (explaining that PHAs may evict a family if "the PHA determines that [the household member] has engaged in criminal activity, regardless of whether [the household member] has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction").

63 NYCHA, MANAGEMENT MANUAL CHAPTER IV, *supra* note 20, at 10.

64 *Id.* at 11.

65 *Id.* at 10–11. The household member whose conduct is at issue in the termination may be able to testify as a witness. *See, e.g.*, Cai v. NYCHA, 2010 N.Y. Misc. LEXIS 5145, at *3–4 (Sup. Ct. Oct. 15, 2010) (explaining that the tenant's son, who had allegedly engaged in prohibited conduct, testified at the termination hearing).

66 NYCHA added permanent exclusion as a possible outcome of a termination action in the *Tyson-Randolph* consent decree. NYCHA, MANAGEMENT MANUAL CHAPTER IV, *supra* note 20, at 3. HUD explicitly contemplates permanent exclusion as a possibility: "The PHA may require a tenant to exclude a household member in order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination." 24 C.F.R. § 966.4(l)(5)(vii)(C).

67 *See* Barbara Mulé & Michael Yavinsky, *Saving One's Home: Collateral Consequences for Innocent Family Members*, 30 N.Y.U. REV. L. & SOC. CHANGE 689, 695 (2006) (explaining that tenants are unlikely to be able to determine whether signing a stipulation is in their best interests and by signing, may put themselves at a higher risk of eviction in the future).

68 NYCHA, MANAGEMENT MANUAL CHAPTER IV, *supra* note 20, at 19.

people were permanently excluded from NYCHA, representing almost a quarter of all non-desirability cases.[69]

Residents who have been permanently excluded can no longer live with or even visit their family at their NYCHA home.[70] Likely, they will become homeless. For most NYCHA residents, most private-market apartments are unaffordable.[71] Moreover, a criminal record, even if it lists only an arrest, makes it harder still for permanently excluded residents to secure what little affordable housing remains.[72] As a result, the only option available to many permanently excluded NYCHA residents is to enter the shelter system.[73] Once someone becomes homeless, it is significantly more likely that they will be re-arrested and cycle back through the criminal justice system.[74] NYCHA's

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[69] *See* NYCHA, REPORT ON OUTCOMES OF ADMINISTRATIVE ACTIONS RELATING TO PERMANENT EXCLUSION AND TERMINATION OF TENANCY FOR NON-DESIRABILITY: 2019 ANNUAL STATISTICS, https://www1.nyc.gov/assets/nycha/downloads/pdf/2019-permanent-exclusion-report.pdf (last visited Aug. 10, 2020) [hereinafter OUTCOMES OF NON-DESIRABILITY CASES – 2019]. Two hundred ninety-nine, or ninety-five percent, of permanent exclusions were established through stipulations as opposed to hearing officer decisions. *Id.* Just over half of non-desirability termination actions were dismissed without further action. *Id.*

[70] *See Permanent Exclusion – Frequently Asked Questions*, *supra* note 7. NYCHA will periodically inspect the apartment to ensure that the tenant of record complies with the permanent exclusion agreement. *See* NYCHA, A HOME TO BE PROUD OF, *supra* note 5, at 17; *see also* BLOOM, *supra* note 14, at 263 (explaining that most non-desirability cases "end up with exclusion of the offender from the family's home with provisions for spot checking by the police"). Violating a permanent exclusion agreement can be grounds for NYCHA to begin a new termination action. *See, e.g.*, Romero v. Martinez, 721 N.Y.S.2d 17, 19–21 (App. Div. 2001) (upholding NYCHA's termination of the petitioner's tenancy after NYCHA found petitioner's son, who was subject to a permanent exclusion order, in her apartment). *But see* Holiday v. Franco, 709 N.Y.S.2d 523, 526–27 (App. Div. 2000) (overturning NYCHA's decision to terminate the petitioner's tenancy after determining her son had violated a permanent exclusion order because there was no evidence that the petitioner knew the son had come to her apartment).

[71] *See supra* notes 14 & 30 and accompanying text. Extremely low-income families, who dominate NYCHA housing, can afford fewer than ten percent of the units available for rent in New York City. N.Y. UNIV. FURMAN CTR., STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2017, at 25 (2018), http://furmancenter.org/files/sotc/SOC_2017_Full_2018-08-01.pdf.

[72] *See* CATERINA GOUVIS ROMAN & JEREMY TRAVIS, TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY 31 (2004), http://www.urban.org/sites/default/files/publication/58121/411096-Taking-Stock.PDF ("Landlords may view individuals with criminal records as a threat to safety.").

[73] Cammett, *supra* note 9, at 1136 ("For tenants with criminal convictions who are displaced from their housing through eviction, inadmissibility, or permanent exclusion, the high cost of living in many cities puts basic shelter out of reach.").

[74] *See* Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUB. POL'Y 139, 140 (2004) (describing how because "many aspects of homeless life have been criminalized, and homeless people may resort to illegal activities as a means of survival," homelessness raises the risk of incarceration (internal citations and quotations omitted)).

claim that permanent exclusion reduces crime and increases safety is unsupported by evidence[75] and, more likely, exacerbates the city's homelessness crisis.[76]

NYCHA has the authority to lift permanent exclusion agreements, but the process is arduous and complicated. The tenant of record, not the person who was excluded, must apply to lift the agreement.[77] The tenant must show one of two things: evidence of rehabilitation or the passage of sufficient "crime-free time."[78] Few tenants, however, start this process, and fewer still are successful. In 2019, only sixty-two applications were approved, less than twenty percent of the number of people who were permanently excluded that year.[79] Among the successful applicants, the average length of their family members' exclusion was almost ten years.[80]

Just as NYCHA has the discretion to lift permanent exclusion agreements, it also has the discretion under federal law not to bring a termination action or pursue permanent exclusion for almost all types of criminal activity.[81] Federal law only imposes mandatory bans on occupancy for two categories of individuals in public housing: people who manufactured methamphetamines on public-housing property

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[75] *See* Wendy J. Kaplan & David Rossman, *Called "Out" at Home: The One Strike Eviction Policy and Juvenile Court*, 3 DUKE F. FOR L. & SOC. CHANGE 109, 135 (2011) ("At its best, [permanent exclusion] merely moves problems from one part of a community to another. Making people homeless will not stop them from committing crimes."); *cf.* Jose Torres, Jacob Apkarian & James Hawdon, *Banishment in Public Housing: Testing an Evolution of Broken Windows*, 5 SOC. SCI. 61, 77 (2016) (showing, based on a study of a public housing authority in the southeastern United States, that "banishment policies"—which are broader than permanent exclusions but accomplish the same end—slightly reduce property crimes but may increase drug crimes).

[76] *Cf.* Harry DiPrinzio, *Hundreds of NYCHA Evictions Raise Questions About Process*, CITY LIMITS (Aug. 14, 2019), http://citylimits.org/2019/08/14/nycha-evicitons-rad-oceanbay (quoting a Legal Aid attorney as saying that "if [NYCHA residents] are evicted, there is a high likelihood that they are going to be homeless").

[77] *See* NYCHA, APPLICATION TO LIFT PERMANENT EXCLUSION 1 (2019), http://www1.nyc.gov/assets/nycha/downloads/pdf/150130-Application%20to%20Lift%20Permanent%20Exclusion-Sept-2019.pdf.

[78] *Id.* (defining evidence of rehabilitation as "evidence that shows the person has changed since the exclusion and does not pose a risk of danger to the NYCHA community" and crime-free as "no new convictions or arrests").

[79] OUTCOMES OF NON-DESIRABILITY CASES – 2019, *supra* note 69. Eighty-three people applied to have their permanent exclusions lifted, *id.*, so most people who applied were successful. The problem with this process is twofold: First, few people apply, and second, it is the *tenant of record* who must apply, not the person who was actually excluded. *See Permanent Exclusion – Frequently Asked Questions*, *supra* note 7.

[80] OUTCOMES OF NON-DESIRABILITY CASES – 2019, *supra* note 69.

[81] *See* DEP'T OF HOUS. & URBAN DEV., HUD OCCUPANCY HANDBOOK CH. 8 TERMINATION, at 8-11, fig. 8-2 (2007), http://www.hud.gov/sites/documents/DOC_35654.PDF (listing the "[a]llowable" reasons for terminating a family's tenancy, but not requiring PHAs to evict families for the reasons listed).

and people subject to a lifetime sex-offender registration requirement.[82] Otherwise, "PHAs have broad discretion to set . . . termination policies for the Public Housing . . . programs."[83] In 2015, HUD issued guidance, reiterating that PHAs have the discretion *not* to adopt one-strike clauses.[84] Without this policy, and thus without the threat of termination based on the single action of a single household member, NYCHA would not be in a position to coerce the tenant of record into signing a stipulation that permanently excludes a family member. But NYCHA has chosen to aggressively pursue permanent exclusion agreements, splitting up families and forcing former residents into homelessness.

II
Permanent Exclusions and Procedural Due Process

NYCHA's permanent exclusion practices deprive residents of their homes without affording them procedural protections, contravening the guarantees of the Fourteenth Amendment. State actors are prohibited from depriving "any person of life, liberty, or property without due process of law."[85] This Note focuses on the deprivation of property that permanently excluded NYCHA residents suffer.[86]

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[82] *See* Letter from Shaun Donovan, Sec'y, Dep't of Hous. & Urban Dev., to PHA Exec. Dir. 1 (June 17, 2011) (citing 24 C.F.R. §§ 960.204, 982.553 (2019)), http://www.usich.gov/resources/uploads/asset_library/Rentry_letter_from_Donovan_to_PHAs_6-17-11.pdf.

