

The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program

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In 1988, Robert Morgenthau, Manhattan's District Attorney since 1974, initiated the Narcotics Eviction Program ("NEP") in an effort to stem the tide of the crack cocaine epidemic in New York City. Emboldened by the efforts of grassroots community safety organizations, Morgenthau dusted off a collection of nuisance abatement statutes dating from the mid-1800s — commonly known as the "Bawdy House" laws — and began to bring eviction actions (either directly or indirectly) against suspected drug dealers in both public *and* private housing throughout the borough. By removing suspected drug dealers from the city's apartment buildings, Morgenthau argued, the NEP would increase community safety and dismantle the infrastructure that supported drug trafficking.

The NEP is just one example of a much larger trend in criminal justice and law enforcement policy in the last thirty years. The reach of the criminal justice system has steadily increased since the mid-1970s, and the modes of exerting control over the lives of people caught in its web have become more sophisticated and far-reaching.¹ Professor Jonathan Simon has argued that, since the 1960s, the United States' preoccupation with crime has led to a phenomenon he calls "governing through crime," whereby policymakers employ criminal law tools — criminalization, incarceration, police intervention — to address social issues traditionally thought to lie outside the sphere of criminal law.² More and more, criminal law enforcement policies attempt to control not only specific individual behaviors — what people do — but

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¹ For a comprehensive account of this phenomenon, see JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) [hereinafter *GOVERNING THROUGH CRIME 2007*]. See also DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); Jonathan Simon, *Governing Through Crime*, in *THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE* 171, 173 (Lawrence M. Friedman & George Fisher eds., 1997) [hereinafter *Governing Through Crime 1997*].

² *Governing Through Crime 1997*, *supra* note 1, at 173-74.

also broader social arrangements — where and how people live.³ And, as with most things in the criminal justice system, much of this newly created power lies in the hands of prosecutors.⁴

The legal community has only recently begun to examine in earnest the collateral consequences and social costs imposed by this new generation of crime prevention tools.⁵ The effects of drug-related evictions have received scant attention, and what little academic literature there is focuses on “one strike” eviction policies in federally subsidized public housing in the wake of the Supreme Court’s decision in *HUD v. Rucker*.⁶ In the shadow of the debate over federal public housing policy, however, prosecutors, police departments, and local governments nationwide have quietly implemented programs that apply the same “one strike” logic, utilizing similar exclusionary mechanisms in public and private housing through creative use of nuisance abatement statutes. The Manhattan District Attorney’s NEP led the charge.

An eviction can have devastating consequences for a family, and the ever-expanding scope of prosecutors’ control over people’s housing choices has raised concerns about the negative collateral effects of policies, like the NEP, on families forced to leave their homes because of the actions of a single family member. Unfortunately, as is the case with so many criminal justice initiatives, policymakers rarely take into account the long-term social consequences of the program. As the Executive Director of the New Haven Public Housing Authority noted in the context of public housing:

All I hear from HUD is ‘evict, evict, evict.’ But eviction without any treatment or services means the tenants will be homeless, and

³ See, e.g., Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective*, 42 HARV. C.R.-C.L. L. REV. 513 (2007) (discussing residential restrictions for registered sex offenders in Georgia); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 640-45 (1997) (discussing anti-gang injunctions in California); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 42-64 (2006) (describing the issuance of order of protection in domestic violence cases as de facto divorce).

⁴ See *infra* Part II(b)(iv).

⁵ See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 15-36 (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter *INVISIBLE PUNISHMENT*].

⁶ 535 U.S. 125 (2002). In *Rucker*, the Supreme Court held that the Anti-Drug Abuse Act of 1988 allowed local housing authorities to evict a tenant from federally funded public housing when a member of the tenant’s family engages in drug-related criminal activity, regardless of whether the tenant knew or had reason to know of the activity. *Id.* at 136. The Court held that the housing authority in Oakland, California had acted within statutory limits when it evicted Pearlle Rucker, a 63-year-old great-grandmother, because her daughter, who suffered from mental retardation, had been found with a crack pipe three miles from her project building, and Willie Lees, a 71-year-old grandmother whose grandson had been caught smoking marijuana in a parking lot. See Dahlia Lithwick, *Too Old to Narc*, SLATE, Feb. 19, 2002, <http://www.slate.com/id/2062274> (last visited Mar. 9, 2008). For an example of the available academic literature on *Rucker*, see Anne C. Fleming, *Protecting the Innocent: The Future of Mentally Disabled Tenants in Federally Subsidized Housing After HUD v. Rucker*, 40 HARV. C.R.-C.L. L. REV. 197 (2005). Because of the dearth of literature about narcotics evictions in private housing, this Note draws heavily on the public housing literature.

they'll go to a shelter. If the shelter costs more, then the state will be right back here, asking me to house them.⁷

Rather than view these problems holistically, the debate over policies like the NEP tends to pit the community's interest in crime prevention and public safety, on the one hand, against individuals' interest in procedural fairness on the other, ignoring completely the broader social implications of such policies.⁸ In the context of the NEP, this debate manifests itself in the various institutional, procedural, and doctrinal mechanisms in place to ensure fairness and protect the interests of innocent tenants.⁹

Developments in the field of community organization theory suggest that this dichotomy — the interests of the community versus the interests of individual tenants facing eviction — is overly simplistic and does not adequately take account of the full scope of negative collateral consequences stemming from narcotics-based evictions. Since the 1940s, social scientists have recognized that a community's social organization — families, friendships, economic arrangements and other social/structural ties — plays a central role in determining its crime rate.¹⁰ Academics, however, have only recently taken seriously the idea that governmental crime prevention and community safety measures may *themselves* be significant ecological factors in the generation of crime.¹¹ In a study of the effects of rates of incarceration on poor neighborhoods in Tallahassee, Florida, Todd Clear et al. found that removing large numbers of community residents through incarceration may actually lead to an *increase* in crime in areas of concentrated poverty.¹² The crucial insight driving this new research is that incarceration and other criminal justice policies operate as forms of “coercive” residential mobility and may, under certain circumstances, undermine a community's ability to self-regulate and exercise informal social control over crime by disrupting the

⁷ Lisa Weil, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161, 172 (1991) (quoting David Echols, Executive Director of the New Haven Public Housing Authority).

⁸ This is a version of the familiar “security versus liberty” dichotomy.

⁹ Under the Bawdy House law rubric, an “innocent tenant” is a tenant of record who neither knew of nor acquiesced in the illegal behavior serving as the basis for a narcotics-based eviction. 1895 Grand Concourse Assocs. v. Ramos, 685 N.Y.S.2d 580, 582 (N.Y. Civ. Ct. 1998). The ailing grandmother who is ignorant of her grandchildren's illegal activity is the quintessential example. See Normandy Realty Inc. v. Boyer, 773 N.Y.S.2d 186, 188 (N.Y. Civ. Ct. 2003) (noting respondent had congestive heart disease and kidney disease and used walking can of oxygen).

¹⁰ See *infra* Part III(a).

¹¹ See, e.g., Todd R. Clear et al., *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q. 33 (2003); Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1552 (2003); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998); Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441 (1998).

¹² Clear et al., *supra* note 11, at 55.

creation of networks of social capital.¹³ This research suggests that the relationship between crime prevention/public safety and the interests of the accused/evicted is far more complex than is generally assumed in the traditional debate about the proper scope of programs like the NEP. The dislocation caused by an eviction not only weakens the familial and social ties that work to curb criminal behavior at the individual level but may also undermine a community's ability to regulate crime without government intervention. One of the central projects of this Note is to provide a more comprehensive overview of the NEP and reframe and expand the legal and policy debate to include an understanding of this dynamic feedback mechanism.

Part I of this Note describes the NEP and provides some historical and theoretical context. Part II looks at the institutional, procedural, and doctrinal structure of the program in light of the traditional crime prevention/tenants' rights dichotomy. This paper argues that, even on its own terms, the NEP fails to perform this balancing act adequately because the mechanisms in place to protect the interests of innocent tenants are unreliable and insufficient.¹⁴ While in theory decision-making authority is distributed between courts and prosecutors (and, to some extent, landlords, tenants, and police), in practice decisions about who will be evicted rest almost exclusively in the unchecked discretion of the NEP's prosecutors. In Part III, this article analyzes the NEP through the lens of social organization theory and applies the concept of "coercive mobility" to narcotics-based evictions, ultimately arguing that the program's current framework does not adequately account for the full range of collateral consequences of the aggressive use of nuisance abatement laws for criminal law purposes. If the goal of the NEP is to optimize the crime prevention/public safety effects of narcotics-based evictions, the program must develop a more robust understanding of the dynamic relationship between evicted tenants and the rest of the community. Part IV offers some final thoughts and conclusions.

I. HISTORY, STRUCTURE, AND CONTEXT

A. *The History of the NEP*

In 1986, the Westside Crime Prevention Program, a grassroots community group, brought suit to evict all of the occupants of a three-story apart-

¹³ *Id.* See also Todd R. Clear, *The Problem with "Addition by Subtraction": The Prison-Crime Relationship in Low-Income Communities*, in *INVISIBLE PUNISHMENT*, *supra* note 5, at 181-93; Meares, *supra* note 11; Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 *STAN. L. REV.* 1171, 1186-93 (2004); Rose & Clear, *supra* note 11, at 441-42.

¹⁴ This Note primarily focuses on the substantive outcomes of the NEP and deals only tangentially with the issue of whether the program is procedurally fair. See *infra* Part II.

ment building on Manhattan's Upper West Side.¹⁵ The building had fallen into disrepair and become a haven for drug activity and prostitution after the previous owner died intestate.¹⁶ In support of their claim, the neighborhood residents invoked section 715 of New York's Real Property Actions and Proceedings Law ("RPAPL"), which allowed residents living within two hundred feet of a premises being used for illegal business to sue for the eviction of the nuisance-creating tenants.¹⁷ Despite the fact that section 715 had been on the books for over a hundred years, the resulting lawsuit, *Kellner v. Cappellini*, represented the first time neighborhood residents had initiated proceedings against a tenant of an adjacent building for illegal activity.¹⁸ At trial, neighborhood residents recounted their observations of illegal activity taking place in front of the building and of the large amount of foot traffic in and out of the building at all hours of the day.¹⁹ In addition, the petitioners also called to the stand a number of police officers who had cooperated in the suit. The officers presented evidence of drug activity collected during various searches of the building.²⁰ When all of the evidence was in,²¹ Judge Tom held for the petitioners, writing, "[t]he Court agrees with Petitioners' argument that the only effective solution to save this neighborhood is to vacate the entire building and get rid of all its drug dealers and users. *To effectively remove a cancer, it must be completely cut out.*"²²

B. How the NEP Works

Two years later, the Manhattan District Attorney's Office followed *Kellner's* lead and created the NEP in an effort to curb New York City's crack cocaine epidemic. The district attorneys' offices in New York City's outer boroughs quickly followed suit.²³ One of the most striking aspects of the NEP was that it did not require any new statutory authorization. Instead, the NEP relied on three preexisting provisions in New York's Real Property Law ("RPL") and RPAPL. These statutes, generally termed the "Bawdy House" laws,²⁴ were originally enacted in 1868 with the intention of giving private

¹⁵ Jan Roehl, *Civil Remedies for Controlling Crime: The Role of Community Organizations*, 9 CRIME PREVENTION STUD. 241, 246 (1998).