[83] *Id.* at 2.

[84] Dep't of Hous. & Urban Dev., Notice PIH 2015-19, Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions 2 (2015), http://www.hud.gov/sites/documents/PIH2015-19.PDF; *see also* Umbach, *supra* note 60, at 158 (noting that the decision in *Department of Housing & Urban Development v. Rucker* permitted PHAs to adopt one-strike policies, but did not require them to do so) (citing Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 133–34 (2002)).

[85] U.S. Const. amend. XIV, § 1.

[86] Permanent exclusions may also give rise to a deprivation of a liberty interest. *See generally* Zimmerman, *supra* note 22, at 1275–76. For purposes of procedural due process, liberty interests include "the right of the family to remain together without the coercive interference of the awesome power of the state." Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977); *see also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640–41 (1974) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."). In the context of permanent exclusions, NYCHA coercively interferes in families' choices to stay together by threatening eviction unless the tenant excludes a family member. Liberty-based due process claims may vest rights in certain family members of the tenant of record but do not vest such rights in non-familial residents. This Note advocates for pursuing property-based due process claims because doing so locates a property right in each and every resident. However, a full discussion of the liberty-based claim is outside the scope of this Note.

Of course, not every deprivation violates procedural due process requirements. First, the state must be the depriver.[87] Second, in *Mathews v. Eldridge*, the Supreme Court set forth the test for determining whether the relevant procedures satisfy due process for a particular deprivation of property.[88] The test has three factors: (1) the nature of the private interest at stake; (2) the risk of erroneous deprivation using the current procedures, and whether additional safeguards will mitigate that risk; and (3) the nature of the government interest.[89]

This Part will address these requirements in turn, ultimately concluding that NYCHA unlawfully deprives authorized residents of a property right without sufficient procedural protections. The first Section will establish that permanent exclusions constitute state action, whether they are imposed through a hearing or through a settlement.[90] The state action component separates private adjustments in family composition from unconstitutional deprivations of property. The second Section will argue that authorized NYCHA residents beyond the tenant of record have a property right in their apartment—the private interest at stake for purposes of the *Mathews* test. The third Section will show, under the second and third factors of the *Mathews* test, that NYCHA does not provide adequate procedural protections before depriving such residents of their homes. As a result, NYCHA violates residents' due process rights when it permanently excludes them.

A. Permanent Exclusions as State Action

NYCHA imposes permanent exclusions in two ways: either through termination hearings or through stipulations with the tenant of record. If permanent exclusion is the outcome of a termination

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[87] *See* Mehta v. Surles, 905 F.2d 595, 598 (2d Cir. 1990) (holding that, to bring a claim for deprivation of property without due process, the plaintiff must show that "the state has deprived him of" his property right).

[88] *See* 424 U.S. 319, 334–35 (1976). The parties agreed that the disability benefits at issue constituted a property interest; the only dispute was whether the administrative procedures for termination were constitutionally sufficient. *See id.* at 332.

[89] *See id.* at 334–35. The private interest at stake in *Mathews* was the continuous receipt of disability benefits. The Court determined that the risk of erroneous deprivation without an evidentiary hearing was low because the determination of eligibility for benefits was based on medical records, so an in-person hearing was not likely to add further protection against erroneous deprivation. *Id.* at 344–45. And, the claimant was entitled to a post-deprivation in-person hearing. *Id.* at 339. The government interest included the administrative burden of requiring evidentiary hearings, which the Court deemed "not insubstantial." *Id.* at 348. As a result, the Court determined that the lack of an evidentiary hearing did not violate procedural due process. *Id.* at 340–47.

[90] This Note uses "settlement" and "stipulation" interchangeably.

hearing, then the state action is clear: A hearing officer, acting on behalf of the city, makes the determination.[91] NYCHA, in turn, is bound by the hearing officer's decision.[92]

But the vast majority of permanent exclusions result from stipulations, not termination hearings.[93] In these stipulations, NYCHA leverages the threat of eviction to coerce the tenant of record into agreeing to permanently exclude a family member.[94] This type of agreement—where the government coerces a third party (i.e., the tenant of record) into depriving someone else of a right—constitutes state action. The Supreme Court has concluded that private decisions are state action when the state "has exercised coercive power" such that the private choice becomes "that of the State."[95] In other words, these private decisions are "fairly attributable to the State."[96] In the context of corporate criminal investigations, one scholar has argued that when a corporation, acting under a deferred prosecution agreement, coerces its employees into answering investigators' questions with the threat of job loss, the corporation's actions become state action.[97] In this arrangement, the government "delegate[s]" its authority to the corporation.[98] The threat of indictment animates the corporation's treatment of its employees.[99] This parallels the predicament facing NYCHA tenants—they are threatened with losing their homes unless they sign a permanent exclusion agreement. Often NYCHA offers a permanent exclusion stipulation to the tenant immediately before a termination hearing, when the threat is most persuasive.[100] The

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91 *See* NYCHA, MANAGEMENT MANUAL CHAPTER IV, *supra* note 20, at 2–3 (describing Hearing Officers as part of the civil service and their role in deciding cases).

92 *See id.* at 19 ("The decision of the Hearing Officer shall be binding on NYCHA . . . .").

93 OUTCOMES OF NON-DESIRABILITY CASES – 2019, *supra* note 69 (noting that ninety-five percent of exclusions result from stipulations, while only five percent of exclusions result from termination hearings).

94 *See supra* note 70 and accompanying text.

95 Blum v. Yaretsky, 457 U.S. 991, 1004, 1007–08 (1982) (holding that decisions to discharge Medicaid patients were not state action because the decisions ultimately lie with doctors based on their medical judgment); *see also* Breault v. Heckler, 763 F.2d 62, 64–65 (2d Cir. 1985) (finding that a bank's act of debiting an individual's accounts was state action because it was required by the Treasury Department).

96 Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

97 *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 353, 358 (2007).

98 *Id.* at 358.

99 *See id.* at 352 (explaining that the threat of indictment creates a "coercive atmosphere").

100 *See* Robinson v. Finkel, 748 N.Y.S.2d 448, 451, 455 (Sup. Ct. 2002) (describing how NYCHA presented the tenant of record with a permanent exclusion stipulation immediately before a termination hearing, which she signed).

tenant's "decision" to exclude a family member permanently is thus fairly attributable to NYCHA.

Moreover, the coercive relationship between NYCHA and the tenant distinguishes permanent exclusion from a tenant's private decision to exclude a family member. NYCHA tenants are permitted to remove authorized occupants from their apartment for a variety of reasons.[101] Whatever the motivation, NYCHA does not cause this removal—nor is the removal necessarily permanent. The tenant is free to change her mind and return the household member to the lease. Thus, these private decisions do not constitute state action nor run afoul of due process.

Having established that permanent exclusions are a form of state action, the next Section will show that permanent exclusions deprive authorized residents of a property right—their public-housing residency.

B. Property Interests for Authorized Residents

Though government benefits are not a traditional form of private property, recipients may acquire a property interest in them. The Supreme Court validated such property interests in its landmark public benefits case *Goldberg v. Kelly*.[102] At issue was whether New York violated public assistance recipients' procedural due process rights when it terminated their benefits without a pre-termination evidentiary hearing.[103] Justice Brennan, writing for the majority, affirmed that because welfare benefits "are a matter of statutory entitlement for persons qualified to receive them," attempted termination triggers procedural due process protections.[104] Brennan discussed the importance of public assistance to its recipients and the social purpose served by welfare: It enables people in poverty to meet their basic subsistence needs and "guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity."[105] Depriving individuals of their welfare benefits has a comparable effect to depriving individuals of private property.[106] In both

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[101] *See* NYCHA, MANAGEMENT MANUAL CHAPTER I, *supra* note 11, at 150 (describing procedures for removing someone from the household).

[102] 397 U.S. 254, 255 (1969).

[103] *Id.*

[104] *Id.* at 262.

[105] *Id.* at 265.

[106] *See* WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE: A CONTEMPORARY APPROACH 250 (6th ed. 2018) (explaining the Court's reasoning in *Goldberg v. Kelly*); *cf. Goldberg*, 397 U.S. at 262 n.8 ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'").

situations, then, the government must comply with the mandates of procedural due process.

The Court, however, has qualified its treatment of government benefits as property in the years since *Goldberg*.[107] Just three years later, the Court decided *Board of Regents v. Roth*, holding that "the *nature* of the interest at stake" is key to determining whether the government must comply with procedural due process requirements before terminating a benefit.[108] The Court then developed a methodology for determining what types of interests trigger procedural protections: "To have a property interest in a benefit, [the recipient] . . . must . . . have a legitimate claim of entitlement in [that property interest]."[109] Property interests necessarily derive from existing statutes and regulations.[110] In a companion case, *Perry v. Sindermann*, the Court similarly concluded that a government benefit becomes a property interest "if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit."[111] Taken together, *Roth* and *Perry* require that, for a government benefit to become property, a recipient has an objectively justifiable belief that the benefit would continue "absent a cause for termination."[112]

Synthesizing the requirements for identifying property interests from *Goldberg* and *Roth*, as well as two other Supreme Court decisions—*Memphis Light, Gas & Water Division v. Craft*[113] and *Logan v.*

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[107] *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 887 (2000) (arguing that in *Goldberg*, the Court appeared willing to protect any "important" interest but in later cases emphasized that finding a *property right* was necessary before procedural protections could apply).

[108] 408 U.S. 564, 570–71 (1972). Roth was an assistant professor at a state university. He was not tenured, and the university was permitted to not rehire him without providing procedural protections. Roth challenged the determination not to rehire him, and the Court held that he lacked a "*property* interest sufficient to require . . . a hearing." *Id.* at 566–67, 578.