¹⁶ *Kellner v. Cappellini*, 516 N.Y.S.2d 827, 828-29 (N.Y. Civ. Ct. 1986). The respondents in the case were the Public Administrator of the County of New York, two named residents, and ten unidentified "occupants and squatters." *Id.* at 827.

¹⁷ *Id.* at 827-28; N.Y. REAL PROP. ACTS. LAW § 715 (McKinney 2005).

¹⁸ See *Kellner*, 516 N.Y.S.2d at 828; Roehl, *supra* note 15, at 246.

¹⁹ *Kellner*, 516 N.Y.S.2d at 828-29.

²⁰ *Id.*

²¹ The only respondent to testify at trial conceded that there was drug activity taking place in the building, though he denied personal involvement and that he would personally allow upwards of fifty people per day to enter the building to make drug transactions. *Id.* at 829-30.

²² *Id.* at 831 (emphasis added).

²³ Each county in New York has its own separate and independent district attorney's office. Currently, there are active independent NEPs in New York County (Manhattan), Queens County, Kings County (Brooklyn), and Bronx County.

²⁴ Roehl, *supra* note 15, at 246.

landlords and public officials a cause of action to evict tenants using premises as brothels, a persistent problem at the time.²⁵ The Bawdy House laws void a lease when the property is used for illegal purposes;²⁶ give private landlords a cause of action to evict where “[t]he premises, or any part thereof, are used or occupied as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business;”²⁷ and give any “duly authorized law enforcement agency” (e.g., the district attorney²⁸) or resident living within two hundred feet of any such property the authority to evict tenants if the landlord fails to take independent action.²⁹ Through legislative and judicial action, the scope of the Bawdy House laws expanded to include counterfeiting, gambling, and, eventually, drug dealing as grounds for eviction.³⁰

The real innovation of the NEP was locating the power to enforce the Bawdy House laws in the District Attorney’s Office rather than in a legal branch of the Mayor’s Office. Traditionally, the power to enforce nuisance abatement law had rested in the City’s Corporation Counsel.³¹ Robert Morgenthau, however, located the program directly under the auspices of the District Attorney, a position selected by regular borough election, giving Morgenthau a great deal of independence and autonomy.

The organization of the NEP flows from the structure of the Bawdy House laws. The office first reviews all narcotics-related search warrants executed by the police.³² Once the NEP determines that there are grounds for an eviction under section 715, it notifies the landlord of the building and requests that eviction proceedings be initiated against the tenant.³³ If the

²⁵ STEVEN L. KESSLER, *NEW YORK CRIMINAL AND CIVIL FORFEITURES* 265 (1999). For a comprehensive history of the Bawdy House laws, see *1165 Broadway Corp. v. Dayana of N.Y. Sportsweat, Inc.*, 166 Misc. 2d 939, 940-47 (N.Y. Civ. Ct. 1995).

²⁶ N.Y. REAL PROP. LAW § 231(1) (McKinney 2005).

²⁷ N.Y. REAL PROP. ACTS. LAW § 711(5) (McKinney 2005).

²⁸ See *infra* text accompanying note 31.

²⁹ N.Y. REAL PROP. ACTS. LAW § 715(1) (McKinney 2005). Section 715 also creates presumptions of illegal use where a tenant has two or more convictions for prostitution or drug distribution in a period of one year. § 715(2)-(3). According to Jan Roehl, most state nuisance abatement ordinances “designate public prosecutors as the individuals who may initiate an abatement action, although citizens may do so in at least 16 states.” Roehl, *supra* note 15, at 249 (citing B.E. SMITH ET AL., *AM. BAR ASSOC., RIDDING NEIGHBORHOODS OF DRUG HOUSES IN THE PRIVATE SECTOR* (1992)).

³⁰ See *Dayana*, 166 Misc. 2d at 940-47.

³¹ Indeed, the District Attorney never appeared as a litigant in a Bawdy House action before 1988. Prior to 1988, the city had been represented by Corporation Counsel in all nuisance abatement suits. See, e.g., *City of New York v. Goldman*, 356 N.Y.S. 754, 754 (N.Y. Civ. Ct. 1974). Corporation Counsel continues to enforce nuisance abatement laws. See New York City Law Department, http://home2.nyc.gov/html/law/html/about/divisions_affirm.shtml (last visited Mar. 9, 2008).

³² See PETER FINN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *THE MANHATTAN DISTRICT ATTORNEY’S NARCOTICS EVICTION PROGRAM* 3, 122 (1995); New York County District Attorney’s Office, Special Litigation Bureau, *available at* <http://www.manhattanda.org/organization/trial/speciallitigation.shtml> [hereinafter Special Litigation Bureau]. Cases can also be referred by the police or members of the community. *Id.*

³³ Special Litigation Bureau, *supra* note 32.

landlord refuses to prosecute the eviction in good faith, the district attorney may be substituted as the petitioner in the case, and the landlord may be sanctioned with a fine of up to \$5,000.³⁴ The district attorney may also initiate forfeiture proceedings against a recalcitrant landlord in federal court.³⁵ Landlords seeking to evict tenants at the behest of the district attorney are allowed to bring summary process actions in a specially created Narcotics Eviction Drug Part, which is generally less congested and more efficient than the city's regular housing courts.³⁶ Once the eviction action has been initiated, prosecutors from the NEP assist the landlord and her attorney in court by arranging for testimony by police officers and providing relevant paperwork.³⁷ This practice has not been without some controversy – Bronx District Attorney Robert Johnson has acknowledged that in some instances, prosecutors have used information contained in sealed criminal cases to pursue evictions.³⁸ In addition, the NEP also provides an attorney or paralegal to monitor the proceedings and assist the landlord's attorney.³⁹ One of the primary advantages of the program cited by proponents is that neighbors who might otherwise be intimidated are not required to testify at most trials.⁴⁰

The goal of the NEP is twofold: (1) to prevent drug dealing and other related crimes by disrupting the underlying infrastructure of drug trafficking; and (2) to increase community safety by wresting control over apartment buildings away from drug dealers and returning it to law-abiding residents.⁴¹ Robert Morgenthau has written:

³⁴ § 715(4); FINN, *supra* note 32, at 5. In practice, this almost never happens. The vast majority of landlords are willing to comply with the District Attorney's request. FINN, *supra* note 32, at 5.