[109] *Id.* at 577.

[110] *See id.* (explaining that property interests "are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits"); *see also* Sidney A. Shapiro & Richard E. Levy, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Due Process*, 57 ADMIN. L. REV. 107, 126–27 (2005) (explaining how *Roth* altered "due process doctrine"). The Court specified that it was *not* overturning *Goldberg v. Kelly* because the welfare recipients had a statutory claim of entitlement to the benefits, so the benefits qualified as property under this new framework. *See Roth*, 408 U.S. at 577.

[111] 408 U.S. 593, 601 (1972).

[112] Note, *Procedural Due Process in Government-Subsidized Housing*, 86 HARV. L. REV. 880, 890 (1973).

[113] 436 U.S. 1, 9 (1978) ("[F]ederal constitutional law determines whether [a statutory property] interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." (quoting *Roth*, 408 U.S. at 577)).

Zimmerman Brush Co.[114]—property law scholar Thomas Merrill proposed a framework for identifying which government entitlements constitute property for purposes of procedural due process. First, the entitlements must be grounded in federal or state laws or regulations.[115] Second, the entitlements must continue absent a "specific condition justifying termination."[116] Third, the entitlements must have some monetary value to beneficiaries.[117] And fourth, the entitlements must provide beneficiaries with an objective expectation of continuing to receive the benefit. If they meet these requirements, they are protected against arbitrary or discretionary revocation.[118]

Consistent with this framework, courts have repeatedly held that public-housing *tenancies* are property for purposes of procedural due process.[119] These cases, however, do not address whether other occupants have property rights. Because the challenges were brought by current or former tenants, they do not explicitly address the rights of other occupants. However, permanent exclusions necessarily affect occupants other than the tenant of record.[120] As a result, no prior cases directly discuss the issue in permanent exclusions: whether non-tenant-of-record residents have a property right in public housing.

One New York case, *Blatch ex rel. Clay v. Hernandez*, briefly considered the rights of NYCHA non-tenant-of-record occupants. There, the district court accepted NYCHA's argument that occupants do not

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114 455 U.S. 422, 430 (1982) ("The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" (quoting *Memphis*, 436 U.S. at 11)).

115 Merrill, *The Landscape of Constitutional Property*, *supra* note 107, at 960, 961 n.280 (locating his theory about statutory entitlement to benefits in *Goldberg* and *Roth*).

116 *Id.* at 960; *see also id.* at 965–67 (elaborating with reliance on *Memphis Light* and *Logan*).

117 *Id.* at 960, 964–65 (arguing that the monetary value component is "implicit in the concept of the *Roth*-type property-as-entitlement").

118 *See id.* at 963–64. Merrill includes this in his description of statutory entitlement to benefits, but this Note separates it out because it goes beyond whether there is a statutory entitlement and discusses how the entitlement is structured.

119 *See, e.g.*, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 135 (2002); Joy v. Daniels, 479 F.2d 1236, 1241 (4th Cir. 1973); Caulder v. Durham Hous. Auth., 433 F.2d 998, 1003 (4th Cir. 1970); Escalera v. NYCHA, 425 F.2d 853, 864 (2d Cir. 1970). For a more detailed discussion of tenants' property rights in public housing, see Ewert, *supra* note 32, at 65; Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681, 721–30 (1994); Robyn Minter Smyers, *High Noon in Public Housing: The Showdown Between Due Process Rights and Good Management Practices in the War on Drugs and Crime*, 30 URB. LAW. 573, 595–96 (1998).

120 *Cf.* NYCHA GUIDELINES, *supra* note 10, at 6 (explaining that permanent exclusions may be imposed "by agreement between the Tenant of Record and NYCHA"); NYCHA MANAGEMENT MANUAL CHAPTER IV, *supra* note 20, at 19 (describing permanent exclusion as an option to preserve the family's tenancy).

have property rights that trigger due process protections.[121] However, this conclusion is unsupported by the court's analysis. To justify its decision, the court approvingly cited NYCHA's reliance on "well settled New York state law holding that a relative of a tenant can be removed from premises without being made party to an eviction proceeding brought against the tenant."[122] The cited case—*Loira v. Anagnastopolous*—does not discuss occupants' property rights at all; rather, it states that the daughter of a tenant was not a necessary named party in a holdover proceeding, and thus could be evicted from her apartment without being made a party to the suit.[123] By relying on *Loira*, the court in *Blatch* blurred two separate analyses: whether there is a property interest and whether someone is a necessary party. *Loira* and its progeny discuss the latter strand only.[124] As such, *Blatch*'s rejection of NYCHA occupants' property interest is not dispositive.

The rest of this Section will thus look to other analytical tools to determine whether authorized NYCHA occupants have such property rights. In Subsection B.1, this Note will, following the methodology in *Roth* and Merrill's framework for identifying property interests in government benefits, show that NYCHA non-tenant-of-record

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[121] 360 F. Supp. 2d 595, 613–14 (S.D.N.Y. 2005). This was a class action lawsuit on behalf of tenants and occupants with mental disabilities in NYCHA housing who were facing eviction and claimed NYCHA did not sufficiently accommodate mental disabilities in its termination procedures. *Id.* at 600.

[122] *Id.* at 613–14.

[123] 612 N.Y.S.2d 189, 189 (App. Div. 1994).

[124] *See, e.g.*, Parkash 2125 LLC v. Galan, 84 N.Y.S.3d 724, 729 (Civ. Ct. 2018) (citing *Loira* for the proposition that a tenant's child does not need to be made a party to holdover proceedings, as distinguished from other roommates); Figueroa v. Hernandez, 753 N.Y.S.2d 669, 672 (Sup. Ct. 2002) (citing *Loira* to support the proposition that a family member occupant did not have succession rights to a public housing property after the tenant of record's tenancy terminates); Washington v. Palanzo, 746 N.Y.S.2d 875, 878 (App. Term 2002) (citing *Loira* for the proposition that a tenant's child does not need to be made a party to holdover proceeding); Randazzo v. Galietti, No. 2015-1875 Q C, 55 Misc. 3d 131(A), at *1 (N.Y. App. Term Apr. 7, 2017) (citing *Loira* for the proposition that a husband was not a necessary party to holdover proceeding because he was not on the lease); JLNT Realty, LLC v. Liautaud, No. 2013–2585KC, 49 Misc. 3d 139(A), at *1 (N.Y. App. Term 2015) (unpublished table decision) (citing *Loira* for the proposition that an occupant did not have to be on a warrant to satisfy due process in rent-stabilized apartment); Crossroads Assocs., LLC v. Amenya, No. LT 49–2015, 47 Misc. 3d 1216(A), at *4 (N.Y. Civ. Ct. 2015) (unpublished table decision) (citing *Loira* for the proposition that a tenant's adult children do not need to be made parties to holdover proceeding); Daley v. Billinghurst, No. 2004–169 K C, 5 Misc. 3d 138(A), at *1 (N.Y. App. Term 2004) (unpublished table decision) (citing *Loira* for the proposition that a tenant's minor children do not need to be parties to holdover proceedings); Kuprewicz v. Muktadir, No. 2001-1648 Q C, 2002 WL 31940887, at *1 (N.Y. App. Term Sept. 19, 2002) (unreported decision) (citing *Loira* for the proposition that a tenant's spouse and children did not have to be made parties to holdover proceeding).

residents have a property interest in their public-housing tenancy. Subsection B.2 will show that the normative values justifying property rights, and particularly property rights in housing, support authorized residents' property interest in their public-housing tenancy.

1. Identifying NYCHA Residents' Interest in Public Housing

Authorized NYCHA occupants—household members lawfully permitted to reside in NYCHA housing—have a property interest in their public-housing residency. First, a property interest in public housing is grounded in NYCHA's statutory and regulatory framework. Second, only certain conditions can trigger termination. Third, NYCHA housing constitutes a monetary benefit for all residents. Finally, based on statutory and regulatory guarantees, NYCHA residents have an objective expectation of continued residency.

a. Statutory and Regulatory Scheme for Public Housing

The statutes and regulations governing public housing broadly, and NYCHA specifically, contemplate a property interest for authorized NYCHA occupants. Most importantly, HUD regulations mandate that public-housing leases "provide that the tenant shall have the right to *exclusive use and occupancy* of the leased unit by the *members of the household* authorized to reside in the unit in accordance with the lease."[125] In other words, public-housing leases expressly contemplate the exclusive use and occupancy rights—both of which are central features of a property interest[126]—of all household members, not just the tenant of record.

Indeed, this focus on all household members permeates the entire federal statutory and regulatory regime. The stated goal of the Housing Act is to provide "decent and affordable housing for all citizens."[127] All PHAs are required to submit annual plans that describe the housing needs of *families* in the jurisdiction[128]—not just leaseholders. The eligibility requirements for public housing apply to all household members, not just the tenant of record. To determine if a family is income-eligible, PHAs are required to verify all sources of income from "each member of the household" and to review the

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125 24 C.F.R. § 966.4(d)(1) (2018) (emphasis added).

126 *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998) (arguing that the right to exclude is the most "fundamental" feature of property); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 74 (1985) ("For the common law, *possession* or 'occupancy' is the origin of property.").

127 42 U.S.C. § 1437(a)(4) (2012).

128 *Id.* § 1437c-1(d)(1). Families can be comprised of a single person or multiple people. *Id.* § 1437a(b)(3).

family's income annually.[129] Once a household has been approved for public housing, their lease must list the "composition of the household as approved by the PHA," including family members.[130] By the same token, the Housing Act mandates that the *family*, and not just the tenant, make rent payments.[131] These statutory and regulatory provisions paint a clear picture: Each household member determines a family's eligibility for, receives the benefit of, and has joint responsibility to pay for public-housing residence.

The Housing Act and its implementing regulations also explicitly confer on *residents* certain rights and requirements of continued occupancy. For example, all PHAs must establish a resident advisory board—composed of public-housing residents—to assist in developing the annual plan.[132] In addition, if HUD designates a PHA as "troubled," the statute authorizes public-housing residents to petition HUD to take certain remedial actions.[133] Part of the determination of whether a PHA is troubled includes the degree to which the PHA "promote[s] the economic self-sufficiency of public housing residents; and . . . provides public housing residents with opportunities for involvement in the administration of the public housing."[134] In the same vein, HUD has the authority to transfer management responsibilities of a housing development from the PHA to an independent manager upon "a majority vote of the residents."[135] With the right to live in—and participate in—public housing also comes a community service requirement for "each adult resident."[136] By vesting these rights and responsibilities in all residents, the statutory and regulatory framework acknowledges the entitlement of all residents to their public housing.

New York State regulations and NYCHA policies place a similar emphasis on all family members as the recipients of public-housing benefits. As with the federal regulations, the state requires PHAs to "determine . . . [the] aggregate annual income of all members of applicant's household"[137] to comply with income limits and to "review at least once a year[ ] aggregate annual income of persons or families in

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[129] *Id.* §§ 1437a(a)(1), (b)(4).

[130] 24 C.F.R. § 966.4(a)(1)(v) (2018).

[131] *See* 42 U.S.C. §§ 1437a(2)(A)(i), (3)(A) (referring to rental payment calculations and mandating that families pay certain minimum amounts).

[132] *Id.* § 1437c-1(e)(1) (laying out advisory board requirements); 24 C.F.R. § 903.13(a) (same).

[133] 42 U.S.C. § 1437d(j)(3)(A).

[134] *Id.* § 1437d(j)(1)(H).

[135] *Id.* § 1437w(a)–(b).

[136] 24 C.F.R. §§ 960.601(b), 960.603(a).

[137] N.Y. COMP. CODES R. & REGS. tit. 9, § 1627-2.2(a) (2020).

possession."[138] NYCHA further specifies that the family composition determines the nature of the benefit that the family receives, including apartment size, income limit, and rent calculation.[139] Each household member thus plays a role in determining whether and how a family will receive public-housing benefits.

NYCHA also explicitly offers a path for authorized occupants to become the tenant of record if the primary tenant dies or moves out of the apartment.[140] This possibility provides NYCHA residents not just with use and occupancy rights but also with a potential future interest as the tenant of record. Family members subject to permanent exclusion, however, are *not* eligible to succeed the tenant of record as a "remaining family member."[141] A permanent exclusion order thus deprives a NYCHA occupant of both a current and future property interest.

At the same time, the regulatory framework does contemplate certain benefits and responsibilities that apply only to the tenant of record. For instance, the tenant of record is the only family member to execute the lease.[142] In addition, the termination procedures apply only to the tenant of record.[143] While HUD and NYCHA funnel some of the rights and responsibilities of all household members through the tenant of record,[144] we should consider this as merely for administrative ease—not an allocation of substantive rights. For convenience, NYCHA has one person—the tenant of record—as the primary point of contact, but convenience alone cannot define the substantive property right.

Indeed, the statutes and regulations establishing public housing and NYCHA in particular recognize the family as the recipient of public-housing benefits, demand eligibility information from each household member, and vest rights and responsibilities in each house-

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138 *Id.* § 1627-2.2(c).

139 NYCHA, MANAGEMENT MANUAL CHAPTER I, *supra* note 11, at 9.

140 *Id.* at 151–55; *Resident Policies & Procedures: Occupancy and Succession (Remaining Family Member) Policy Overview*, NYCHA, http://www1.nyc.gov/assets/nycha/downloads/pdf/RESIDENTS.POLICIESPROCEDURES.OCCUPANCYSUCCESSION.pdf (last visited May 19, 2020) ("Persons who qualify as Remaining Family Members may be entitled to a NYCHA lease, or permanent occupancy status in a new tenancy . . . .").

141 NYCHA, MANAGEMENT MANUAL CHAPTER I, *supra* note 11, at 156.

142 *See* 24 C.F.R. § 966.4(a)(3).

143 *See id.* § 966.4(m) (describing the *tenant's* right to examine documents before trial); *id.* § 966.53(b)–(c) (specifying complainant definition and due process protections that apply only to tenants). While this Note advocates for providing procedural protections to other residents in the case of permanent exclusion, the regulations, as they exist now, only contemplate these procedures for the tenant of record.

144 *See, e.g.*, *id.* § 966.4 (stating that the lease is between the PHA and the tenant); N.Y. COMP. CODES R. & REGS. tit. 9, § 1627-4.5 ("At time of lease signing, tenant should be informed of his rights and obligations under the lease.").

hold member. As such, NYCHA residents besides the tenant of record have a "legitimate claim of entitlement" to public-housing benefits deriving from federal and state law.[145]

b. Conditions Triggering the Termination of a NYCHA Residency

Benefits become property when they "can be terminated only upon a finding that a specific condition has been satisfied"—that is, when they receive "for cause" protection against termination.[146] NYCHA residents have for-cause protection. New York State regulations list the grounds for termination, including non-payment, non-verifiable income, and non-desirability.[147] Before NYCHA can terminate a tenancy for one of these reasons other than non-payment of rent or excess income, it must follow the procedures laid out in the *Escalera* consent decree.[148] If there is a hearing, the Hearing Officer must issue a decision on the merits.[149] Termination thus requires NYCHA, through its Hearing Officer, to find that the family in question has run afoul of one of the grounds for termination it lists in its policies.

Not only is termination limited to certain circumstances, but permanent exclusion orders are as well. Indeed, the HUD regulations that contemplate permanent exclusion specify that it may be a remedy only if the "household member has participated in or been culpable for action or failure to act that warrants termination."[150] HUD explicitly ties the grounds for permanent exclusion to the grounds for termination. Going further, NYCHA limits permanent exclusion as a potential outcome in non-desirability cases only.[151] That NYCHA, and the regulations governing NYCHA, provides protection against the arbitrary permanent exclusion of residents suggests a corresponding property right for such residents.

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145 Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). In other words, the laws and regulations "support [NYCHA residents'] claim of entitlement" to their public housing. Perry v. Sindermann, 408 U.S. 593, 601 (1972).

146 Merrill, *The Landscape of Constitutional Property*, *supra* note 107, at 893. For-cause protection ensures that NYCHA cannot arbitrarily terminate an entire family's tenancy or permanently exclude one of its members.

147 N.Y. COMP. CODES R. & REGS. tit. 9, § 1627-6.3; *see also* NYCHA MANAGEMENT MANUAL CHAPTER IV, *supra* note 20, at 3–5 (listing the grounds for termination).

148 NYCHA MANAGEMENT MANUAL CHAPTER IV, *supra* note 20, at 3.

149 NYCHA, A HOME TO BE PROUD OF, *supra* note 5, at 14.

150 24 C.F.R. § 966.4(l)(5)(vii)(C).

151 *See Permanent Exclusion – Frequently Asked Questions*, *supra* note 7 (stating, under the heading of Permanent Exclusion, that NYCHA brings cases for "Non-Desirability," and further explaining that to lift a permanent exclusion, the tenant must show that the excluded person no longer poses a risk).

c. Monetary Benefit of NYCHA Housing

Analysis of the monetary value of NYCHA housing is relatively straightforward. All NYCHA residents receive an apartment at a rent far below the market rate and pay at most thirty percent of their households' gross income in rent.[152] The difference between the rent residents pay NYCHA and the rent they would otherwise have to pay on the private market is the monetary benefit that all NYCHA residents receive.

d. NYCHA Residents' Objective Expectation of Continued Residency

NYCHA residents' objective expectation of continuing to receive public housing derives from both the for-cause protections against termination and the regulatory framework. Because NYCHA has a defined list of reasons that justify termination, residents have a reasonable expectation that they can remain in NYCHA unless they violate the explicit requirements of residency. Similarly, NYCHA families can expect to remain in the same apartment from year to year if all members of the household remain the same.[153]

The expectation of permanency is strengthened by NYCHA's policy on Remaining Family Members—that is, residents who succeed a former tenant of record as the new leaseholder. Specifically, eligible Remaining Family Members are "entitled to a NYCHA lease."[154] Like traditional private property, then, NYCHA leases can be passed down indefinitely to eligible family members. As a result, every member of a NYCHA household has a reasonable expectation that they can remain in NYCHA housing as long as they are eligible.

Based on the methodology established in *Roth* and *Perry*, and Merrill's analysis of those and other cases, all authorized NYCHA

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[152] *Compare Public Housing Rent Calculation Frequently Asked Questions*, NYCHA, http://www1.nyc.gov/assets/nycha/downloads/pdf/Rent-Calculation-FAQ.pdf (last visited May 19, 2020) (explaining that NYCHA households' rent is "either 30% of the household's adjusted gross income or the flat rent, whichever is lower"), *and* NYCHA, FINAL PHA AGENCY PLAN 55 (2019), http://www1.nyc.gov/assets/nycha/downloads/pdf/FY20_Final_Annual_Plan_10.18.19.pdf (showing NYCHA's flat rent schedule, with a one-bedroom renting for $1371 and a two-bedroom renting for $1561), *with Rent Trend Data in New York, New York*, RENT JUNGLE, http://www.rentjungle.com/average-rent-in-new-york-rent-trends (last visited May 19, 2020) (showing that as of April 2020, the average rent for a one-bedroom was $2940 and the average rent for a two-bedroom was $3693).