³⁵ FINN, *supra* note 32, at 10. The District Attorney reports, however, that landlords rarely object to initiating evictions. Special Litigation Bureau, *supra* note 32.

³⁶ See James Barron, *New Court Is to Handle Evictions of Drug Suspects*, N.Y. TIMES, July 31, 1988, at 31. Commonly known as "redbacks," because they are filed on bright red paper, narcotics eviction suits brought at the behest of the district attorney are prioritized and litigated on an expedited timetable. See Geoffrey Gray, *Busted Out*, CITY LIMITS MAGAZINE, Nov. 2003, at 20.

³⁷ See *City of New York v. 924 Columbus Ave. Assocs.*, N.Y.L.J., Oct. 19, 1994, at 22, col. 3 (N.Y. Sup. Ct. 1994) ("[S]pecific information of arrests and lab tests are made available to the owner of the property . . . so that an eviction proceeding can be started with some hope of success."); FINN, *supra* note 32, at 6; Special Litigation Bureau, *supra* note 32.

³⁸ See Karah Woodward & Cassi Feldman, *Breaking the Seal: DAs Dig Up Old Court Files*, CITY LIMITS WEEKLY, June 7, 2004, available at <http://www.citylimits.org/content/articles/weeklyView.cfm?articlenumber=1530> (last visited Mar. 9, 2008). Under New York law, official records and papers of arrests and prosecutions that result in dispositions favorable to the defendant, non-criminal offense convictions, and youthful offender adjudications are automatically sealed. See N.Y. CRIM. PRO. LAW §§ 160.50, 160.55, 720.35.

³⁹ See FINN, *supra* note 32; Special Litigation Bureau, *supra* note 32.

⁴⁰ See FINN, *supra* note 32, at 26.

⁴¹ See FINN, *supra* note 32; N.Y. COUNTY DIST. ATTORNEY'S OFFICE, TRESPASS AFFIDAVIT AND NARCOTICS EVICTION PROGRAMS 2 (agency pamphlet) [hereinafter D.A. Pamphlet]; cf. Weil, *supra* note 7, at 169 (describing Congress's rationale for implementing a "one-strike" policy in federally funded public housing).

Criminals often use residential and commercial buildings as sites for their illegal operations. Drug dealing, prostitution, and other illegal acts threaten the safety of law-abiding tenants and disrupt communities. Buildings with limited security tend to be most inviting for criminals, but no building is immune to crime. Through our . . . Narcotics Eviction Program[], the Manhattan District Attorney's Office provides legal support, law enforcement oversight, and other services for buildings victimized by . . . unlawful residents. No tenant or landlord should ever feel helpless against crime in his or her building.⁴²

Measured by rate of eviction, the NEP has been quite successful. Ninety-three percent of the narcotics-based evictions initiated between June 1988 and August 1994 resulted in the tenant vacating the premises,⁴³ and from the program's start in 1988 to April 2005, its efforts have led to more than 6,200 evictions from public⁴⁴ and private housing in Manhattan alone.⁴⁵

This "success" in displacing tenants, of course, provides little information as to whether the program has been successful in attaining its public safety goals. Measured in terms of actual reduction in crime or increase in community safety, the NEP's success is less clear. Though there has been some anecdotal evidence of the NEP's success in these areas,⁴⁶ there are no empirical studies to show whether the NEP has had any material effect on drug crime in New York City, or on crime rates more generally.⁴⁷ Just as Judge Tom did in *Kellner*, however, most proponents of the program simply assert that the success of the program is self-evident: drug dealing is bad; therefore removing it is good.

⁴² D.A. Pamphlet, *supra* note 41, at 2.

⁴³ FINN, *supra* note 32, at 5. Thirty-eight percent of respondents were evicted through judicial action, while fifty-five percent simply failed to contest the eviction in court. The remaining seven percent of cases were settled (five percent) or dismissed or withdrawn (two percent). *Id.*

⁴⁴ From 1988 to 1996, the NEP worked with the New York City Housing Authority (NYCHA) to evict drug dealers from the city's public housing. In 1971, NYCHA entered into a consent decree under which it agreed to guarantee New York's public housing residents certain procedural protections from eviction. KESSLER, *supra* note 25, at 361. Thus, when the District Attorney attempted to coerce NYCHA into bringing eviction actions against public housing residents under the Bawdy House laws, NYCHA argued that it was prohibited from doing so by the consent decree. *Id.* at 361-62. This situation resulted in a peculiar arrangement under which the District Attorney would be substituted as the petitioner in narcotics eviction suits and NYCHA would be named as a respondent along with the tenant. *Id.* at 362. While NYCHA was nominally the respondent, it would cooperate with the District Attorney to collect and present evidence in support of the eviction. *Id.* Thus, NYCHA was able to sidestep the consent decree until 1996, when the consent decree was modified to allow NYCHA to proceed directly under the Bawdy House laws. *Id.* at 363.

⁴⁵ Press Release, N.Y. County Dist. Attorney's Office, Narcotics Eviction Program (Apr. 11, 2005), available at <http://manhattanda.org/whatsnew/press/2005-04-11.shtml> (last visited Mar. 12, 2008).

⁴⁶ See, e.g., Janet Allon, *In Once-Infamous Drug Area, Only Mailman Is on the Stoop Now*, N.Y. TIMES, July 6, 1997, at CY5.