[153] *Cf.* NYCHA, A HOME TO BE PROUD OF, *supra* note 5, at 10 (informing residents that "family composition determines the appropriate apartment size for your family," and requiring them to apprise NYCHA "of any changes in your family composition").

[154] *Resident Policies & Procedures*, *supra* note 140. Given that the family composition has likely changed, they may be required to move to a NYCHA apartment of a different size. *Id.*

residents have a property interest in their public housing. To limit the property interest to tenants of record would: ignore the statutory and regulatory scheme, which explicitly provides rights for and imposes requirements on non-tenants; discount the for-cause protections against termination that apply to all authorized residents; and dismiss authorized residents' reasonable expectation of permanency. It is possible to argue that, because the property right is statutorily defined, it is also limited by the statutes' termination provision; specifically, the right for authorized residents is limited by the possibility, contemplated in the regulatory framework for NYCHA, that they could face permanent exclusion without procedural protections.[155] However, the Supreme Court has expressly rejected this view of property rights, separating the substantive right from any procedures related to its deprivation.[156] To further explore this substantive right, the next Subsection will discuss why the special nature of housing, in comparison to other government benefits, supports an expansive understanding of property rights for public-housing residents.

2. The Unique Nature of Housing

Property law recognizes that homes are more than mere possessions. The evolution of landlord-tenant law illustrates the primacy of homes within property jurisprudence. Historically, landlords had wide latitude to control their rental properties, from the authority to set rent to the right to regain possession when a lease expired.[157] But courts and legislators have increasingly protected tenants' rights to a habitable home and the right to remain in it.[158] As a result, though landlords technically own the property, tenants hold the right to exclu-

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[155] *Cf.* Arnett v. Kennedy, 416 U.S. 134, 153–54 (1974) (Rehnquist, J.) (plurality opinion) ("[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet.").

[156] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 535, 539–41 (1985) (establishing that because "'[p]roperty' cannot be defined by the procedures provided for its deprivation," public employees with for-cause termination protections "possessed property rights in continued employment" and thus were entitled to due process prior to termination).

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

[158] *See* N.Y. UNCONSOL. LAW § 8585(1) (McKinney 2020) (providing that tenants living in rent stabilized housing cannot be evicted unless they fail to pay rent or violate the express provisions of the statute or the lease); Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1076–77 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (establishing the implied warranty of habitability, which requires landlords to maintain their apartments in habitable conditions).

sive possession more strongly than landlords.[159] Similarly, "good cause" eviction protections give tenants continuing control over their apartments and allow them to develop an expectation of permanency. Protected by good-cause eviction laws and rent control, tenants can "become attached to places" in much the same way homeowners can.[160]

Extrapolating from protections like these, Margaret Radin developed a framework for property rights based on the concept of personhood.[161] People possess certain objects—quintessentially, a home—that "are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world."[162] Importantly, not all objects people possess are bound up with their identity or self-consciousness. Perfectly fungible property—investments, for example—has no strong relation to personality.[163] Applying this to the landlord-tenant context, tenants and their family members develop an interest in their apartment that is tied to their self-consciousness and identity. This gives tenants a normatively stronger property right to their apartment than landlords, whose interests are typically commercial and fungible.[164] Indeed, New York follows this theory in its laws on self-help eviction; it is unlawful for landlords to use self-help to evict a residential tenant but not a commercial tenant.[165] The importance of the home, as compared to other

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159 *See* State v. Shack, 277 A.2d 369, 372, 374–75 (N.J. 1971) (recognizing that because property rights both are limited by and "serve human values," migrant farmworker tenants were entitled to invite caseworkers to meet with them over their landlord's protest); *see also* GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 152 (2012) ("[T]he rights of tenants to receive visitors have traditionally trumped the rights of landlords to control access to their land." (citing *Shack*, 277 A.2d at 369)).

160 Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 994 (1982); *see also* Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 371 (1986) (arguing that rent control prevents tenants from being displaced by unaffordable rent increases). *But see* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1105–09 (2009) (cataloging and critiquing the various ways in which the law protects homeownership).

161 Radin, *Property and Personhood*, *supra* note 160, at 958.

162 *Id.* at 959.

163 *See id.* at 960 (describing fungible and personal property as opposites); *see also* ALEXANDER & PEÑALVER, *supra* note 159, at 57–58, 66–67 (introducing Hegel's "personality theory of property" and explaining that Radin, who drew upon Hegel's theory, sees fungible property as requiring less legal protection than property that is tied to "human flourishing").

164 Radin, *Residential Rent Control*, *supra* note 160, at 365; *see also* Radin, *Property and Personhood*, *supra* note 160, at 986 ("The more closely [property is] connected with personhood, the stronger the entitlement.").

165 *Compare* Nutter v. W & J Hotel Co., 654 N.Y.S.2d 274, 277 (Civ. Ct. 1997) (prohibiting self-help eviction of resident of rent-stabilized hotel who had resided in the hotel for one night and requested lease), *with* Bozewicz v. Nash Metalware Co., 725

forms of property, justifies the expansive recognition of the property rights of residential renters.

Property rights can also protect individuals' autonomy. This understanding of property derives from John Locke and James Madison, who "recognized property law's vital role in preserving individual freedom against the government and other large, powerful forces."[166] Charles Reich used this theory to justify expanding property rights to government benefits. Recognizing a property right, he argued, would create "a circle around the activities of each private individual" within which each individual "is master, and the state must explain and justify any interference."[167] An individual's autonomy interest in a public benefit is highest when the benefit is their home. Indeed, the sanctity of the home animates much of the Supreme Court's jurisprudence on privacy rights, protecting individuals from warrantless searches in their homes and from criminal prosecutions for certain in-home activities.[168]

Property rights in service of autonomy are especially important for public-housing residents, who already deal with the government invading aspects of their lives by demanding information about their income, their family composition, their background, and other personal details.[169] It is all the more critical, then, to ensure that public-

N.Y.S.2d 671, 671–72 (App. Div. 2001) (restating case law allowing self-help eviction of commercial tenant).

166 David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1777, 1793 (2013). Super characterizes property law "as a defender of individuals," *id.* at 1778, and as "the foundation of individual autonomy and independence," *id.* at 1794.

167 Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964); *see also* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1135 (3d ed. 2017) (explaining that Reich understands property to "promote[ ] individual freedom in the way we organize our private lives"); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1256 (1965) (arguing that if welfare recipients are entitled to their benefits, they will have greater independence from the government); Marc L. Roark, *Under-Propertied Persons*, 27 CORNELL J.L. & PUB. POL'Y 1, 9 (2017) ("Property . . . affords owners with enhanced privacy . . . . Such privacy gives property owners autonomy towards creating and revealing their identity.").

168 *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (striking down a statute criminalizing homosexual behavior based, in part, on the protection of the home as "the most private of places"); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (protecting defendant from criminal prosecution for possessing obscene material within the confines of his home); Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (relying on the sanctity of the home to reverse convictions for abetting in the use of contraceptives). *Compare* Payton v. New York, 445 U.S. 573, 576 (1980) (prohibiting warrantless search of suspect's home), *and* Minnesota v. Olson, 495 U.S. 91, 99–100 (1990) (protecting overnight guest from a warrantless search and arrest within a home), *with* South Dakota v. Opperman, 428 U.S. 364, 367 (1976) (emphasizing the distinction between cars and homes).

169 *See* NYCHA, A HOME TO BE PROUD OF, *supra* note 5, at 9–10 (mandating that residents report changes to their income and submit requests to adjust their family composition); NYCHA, MANAGEMENT MANUAL CHAPTER I, *supra* note 11, at 10

housing residents have property rights in what they can control—their apartments—so that they can have the autonomy and individuality afforded to others in society.[170] That they are public-housing residents "ought never to be an excuse for denying them control over their own lives."[171]

Like all renters, NYCHA residents have a strong, personality-based attachment to, and autonomy interest in, their public-housing apartments, an attachment that NYCHA regulations cultivate.[172] The expectations of permanency and control NYCHA fosters and the primacy of the home as a form of property justify an expansive recognition of property rights for NYCHA residents. As the Court stated in *Roth*, "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."[173] Authorized NYCHA residents rely on their permanency in and control over their public housing in their daily lives; property rights should protect that reliance. But as the next Subsection will argue, the property rights of NYCHA residents facing permanent exclusion are not adequately protected by NYCHA's current procedures.

C. The Paucity of Due Process Protections for Residents Facing Permanent Exclusion

As a property right, public-housing residency should be protected against arbitrary revocation.[174] Such protection is the purpose of procedural due process.[175] Fundamentally, due process requires notice

(describing NYCHA's standards for admission and explaining that they conduct a National Sex Offender search for all applicants); *see also* Reich, *Individual Rights and Social Welfare*, *supra* note 167, at 1247–48 (detailing welfare recipients' lack of privacy).

170 *See* Super, *supra* note 166, at 1778–79 (arguing that property law can only satisfy its purpose of "shielding individuality and autonomy from hostile or insensitive outsiders . . . if it does so for *all* people").

171 Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731, 736 (1990).

172 *See supra* Section II.B.1.

173 Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

174 *Cf.* Henry Paul Monaghan, *Of "Liberty" and "Property*," 62 CORNELL L. REV. 405, 443 (1977) (explaining that if "[n]o 'property' interest has been created, . . . no due process is required").

175 Fuentes v. Shevin, 407 U.S. 67, 81 (1972) ("[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference."); *see also* Reich, *The New Property*, *supra* note 167, at 783 ("[P]rocedure offers a valuable means for restraining arbitrary action."); Note, *supra* note 112, at 891 ("One important purpose [of procedural due process] is to protect against arbitrary or erroneous deprivation of property.").

and the opportunity to be heard.[176] This principle is firmly established for public-housing tenants who face termination. In *Escalera*, the court identified core procedural due process protections: providing sufficient notice of the charges; providing tenants with access to their files, which included the information NYCHA used to determine whether termination was necessary; providing tenants with the opportunity to cross-examine adverse witnesses; and disclosing hearing rules before the hearing.[177] NYCHA residents who face permanent exclusion, however, do not benefit from the protections established in *Escalera*. Instead, they must rely on the tenant of record, who will receive notice of a proposed termination and who has the right to a hearing, to protect their interests.

But that is impossible. This Section will show that, under the *Mathews* test, authorized NYCHA residents facing permanent exclusion are denied sufficient procedural protections. First, this Section will compare the nature of residents' private interest—their property right in their public housing—to other interests that the Supreme Court has recognized as worthy of protection. Next, this Section will argue that authorized residents face a high risk of erroneous deprivation of their housing under the current system. Additional procedural protections—specifically, recognizing authorized residents as necessary parties to any termination actions—would meaningfully reduce this risk. Finally, this Section will argue that NYCHA's interest in achieving efficient permanent exclusions does not outweigh the countervailing *Mathews* factors.

1. The Nature of the Private Interest

For NYCHA residents facing permanent exclusion, the nature of their interest is established above: It is their property right in their apartment, which protects their interests in personhood and autonomy. This interest is, in some ways, analogous to that of the welfare recipients in *Goldberg*. Both public-housing residents and welfare recipients are low income, and for both, when they are deprived of their respective government benefits, their "situation[s] become[ ] immediately desperate."[178] Though both public-housing residents and welfare recipients may have the opportunity to appeal an unfavorable

[176] Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)); MERRILL & SMITH, *supra* note 167, at 1128 (stating that the core procedural protections afforded by the Fifth and Fourteenth Amendments are a requirement of notice and an opportunity to contest government deprivations of property before they occur).

[177] Escalera v. NYCHA, 425 F.2d 853, 862–63 (2d Cir. 1970).

[178] *Goldberg*, 397 U.S. at 264.

decision,[179] any period of deprivation will likely force them into destitution.

But the private interest for public-housing residents goes beyond the private interest for welfare recipients. Welfare, as characterized by the Court in *Goldberg*, enables recipients to pay for necessities like housing, food, and health care.[180] Though it may enable acquiring the type of property that is enmeshed with personhood, the welfare benefit itself is more akin to fungible property. Public housing, by contrast, is a quintessential form of property constitutive of personhood.[181] As such, NYCHA residents' interest in their public housing should be protected at least as strongly as the welfare recipients' interest in *Goldberg*.

2. *The Risk of Erroneous Deprivation and the Value of Additional Protections*

When NYCHA brings a termination action based on the "non-desirable" behavior of a household member, only the tenant of record is party to the termination action, not the household member who may face permanent exclusion.[182] The risk that the household member will erroneously be excluded—despite, for example, evidence that the household member does not pose a threat to the safety of others—is high precisely because the household member is not a party to the termination action and any resulting settlement or hearing. No party to the termination proceeding represents their interests. *Goldberg* and *Escalera* recognized that denying welfare or public-housing recipients the right to a personal appearance or "the opportunity to confront and cross-examine" witnesses were critical flaws in the termination procedures.[183] NYCHA residents facing permanent exclusion are denied precisely these rights.

During settlement negotiations—how ninety-five percent of permanent exclusions are enacted[184]—residents facing permanent exclusion have no right to be present. They have no guarantee of an opportunity to argue that they do not pose a threat to safety and that the non-desirability case should be dropped. NYCHA typically

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[179] *See id.* at 259–60 (describing welfare recipients' right to a post-termination hearing); Matos v. Hernandez, 912 N.Y.S.2d 49, 51 (N.Y. App. Div. 2010) (overturning on appeal NYCHA's imposition of a permanent exclusion because the penalty "shocks the conscience of the court"); Mulé & Yavinsky, *supra* note 67, at 695–96 (explaining that NYCHA tenants can challenge an unfavorable decision through an Article 78 proceeding).

[180] *Goldberg*, 397 U.S. at 264.

[181] *See supra* Section II.B.2.

[182] *See supra* notes 63–65 and accompanying text.

[183] Escalera v. NYCHA, 425 F.2d 853, 862 (2d Cir. 1970); *Goldberg*, 397 U.S. at 267–68.

[184] *See* OUTCOMES OF NON-DESIRABILITY CASES – 2019, *supra* note 69.

presents the tenant of record with a "take-it-or-leave-it" stipulation,[185] the alternative to which is a hearing that could result in the termination of the entire tenancy. Excluding that resident from notice of termination, from settlement negotiations, and from termination hearings violates "fundamental due process."[186]

Increased procedural due process protections—namely, recognizing residents facing permanent exclusion as "necessary parties" to termination proceedings and giving them the right to participate in any hearings and settlement negotiations—would reduce the risk of erroneous deprivation. Under New York law, parties are necessary if they "might be inequitably affected by a judgment in the action."[187] This, in turn, depends on whether their interests are adequately protected by the parties.[188]

In most eviction proceedings, non-party household members' interests are aligned with—and can be protected by—the tenant of record's interests; all residents, presumably, want to avoid eviction. New York courts have thus consistently held that family members are not necessary parties to an eviction suit between the tenant of record and the landlord.[189] In line with such cases, NYCHA must serve only the tenant of record when commencing a termination.[190] Other authorized residents, typically, are not necessary parties.

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185 *See* Brief for the Brennan Center for Justice as Amicus Curiae Supporting Petitioner at 10, Robinson v. Martinez, 764 N.Y.S.2d 94 (App. Div. 2003) (No. 401128/1999) (describing NYCHA's practice of forcing settlements).

186 *See* Magier v. Joy, 432 N.Y.S.2d 311, 312 (Sup. Ct. 1980) (holding that a landlord suing the New York City Office of Rent Control for permission to evict a tenant was obligated to give notice to the tenant).

187 N.Y. C.P.L.R. 1001(a) (Consol. 2020). The rules of civil procedure apply in courts, not necessarily in administrative proceedings. Applying this rule to NYCHA termination proceedings would, however, ensure more protections for residents facing permanent exclusion.

188 *See* Llana v. Town of Pittstown, 667 N.Y.S.2d 112, 113 (App. Div. 1997) (requiring the joinder of property owners whose interests would be adversely affected by a government action, because it was not demonstrated that their interests would otherwise be adequately protected).

189 *See* Randazzo v. Galietti, No. 2015-1875 Q C, 2017 N.Y. Misc. LEXIS 1173, at *3 (App. Div. Apr. 7, 2017) (rejecting tenant's argument that her husband was a necessary party to a holdover proceeding); Washington v. Palanzo, 746 N.Y.S.2d 875, 878 (App. Div. 2002) (rejecting tenant's argument that her adult child was a necessary party in an eviction proceeding); Loira v. Anagnastopolous, 612 N.Y.S.2d 189, 189 (App. Div. 1994) (rejecting the argument of a daughter of a tenant that she should have been made a party to a holdover proceeding); *see also* 4 KARL B. HOLTZSCHUE ET AL., N.Y. PRACTICE GUIDE: REAL ESTATE § 31.08(1)(c) (2020) (summarizing case law regarding necessary parties to an eviction).

190 McLaughlin v. Hernandez, 793 N.Y.S.2d 15, 15–16 (App. Div. 2005) (overturning a lower court decision requiring NYCHA to serve the tenant of record's daughter).

But, if a non-party could face eviction as the outcome of a proceeding, and none of the existing parties are in the same position as the non-party, then the non-party's interests are not adequately protected.[191] Stated more generally, if a non-party has an interest distinct from that of either of the parties, then the non-party is necessary to the suit.[192] Courts have routinely recognized this principle for certain occupants in an apartment. If a landlord seeks to evict a tenant and a subtenant, then both are necessary parties to the proceeding.[193] Subtenants have a possessory interest distinct from that of the tenant, so they cannot lose that interest in a proceeding between the landlord and the tenant. Courts have deemed these parties to be necessary because if they are subject to a warrant of eviction without being provided notice or the opportunity to be heard, they will be inequitably affected.

Faced with permanent exclusion, NYCHA residents are necessary parties to a termination action because the tenant of record cannot adequately protect their interests. When NYCHA forces the tenant of record to choose between losing her home or excluding her family member, the agency drives a wedge between the interests of

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191 *See, e.g.*, Town of Brookhaven v. Marian Chun Enters., Inc., 71 N.Y.2d 953, 954–55 (1988) (dismissing a suit between a town and a facility for homeless families because the suit could inequitably affect the interests of non-party homeless families); Notre Dame Leasing Ltd. P'ship v. Div. of Hous. & Cmty. Renewal, 802 N.Y.S.2d 734, 736–37 (App. Div. 2005) (holding that the tenant was a necessary party to a stipulation between the landlord and the state government under which the tenant had obligations and was liable to face eviction for non-compliance); *Magier*, 432 N.Y.S.2d at 311–12 (determining that the landlord violated "fundamental due process" by failing to serve his tenant with an appeal to the New York City's Office of Rent Control that could have resulted in the tenant's eviction); *see also* 166 E. 61st St. Tenants Ass'n v. N.Y.S. Div. of Hous. & Cmty. Renewal, No. 102320/2008, 2008 N.Y. Misc. LEXIS 5601, at *8 (Sup. Ct. Sept. 9, 2008) (finding that tenants were necessary parties in a case between their landlord and the Division of Housing and Community Renewal, which could have resulted in a rent increase).