⁴⁷ The author's research revealed no studies.

Despite the lack of conclusive evidence of the program's success, the NEP has been heralded as a promising example of community-based prosecution and policing and has been held out as a model program nationwide.⁴⁸ Following Morgenthau's lead, and spurred on by the Supreme Court's decision in *HUD v. Rucker*,⁴⁹ a number of jurisdictions around the country have implemented their own NEP-type programs through policy changes in law-enforcement organizations, new legislation, or both. Similar programs now exist in Los Angeles,⁵⁰ Indianapolis,⁵¹ Memphis,⁵² and Chicago.⁵³

C. *The NEP in Context*

1. *Broken Windows*

The creation of the NEP, and its creative use of nuisance abatement laws, was not an aberration. The late 1980s saw the emergence and adoption of two parallel but related strands of thought about law enforcement and crime prevention that provided the theoretical underpinnings of the NEP. The first was "Broken Windows," or "order maintenance," theory, most forcefully advocated by James Q. Wilson and George L. Kelling in their seminal article published in *The Atlantic Monthly*, *Broken Windows: The Police and Neighborhood Safety*.⁵⁴ In that article, Wilson and Kelling posited that unaddressed signs of disorder in a neighborhood — graffiti, litter, broken windows, loitering, panhandling, prostitution — created ecological conditions that fostered more serious criminality.⁵⁵ The solution, they argued, was to focus the attention of law enforcement on low-level crime and disorder in order to eliminate the signs of social decay and cut off more serious crime before it started.⁵⁶ The wholesale adoption of the Broken Windows

⁴⁸ See FINN, *supra* note 32, at 1; see also Press Release, Shelby County District Attorney General, District Attorney's Office Notifies Thousands of Hickory Hill Residents About Drug Dealer Eviction, <http://www.scdag.com/Information/NewsReleases/tabid/75/newsid383/102/Default.aspx> (last visited Mar. 12, 2008) [hereinafter Press Release, Shelby County Attorney General]

⁴⁹ 535 U.S. 125 (2002).

⁵⁰ See LOS ANGELES CAL. MUNICIPAL CODE § 47.50 (1997) (applies to drug activity taking place within 1000 feet of a residence); Rocky Delgadillo, Los Angeles City Attorney, Citywide Nuisance Abatement Program ("CNAP"), <http://www.lacity.org/atty/atycb1b2c.htm#NET> (last visited Mar. 12, 2008).

⁵¹ See CATHERINE COLES & MARK H. MOORE, PROSECUTION IN THE COMMUNITY: A STUDY OF EMERGENT STRATEGIES, Appendix C: Marion County (Indianapolis), Indiana Case Study, at 19 (1997).

⁵² See Press Release, Shelby County Attorney General, *supra* note 48.

⁵³ See Cook County State's Attorney's Office, About the Cook County State's Attorney's Office, http://www.statesattorney.org/about_the_office.htm (last visited Mar. 12, 2008).

⁵⁴ James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, *THE ATLANTIC MONTHLY* 29 (March 1982).

⁵⁵ *Id.* Numerous scholars have commented on Wilson and Kelling's work. One wonderful example is BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 23-27 (2001).

⁵⁶ Wilson & Kelling, *supra* note 54, at 29.

strategy in New York City in the mid-90s led to an explosion in the number of misdemeanor arrests citywide.⁵⁷ Most importantly for our purposes here, though, Broken Windows theory explicitly tied crime prevention efforts to the exercise of control over physical spaces, especially those spaces considered “high crime” areas. And as a result, state control and regulation penetrated deeper into the everyday lives of poor people.

2. *Community-Based Approaches*

The second strand of law enforcement strategies falls under the rubric of community policing and prosecution. Community-based approaches to law enforcement gained real traction with policy-makers in the early and mid-1980s. Though almost universally touted as the way of the future in law enforcement circles, the notion of community-based law enforcement is notoriously difficult to define. However, at the core of almost every definition is the idea that law enforcement officials should be “problem solvers” in the community, identifying the underlying sources of crime in a neighborhood and working with community members to develop creative solutions.⁵⁸ Community-based law enforcement strategies look beyond the traditional law enforcement tools of arrest, prosecution, and incarceration, and instead emphasize interdisciplinary and cross-agency solutions.⁵⁹ The most commonly cited examples of successful problem-solving/community-based law enforcement are stories of groups of concerned community members banding together, partnering with police departments, district attorneys’ offices, and other governmental agencies to “take back” buildings that have become eyesores and centers of illicit activity. Together they use various policy tools — housing/health code enforcement, political organizing and public shaming, and nuisance abatement suits — to apply pressure on a negligent landlord to improve the situation.⁶⁰

Broken Windows theory and community-based law enforcement share a common thread: they both put control over physical space as a central policy concern of law enforcement.⁶¹ This perceived need to control the space in which crime occurs has resulted in an expansion of the tools availa-

⁵⁷ See HARCOURT, *supra* note 55, at 1, 47-51.

⁵⁸ See HENRY RUTH & KEVIN R. REITZ, *THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE* 137-44 (2003).

⁵⁹ *Id.*

⁶⁰ See WESLEY SKOGAN & SUSAN HARTNETT, *COMMUNITY POLICING, CHICAGO STYLE* 175 (1999). *Kellner v. Cappellini*, 516 N.Y.S.2d 827 (N.Y. Civ. Ct. 1986) is a prime example of this type of effort. See *supra* text accompanying note 15.