192 *See* Caramico v. Sec'y of Dep't of Hous. & Urban Dev., 509 F.2d 694, 701 (2d Cir. 1974) (holding that occupants of foreclosed buildings were required parties to a suit that could have resulted in their eviction because the buildings' owners were not well situated to protect their interests); Bos. Props. v. Taveras, No. 17417/2017, 2018 NYLJ LEXIS 1820, at *6–10 (Civ. Ct. May 7, 2018) (holding that the tenant's sister was a necessary party to an eviction suit since she stated a colorable succession claim and affirmatively distinguishing this case from others not requiring family members to be joined); *cf.* Goldberg v. Kelly, 397 U.S. 254, 269 (1969) (arguing that, if a welfare recipient's caseworker is the only party presenting evidence about the recipient's eligibility, due process requirements are not met because the interests of the caseworker and the welfare recipient are not necessarily aligned).

193 *See* 170 W. 85th St. Tenants Ass'n v. Cruz, 569 N.Y.S.2d 705, 707 (App. Div. 1991) (explaining that warrants of eviction are only effective against occupants or subtenants if they have been made a party to the eviction proceeding); Farchester Gardens, Inc. v. Elwell, 525 N.Y.S.2d 111, 116 (Yonkers City Ct. 1987) ("If [the landlord] fails to join a subtenant, then he will not be able to evict such subtenant pursuant to the warrant he may obtain in the proceeding directing the removal of the paramount tenant.").

the tenant of record and the resident accused of non-desirable behavior.[194] Tenants in typical eviction cases have a strong incentive to advocate for what is in the best interests of their entire household—avoiding eviction. But, in this circumstance, NYCHA tenants have mixed incentives. Under threat of eviction, permanently excluding a family member may be in the best interests of the tenant of record. Coerced into choosing an outcome harmful to her family member, she is thus unable to protect that family member's interests. That 95% of permanent exclusions are achieved through stipulations between the tenant and NYCHA[195] illustrates this divergence in interests. In 95% of cases, NYCHA pressures the tenant into "agreeing" to exclude their family member—to functionally evict their family member from their home. In at least these 95% of cases, the interests of the family member are starkly at odds with those of the tenant. Because the family member's interests may be inequitably affected by a judgment, the family member is a necessary party to any termination action that could result in their permanent exclusion.[196]

Recognizing authorized residents as necessary parties—thus giving them notice of a termination action and a right to participate in hearings and settlement negotiations—will reduce the risk of erroneous deprivation. They, not their family members, are uniquely positioned to present their own defense and cross-examine adverse witnesses during termination hearings because they know the facts of their case best. In addition, since most permanent exclusions come about through stipulation, granting residents the right to participate in settlement negotiations would provide yet more effective protection against erroneous deprivation. Residents facing permanent exclusion have a stronger interest than the tenants of record to advocate against the take-it-or-leave-it settlements that NYCHA offers. At settlement

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194 *See* RAJAGOPAL, *supra* note 19, at 6 ("It is not unusual for tenants to regularly make the difficult decision to permanently exclude their sons and grandsons from their homes to safeguard the rest of their family.").

195 OUTCOMES OF NON-DESIRABILITY CASES – 2019, *supra* note 69.

196 Admittedly, if NYCHA did not use permanent exclusions as an alternative to terminating the entire family's tenancy, it would not run into the same due process issues. In that alternative, the interests of the tenant would be perfectly aligned with the interests of the family member accused of non-desirable behavior. The only good outcome for both the tenant and the family member would be dismissing the termination. However, this Note is not advocating that NYCHA abandon its policy of permanent exclusions in favor of more aggressively pursuing terminations against entire families. If NYCHA did terminate more families' tenancies, this would push yet more people into homelessness and penalize people for the alleged behavior of others, behavior that they might know nothing about. *See* DiPrinzio, *supra* note 76 (discussing the likelihood that people become homeless after being evicted from NYCHA housing); Mulé & Yavinsky, *supra* note 67, at 693 (describing how "innocent" tenants can face eviction proceedings).

negotiations, they can present evidence that they do not pose a threat and should not be permanently excluded. Perhaps more so than the actual hearings, settlement negotiations provide a forum for residents to present their defenses and advocate for their interests.

3. The Nature of NYCHA's Interest

The last factor of the *Mathews* test requires courts to consider the government's interest. Here, that interest cuts both ways. On the one hand, NYCHA has an interest in providing decent housing for low-income New Yorkers.[197] Erroneously excluding residents frustrates that interest.[198] On the other hand, NYCHA has an interest in efficiency and keeping the costs of termination procedures manageable.[199] These proposed protections do not, however, impose significant additional costs or administrative burdens. NYCHA already must provide notice and a hearing for the tenant of record in a termination action. If NYCHA continues to bring termination actions against an entire family for non-desirability, it is little additional cost to name the occupant who may ultimately face permanent exclusion and give them the opportunity to cross-examine witnesses and present their case.[200] Even if the financial cost were significant, this cannot be the controlling factor in a *Mathews* analysis.[201]

Beyond their administrative and financial interests, NYCHA also has an interest in ensuring that its properties remain safe. Indeed, NYCHA's primary justification for using permanent exclusions is protecting the safety of its residents.[202] Many NYCHA residents have opposed granting additional procedural protections to "undesir-

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[197] *See About NYCHA*, NYCHA, http://www1.nyc.gov/site/nycha/about/about-nycha.page (last visited May 20, 2020) ("The New York City Housing Authority's mission is to increase opportunities for low- and moderate-income New Yorkers by providing safe, affordable housing and facilitating access to social and community services.").

[198] *Cf.* Caulder v. Durham Hous. Auth., 433 F.2d 998, 1003 (4th Cir. 1970) (determining that evicting an eligible tenant from public housing frustrates the state's interest to house low-income families).

[199] *See* Mathews v. Eldridge, 424 U.S. 319, 347 (1976) (characterizing the government interest as "the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits").

[200] If New York City were to provide an attorney for residents facing permanent exclusion, *see infra* Section III.A, this would increase the administrative burden of the additional procedural protections, but that should not be enough to alter the calculus of the *Mathews* analysis.

[201] *Mathews*, 424 U.S. at 348 ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard . . . .").

[202] *See Permanent Exclusion – Frequently Asked Questions*, *supra* note 7.

able[ ]" residents.[203] Some believe that additional protections actually make NYCHA developments more dangerous by slowing the eviction process.[204] Because the availability of permanent exclusions affects other residents, their interests are weighed alongside the government's interest.

But the interests of NYCHA and other residents are not sufficient to outweigh the private interest of NYCHA residents facing permanent exclusion. At stake is their property right to their public housing and their interest in staying in their home. NYCHA's procedures put them at great risk of erroneous deprivation, risk that could be mitigated with proper notice and the opportunity to be heard. Finally, the weight of NYCHA's interest is ambiguous—the agency has a financial, administrative, and public safety interest in not providing additional procedures, but it also has mission-based interests in reducing the number of erroneous exclusions and not increasing homelessness. The additional procedures that could mitigate the risk of erroneous deprivation have little impact on NYCHA's interests. Recognizing the resident as a necessary party means that they have a right to attend termination hearings—hearings that NYCHA already must provide. This will not add much, if any, financial or administrative burden. Nor will it significantly extend the time of the termination process or allow residents who actually pose a threat to public safety to remain in NYCHA. The additional procedural protections will simply enable those residents who pose little safety risk to remain in their homes.

Thus, the result of the *Mathews* test is clear: NYCHA's current procedures for termination actions do not adequately protect residents facing permanent exclusion. The next Part discusses alternatives to NYCHA's current practices that would protect residents' due process rights.

III
Moving Beyond Permanent Exclusion

Fundamentally, NYCHA residents lack the protections of due process before they permanently lose their homes. To correct this constitutional violation, NYCHA must give residents whose alleged undesirable behavior may trigger permanent exclusion notice of the

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[203] *See* Umbach, *supra* note 60, at 108, 115 (describing tenants' desire for NYCHA to evict undesirable residents and their opposition to the procedural protections of the *Escalera* consent decree).

[204] *See* Golden, *supra* note 38, at 548–49 (explaining that evictions after the *Escalera* consent decree typically take two years and arguing that these procedures have caused the quality of NYCHA to deteriorate).

charges and an opportunity to be heard. This Part discusses the measures NYCHA should take, beyond the constitutionally required minimum, to ensure its residents are not unnecessarily deprived of their home. First, it considers further procedural enhancements; second, it discusses possible legislative actions; and finally, it advocates for changes to NYCHA's permanent exclusion policy.

A. Procedural Enhancements: Expanding Access to Counsel

To ensure that the opportunity to be heard is meaningful, New York City should provide NYCHA residents with counsel. In 2017, New York City established universal access to counsel for tenants in Housing Court,[205] implicitly acknowledging the significance of an attorney in achieving access to justice. The city is also working to provide access to counsel for NYCHA tenants in termination proceedings.[206] But only *tenants* will receive counsel under the city's plan. NYCHA residents who may face permanent exclusion do not have the right to an attorney. Indeed, an attorney representing the tenant of record in a termination hearing may not be able to represent the family member who could face permanent exclusion precisely because their interests are not aligned. Representing both would present a conflict of interest for the tenant's attorney.[207] Admittedly, providing counsel for all residents facing permanent exclusion would be expensive.[208] But doing so would enhance the efficacy of the necessary procedural protections and may incentivize NYCHA not to pursue permanent exclusion unless it is absolutely necessary.