⁶¹ There has also been a recent shift in focus from traditional law enforcement to land management responses to crime. Nicole Stelle Garnett argues that the Warren Court’s criminal procedure revolution limited police ability to create social order and made land management solutions that do not present the same procedural and constitutional limitations — such as new “skid rows,” stricter housing codes, trespass zoning, and homeless campuses — more appealing to policymakers. See Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075 (2005).

ble to criminal prosecutors. Indeed, the NEP is often described in terms that directly link it to the theories of order maintenance and community-based law enforcement and emphasize the need to exert control over physical spaces.⁶² The idea is to “take back” control of physical spaces for law-abiding residents.

3. *The Rise of Civil Law Techniques*

Applying civil law techniques — nuisance abatement, forfeiture, and eviction — to problems traditionally cabined in the domain of the criminal law has been one of the most widely utilized strategies by law enforcement to gain greater control over criminal infrastructure. The mid-1980s saw a drastic increase in the use of civil law techniques to advance criminal justice aims, especially in the federal system.⁶³ Strategies employing parallel criminal and civil actions proliferated in the federal courts.⁶⁴ Perhaps most notably, the federal government invoked the Racketeer Influenced and Corrupt Organizations Act (“RICO”) to bring divestiture and treble damage actions against white-collar criminals and organized crime.⁶⁵ The federal government also began using forfeiture actions more aggressively, especially in the War on Drugs.⁶⁶ As Professor Mary M. Cheh writes:

Police and prosecutors have embraced civil strategies not only because they expand the arsenal of weapons available to reach anti-social behavior, but also because officials believe that civil remedies offer speedy solutions that are unencumbered by the rigorous constitutional protections associated with criminal trials, such as proof beyond a reasonable doubt, trial by jury, and appointment of counsel.⁶⁷

Thus, whereas criminal proceedings are seen as protracted and cumbersome, civil actions present an expedient alternative.

This is undoubtedly true in the case of New York’s program. The NEP developed as a response to concerns that traditional law enforcement measures were inadequate to combat drug-dealing networks. Moreover, the criminal justice system was seen as a slow and cumbersome obstacle to ridding privately owned apartment buildings of drug dealers.⁶⁸ Employing civil law techniques, and in particular, summary process evictions in which te-

⁶² See, e.g., D.A. Pamphlet, *supra* note 41.

⁶³ See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325-28 (1991).

⁶⁴ See Henry H. Rossbacher, *Let the Punishment Fit the Crime: Aspects of Civil Lawsuits Against Criminal Defendants*, 21 THE COMPANY LAWYER 27 (2000).

⁶⁵ Cheh, *supra* note 63, at 1326-28.

⁶⁶ *Id.*; see also Rossbacher, *supra* note 64, at 27.

⁶⁷ Cheh, *supra* note 63, at 1329.

⁶⁸ See FINN, *supra* note 32, at 2.

nants have no right to counsel, on the other hand, provided a relatively quick and easy way to rid buildings of disruptive tenants.⁶⁹ Although it relied on nuisance abatement statutes, the NEP essentially treated apartments (or, more precisely, leases) used for dealing drugs as instrumentalities of crime, subject to forfeiture by the state.⁷⁰ Rather than replace the criminal sanction associated with drug dealing,⁷¹ the NEP supplemented criminal sanctions and expanded the crime prevention tools available to prosecutors, overcoming some of the structural limitations of the criminal law in regulating physical space.⁷²

However, the procedural and substantive advantages offered by civil remedies, and the structure of the NEP in particular, give rise to a host of unintended negative consequences not traditionally associated with criminal law enforcement. More specifically, because an eviction results in the displacement of all members of a household — not just the alleged drug dealer — the NEP acts as a collective, rather than individual, sanction. Part II begins with a brief look at the unintended negative collateral consequences of such a collective sanctioning regime — namely, the risk of homelessness for evicted tenants, especially those deemed to be innocent of the underlying criminal behavior — and argues that the existing means of guarding against these consequences are inadequate.

II. PROTECTING THE “INNOCENT”

From its inception, the NEP has raised concerns that aggressive employment of narcotics evictions will result in the displacement of “innocent family members including those who are senior citizens, disabled tenants and tenants with infant children.”⁷³ Typically, the policy debate over the NEP, and other programs like it, focuses on balancing the interests of the community in crime prevention and public safety on one hand and the negative collateral consequences of eviction on the other. While a community’s interest in promoting safe living conditions for its residents is of paramount concern, the consequences of an eviction are not insignificant; an eviction can be devastating for a family and will likely have serious lasting negative effects.

The following section discusses the potential for unintended harms arising from narcotics evictions and evaluates the various mechanisms in place to protect the interests of tenants not directly involved in the illegal activity

⁶⁹ *Id.*

⁷⁰ Eviction is essentially forfeiture for the poor, as most low-income renters have few assets and are therefore insolvent for purposes of traditional forfeiture actions.

⁷¹ See Cheh, *supra* note 63, at 1333-34. Cheh notes that civil remedies may be incorporated into criminal proceedings themselves (e.g., restitution) or may serve as an alternative or supplement to criminal sanctions. *Id.*

⁷² Unlike criminal law, “[t]he civil law is rich in remedies.” *Id.* at 1333.

⁷³ *Lloyd Realty Corp. v. Albino*, 552 N.Y.S.2d 1008, 1009 (N.Y. Civ. Ct. 1990).

giving rise to the eviction action. While there are institutional, procedural, and doctrinal mechanisms in place to protect the interests of these innocent tenants, they are largely ineffective. In the end, whether or not a tenant is evicted largely depends on the unchecked discretion of prosecutors.

A. *Collective Sanctions*

The aggressive use of narcotics evictions by the NEP is notable, in part, because it extends the collateral consequences of criminal involvement to people not directly implicated in the illegal activity.⁷⁴ Indeed, narcotics evictions, perhaps more than any other collateral consequence attached to criminal behavior, have a tendency to directly and adversely affect third parties.⁷⁵ That is, in a sense, their very aim. In many, if not most, narcotics eviction cases, the tenant of record is not the suspected drug dealer,⁷⁶ and the primary wrongdoer is prosecuted in the criminal system. Thus, viewed from a deterrence-based perspective, one primary aim of the NEP is to create incentives for the heads of households to control illegal activity taking place in their apartments.⁷⁷ By threatening the heads of households with eviction and possible homelessness, the NEP harnesses the coercive power of the family unit to control the targeted behavior (i.e., drug dealing).