B. Legislative Actions: Repealing One-Strike Eviction

Beyond procedural improvements, the federal government should lessen the housing consequences of criminal justice involve-

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[205] *See* N.Y.C. ADMIN. CODE §§ 26-1301 to -1305. Access to counsel is being phased in by 2022. *See id.* § 26-1302(a); *Legal Services for Tenants*, N.Y.C. HUMAN RES. ADMIN., http://www1.nyc.gov/site/hra/help/legal-services-for-tenants.page (last visited May 20, 2020).

[206] THE COUNCIL OF THE CITY OF N.Y., REPORT OF THE FINANCE DIVISION ON THE FISCAL 2020 PRELIMINARY PLAN AND THE FISCAL 2019 PRELIMINARY MAYOR'S MANAGEMENT REPORT FOR THE HUMAN RESOURCES ADMINISTRATION'S OFFICE OF CIVIL JUSTICE 5 (2019), http://council.nyc.gov/budget/wp-content/uploads/sites/54/2019/03/Office-of-Civil-Justice-2020.pdf.

[207] *See* Rule of Professional Conduct 1.7, N.Y. COMP. CODES R. & REGS. tit. 2, § 1200.0 (2017) (prohibiting, subject to certain exceptions, a lawyer from representing a client if "the representation will involve the lawyer in representing differing interests").

[208] *Cf.* OFFICE OF CIVIL JUSTICE, N.Y.C. HUMAN RES. ADMIN., UNIVERSAL ACCESS TO LEGAL SERVICES 1 (2019) (explaining that, once fully implemented, New York City's current universal access to counsel program is expected to cost $166 million and will provide legal representation in 125,000 cases annually).

ment. At the highest level, Congress should repeal the one-strike eviction rule that underlies NYCHA's policy of permanent exclusions. In 2019, Representative Alexandria Ocasio-Cortez and Senator Kamala Harris introduced the Fair Chance at Housing Act, which would outlaw one-strike rules. Specifically, the bill would make it unlawful for PHAs to terminate a family's tenancy based on a misdemeanor, an arrest that did not result in conviction, a juvenile conviction, or non-criminal citations, among other causes.[209] This, in turn, would limit the circumstances in which a household member could be permanently excluded. The act will not necessarily pass, but given the renewed interest in criminal justice reform in Congress and the White House,[210] it is not impossible.

C. NYCHA Policy Changes: Limiting Permanent Exclusions

Even without changes to the federal law, NYCHA can and should limit its use of permanent exclusions. HUD has explicitly stated that PHAs are not required to adopt one-strike eviction rules and urged PHAs to consider mitigating factors before terminating a family's tenancy.[211] Among these mitigating factors is the seriousness of the alleged criminal conduct.[212] In a similar vein, in 2019, the New York City Council called on NYCHA to stop considering unlawful or criminal possession of marijuana as grounds for terminating a family's tenancy.[213] The guidance from HUD and City Council is relevant to NYCHA's practices regarding permanent exclusion: Without the threat of termination based on, for example, marijuana possession or other low-level criminal conduct, NYCHA cannot coerce tenants into permanently excluding their family members. NYCHA can and should use the discretion granted by HUD to confine its use of termination actions and permanent exclusions to only the most serious criminal convictions.

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209 *See* S. 2076, 116th Cong. § 2(5)(D) (2019); H.R. 3685, 116th Cong. § 2(2) (2019); *see also* NAT'L LOW INCOME HOUS. COAL. & NAT'L HOUS. LAW PROJECT, FAIR CHANCE AT HOUSING ACT (2019), http://www.nhlp.org/wp-content/uploads/Factsheet_Fair-Chance-at-Housing-Act1.pdf (summarizing the provisions of the bill).

210 For example, in 2018, President Trump signed the First Step Act into law. This enacted a host of criminal justice reforms, including reducing sentences and promoting reentry efforts. First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194 (2018). In 2019, Senator Cory Booker introduced the Next Step Act, which would build on the reforms of 2018, focusing on reducing barriers to reentry. S. 697, 116th Cong. (2019).

211 *See* DEP'T OF HOUS. & URBAN DEV., NOTICE PIH 2015-19, *supra* note 84, at 2–3.

212 *Id.* at 6.

213 Res. No. 296, N.Y.C. Council (2019), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3474323&GUID=291B7764-D58D-407E-BC53-5A2BCA9E198E.

In addition, NYCHA should not pursue permanent exclusions on the basis of pending criminal charges. Currently, nothing prevents NYCHA from pursuing "premature" exclusions.[214] Recently, New York State limited NYCHA's ability to terminate a family's tenancy or permanently exclude a household member on the basis of an arrest alone.[215] It is not uncommon, however, for someone's criminal charges to be dismissed *after* NYCHA has permanently excluded them.[216] In 2018, 56.34% of cases in New York City resulted in non-prosecution, dismissal, or acquittal.[217] This data suggests that if NYCHA pursues termination or permanent exclusion while charges are pending, there is a serious danger that the agency will evict someone who ultimately has their charges dropped. Had NYCHA waited to bring a termination action, they would ultimately have been prohibited from doing so under the new Human Rights Law.[218]

Most broadly, NYCHA should stop bringing termination actions against an entire family based on the actions of one resident. NYCHA has the discretion not to pursue termination actions for almost every type of criminal or undesirable conduct.[219] Without the threat of termination, NYCHA would not be able to coerce a tenant into excluding her family member. Instead, if necessary, NYCHA can bring a termination action against only the alleged undesirable resident. This would reduce the coercive pressure on the family—and on

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214 *See supra* note 62 and accompanying text.

215 N.Y. EXEC. LAW § 296(16) (Consol. 2020) (prohibiting agencies from taking adverse action against someone regarding their housing based on "any arrest or criminal accusation" that is "not . . . pending" and that was (1) terminated "in favor of such individual," (2) "adjourn[ed] . . . in contemplation of dismissal," (3) concluded by "youthful offender adjudication," or (4) ended in "conviction for a violation"). The law is still in its early stages, so it is not yet clear how vigorously it will be enforced.

216 *See, e.g.*, Fred Mogul, *How a Sealed Arrest Can Get You Arrested in New York*, GOTHAMIST (June 5, 2019, 4:35 AM), http://gothamist.com/news/how-a-sealed-arrest-can-get-you-arrested-in-new-york (describing one case in which a NYCHA resident, after being arrested on drug charges, was evicted during the two-and-a-half years that it took for her charges to be dismissed).

217 *See* NYS DIV. OF CRIMINAL JUSTICE SERVS., *supra* note 57. To calculate this percentage, add the number of 2018 felony cases diverted and dismissed (321), dismissed (ACD) (6437), dismissed (Not ACD) (18,285), acquitted (277), and DA declined to prosecute (5892), and the number of 2018 misdemeanor cases diverted and dismissed (63), dismissed (ACD) (44,781), dismissed (Not ACD) (31,613), acquitted (234), and DA declined to prosecute (13,138), which comes to 121,041. Divide that by the total number of arrests for felonies in 2018 (72,986) plus arrests for misdemeanors in 2018 (141,866), or 214,852.

218 *See supra* note 215. The caveat for this suggestion is that if NYCHA can prove the occurrence of the conduct underlying an arrest record—through eyewitness testimony, for example—it can evict a resident through termination or permanent exclusion even if the criminal charge is dismissed.

219 *See supra* note 81 and accompanying text.

the resident—because they would not have to worry about losing their entire home. It will also be less costly for NYCHA: The agency can provide residents with their constitutional due process protections without having to also provide that process to the tenant of record.

Reducing the number of permanent exclusions NYCHA brings serves two purposes. First, it will offset, in part, the costs of the increased procedural protections for residents facing permanent exclusion. While each case may be a greater administrative burden, with fewer cases overall, the costs should not become unmanageable. Second, and more fundamentally, NYCHA can and should shift its focus away from using permanent exclusions to address crime. Permanent exclusions do not reduce crime; at best, they push people who have committed crimes into other parts of the city, and at worst, they exacerbate the social and economic instability that produces crime.[220] Instead, NYCHA can focus on improving resident services—daycares, community centers, medical clinics, and the like—that can strengthen the resident community and mitigate the underlying causes of crime.[221] Though the cost of such investment is not trivial, these services should become part of NYCHA's strategy for promoting resident safety.

Conclusion

NYCHA deprives hundreds of residents of their housing every year without affording them due process. Authorized occupants accused of undesirable behavior may find themselves permanently excluded—allowed neither to live with nor visit their families—despite having no notice of their pending exclusions nor the opportunity to contest them. NYCHA tenants are forced into an impossible position: lose their home or exclude their family.

This Note contends that authorized occupants in NYCHA have due process rights which mandate notice and the opportunity to be heard before they lose their home. NYCHA does not currently recognize such rights. But, as this Note shows, authorized occupants have a property interest in their public housing. NYCHA's practice of per-

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220 *See* Jimenez, *supra* note 19, at 4–5 (arguing that because permanent exclusions, and resulting homelessness, may disrupt someone's mental health care, they can lead to more rather than fewer violent incidents).

221 *See, e.g.*, Stuart Butler & Marcela Cabello, Brookings Inst., Housing as a Hub for Health, Community Services, and Upward Mobility 9 (2018), http://www.brookings.edu/wp-content/uploads/2018/03/es_20180315_housing-as-a-hub_final.pdf (describing the benefits of a public housing or affordable housing development having daycares, clinics, neighborhood grocery stores, and other amenities that strengthen community cohesion).

manent exclusion deprives them of that interest. The current system, vesting all procedural rights in the tenant of record, offers no protection to occupants facing permanent exclusion. This Note further provides alternatives for NYCHA to consider instead of relying on permanent exclusion as a means of crime reduction. Ultimately, the goal of this Note is to push NYCHA to live up to its mission: to provide decent and affordable housing to low-income New Yorkers.