The concern for “innocent tenants” that lies at the center of the debate over the NEP points to an important threshold question: whether narcotics evictions, which have as their very aim the punishment of people who are not directly responsible for drug dealing, are morally defensible as collective sanctions. Collective sanctions — here, in the form of a tenant of record’s vicarious liability for the actions of other members of the household — are generally frowned upon as unfair or unjust because they impose a form of “guilt by association,” rather than an individualized assessment of culpability and guilt.⁷⁸ Such sanctions are seen as “objectionable because [they

⁷⁴ Cf. Alicia Werning Truman, *Unexpected Evictions: Why Drug Offenders Should Be Warned Others Could Lose Public Housing if They Plead Guilty*, 89 IOWA L. REV. 1753, 1757-58 (2003-2004) (discussing the loss of public housing for drug convictions). Of course, entire families are almost always affected when a person is accused of a crime but the law rarely formally involves other family members as it does with the NEP.

⁷⁵ See Regina Austin, “*Step on a Crack, Break Your Mother’s Back*”: *Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 YALE J.L. & FEMINISM 273 (2002).

⁷⁶ FINN, *supra* note 32, at 6 (“If, as is usually the case, the tenant of record is not the accused drug dealer, the landlord or district attorney must also prove that the tenant knew about the illegal activity and did not try to stop it.”).

⁷⁷ See Austin, *supra* note 75, at 276; see also Lithwick, *supra* note 6; Renai S. Rodney, *Am I My Mother’s Keeper? The Case Against the Use of Juvenile Arrest Records in One-Strike Public Housing Evictions*, 98 NW. U.L. REV. 739, 746, 766 (2004). As Jan Roehl notes: “Community organizations and citizens have learned to apply civil remedies, to use civil laws and mechanisms to compel non-offending third parties to take action to prevent or mitigate crime.” Roehl, *supra* note 15, at 242.

⁷⁸ Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 347-48 (2003).

seem] to reflect an antiliberal embrace of communal responsibility.”⁷⁹ Guilt, and thus suitability for punishment, it might be argued, is non-transferable.⁸⁰

On the other hand, in contexts other than narcotics-based evictions, it seems normatively uncontroversial (and generally accepted) to impose some sort of liability for a nuisance on a leaseholder, whether or not she is in the best position to prevent the undesired behavior.⁸¹ This was the position taken by the Supreme Court in *Rucker*. Notwithstanding *Rucker*, however, there appears to be something normatively different about imposing strict liability on heads of households for the criminal behavior of their family members, especially when the remedy is forfeiture of the leasehold.⁸² The NEP conscripts family members to be informal, front-line law enforcers. While this may seem reasonable, imposing the penalty of homelessness on the leaseholder when these informal family controls fail is morally problematic, particularly when the leaseholder was not in a position to prevent the undesired conduct. As one observer noted: “To hold a parent responsible for juvenile delinquency ‘effectively converts poor, or simply unlucky, parenting into a public welfare offense.’”⁸³ Moreover, housing choices are severely limited in most communities of concentrated poverty, and living arrangements are often created out of necessity rather than personal choice. For example, in New York City, the amount of regulated and subsidized housing has decreased in recent years while demand for housing has risen and the average wage has declined.⁸⁴ Imposing strict liability on leaseholders without creating an exception for those people who were not in a position to prevent the illegal conduct simply goes too far.

Professor Daryl Levinson has argued that while some collective sanctions may be objectionable, such as when relying on morally irrelevant characteristics such as race as proxies, others are both functionally and morally

⁷⁹ *Id.*

⁸⁰ Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674, 676 (1968).

⁸¹ Cf. JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 307 (2002) (“Nuisance must also be distinguished from *negligence*. . . . Nuisance focuses on the *result* of the conduct rather than the conduct itself; the question is not whether the defendant’s conduct was unreasonable but whether the *interference* is unreasonable.”).

⁸² One possible reason eviction is the sole remedy employed by the Bawdy House regime is that regular injunctions are thought to be ineffective, and most respondents in narcotics eviction cases will be judgment-proof in forfeiture and damage actions.

⁸³ Rodney, *supra* note 77, at 765 (quoting James Herbie Difonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1, 7 (2001)); see also Austin, *supra* note 75, at 276 (“The person being controlled here, of course, is not the child, but the parent. The parent becomes the guarantor of the good behavior of her family members and guests. The policy depends on her economic rationality as head of the household and provides incentives for her to kick the offending family member out of the unit.”).

⁸⁴ NEW YORK BAR ASSOCIATION, “Re-Entry and Reintegration: The Road to Public Safety”: Report and Recommendations of Special Committee on Collateral Consequences of Criminal Proceedings, 215-20 (May 2006) (adopted as official NYSBA policy Nov. 2006), available at <http://www.reentry.net/link.cfm?9285> (last visited Mar. 12, 2008) [hereinafter “Re-Entry and Reintegration”].

justifiable when they are directed at the group of people in the best position to control the undesired behavior.⁸⁵ Professor Levinson writes:

Collective sanctions make functional sense when group members have the capacity to monitor and control the behavior of some intuitively primary wrongdoer more efficiently than an external sanctioner. Sanctions are actually imposed only when the group fails to prevent wrongdoing that it could have prevented. Intuitively, then, we might be inclined to see group members as responsible for the wrongdoing that results. Theorists will disagree about the extent to which, or the precise conditions under which, legal and moral responsibility can be premised on group members' "omission" to prevent harm (if that is how their failure ought to be characterized). But it seems reasonable to argue that group members who fail in their delegated "duty" to deter primary wrongdoing should bear *some* responsibility for that wrongdoing, and perhaps enough to justify the imposition of collective sanctions. Members of groups who are well situated to deter misconduct but fail to do so cannot claim entirely clean hands.⁸⁶

From this point of view, then, the NEP is morally defensible insofar as it only punishes those who were actually in a position to regulate or prevent drug dealing in their own home. And, in theory, the Bawdy House law regime precisely mirrors Professor Levinson's argument. Under RPAPL section 711(5) and RPL section 231(1), "[a] tenant will be liable for the illegal acts committed in the leased property by a subtenant or occupant . . . if the tenant had knowledge of and acquiesced to the use of the demised premises for such an illegal activity."⁸⁷ Thus, the knowledge and acquiescence requirements act as a negligence standard and limit liability precisely to those people who are, in fact, in a position to prevent the illegal behavior.⁸⁸

By so limiting liability, the NEP regime seems to strike the proper normative balance within the confines of the traditional debate by attaching liability only where the tenant "cannot claim entirely clean hands."⁸⁹ This article will ultimately argue that this moral dichotomy oversimplifies the

⁸⁵ Levinson, *supra* note 78, at 378-86.

⁸⁶ *Id.* at 426. Professor Levinson notes that the Israeli Supreme Court has taken an opposing view in condemning a policy of deporting the family members of suicide bombers. The Supreme Court concluded: "From our Jewish Heritage . . . we have learned that 'Fathers shall not be put to death because of their sons, and sons shall not be put to death because of their fathers; a person shall be put to death for his own wrongdoing.'" *Id.* at 413-14 (quoting H.C.J. 7015/02 Ajuri v. IDF Commander in West Bank [2002] (quoting *Deuteronomy* 24:16)).

⁸⁷ 1895 Grand Concourse Assocs. v. Ramos, 685 N.Y.S.2d 580, 582 (N.Y. Civ. Ct. 1998).

⁸⁸ Regina Austin has questioned whether poor single mothers generally are in fact in a position to exert meaningful control over their grown children. Austin argues that due to a lack of political, social, and economic power, "the authority of poor mothers may not be sufficiently underwritten with material capital to achieve compliance with their requests regarding drug-related behavior." Austin, *supra* note 75, at 287.

⁸⁹ Levinson, *supra* note 78, at 426.

true costs and benefits of the NEP in light of the dynamic relationship between evictions and public safety.⁹⁰ However, assuming here that the distinction between those tenants who are in a position to control the targeted behavior and those who are not is the proper one, the next section argues that, in practice, the NEP is rather ineffective at enforcing even these normative constraints.

B. The Structure of the NEP and the Protection of Innocent Tenants

In theory, there are several mechanisms in place to protect against the unnecessary (and perhaps morally unjustifiable) harms inflicted on innocent tenants—or those guilty of nothing more than possession for personal use—by the aggressive use of narcotics evictions. The following sections will discuss the procedural, doctrinal, and institutional aspects of the NEP and the way in which they protect (or fail to protect) the interests of innocent tenants. Ultimately, this section concludes that while courts and prosecutors pay lip service to protecting innocent tenants, in practice, the existing mechanisms do not provide adequate safeguards for already vulnerable tenants.

1. Procedure

Perhaps the greatest advantage the NEP provides to prosecutors is the relative speed and ease with which narcotics eviction cases are resolved. Summary eviction proceedings are much quicker and less costly than criminal prosecutions.⁹¹ All cases brought at the insistence of the NEP are heard in the Narcotics Eviction Part in the New York Housing Court.⁹² The specialized court allows for more rapid processing of narcotics-based evictions.⁹³ While a criminal drug prosecution may take several months, or even years, to complete, summary eviction proceedings “are rarely delayed or postponed and typically last only fifteen minutes to an hour.”⁹⁴

The majority of cases instigated by the NEP, however, never even make it to court: Fifty-five percent of tenants in Manhattan vacate the premises before any court action is ever taken.⁹⁵ Of the cases that end up making it to trial, approximately half are uncontested by the tenant.⁹⁶ Of the 2,150 cases litigated by the NEP between June 1988 and August 1994, only three hundred resulted in trials in which the tenant was represented by counsel; fifty-

⁹⁰ See *infra* Part III(c).

⁹¹ See FINN, *supra* note 32, at 6; see also Cheh, *supra* note 63, at 1345 (“In general, civil remedies are easier to use, more efficient, and less costly than criminal prosecutions.”).

⁹² See *supra* note 36.

⁹³ Respondents are permitted very little discovery. See FINN, *supra* note 32, at 6.

⁹⁴ *Id.*

⁹⁵ *Id.* at 5. All of the data in this section pertains solely to the Manhattan NEP.

⁹⁶ *Id.* at 6.

four tenants who went to trial were unrepresented by counsel.⁹⁷ Few appeals are ever taken.⁹⁸

There are a number of explanations for why relatively few of the cases instigated by the NEP are seriously challenged. One possible explanation is that many tenants simply do not see the value of contesting the claim in the face of clear evidence of drug activity.⁹⁹ More complicated motivations, however, are likely at play as well. First, because narcotics evictions stem from alleged criminal activity, many tenants are likely involved in underlying criminal proceedings that make contesting an eviction difficult or impossible, even if the criminal activity did not rise to the level of the Bawdy House illegal use standard. Second, tenants may be prevented from challenging their evictions by their unfamiliarity with the legal system, the relative speed with which narcotics evictions are litigated, and other barriers typically associated with economic disadvantage.¹⁰⁰ Third, even relatively sophisticated tenants may not understand the applicable legal standards — for example, that simple drug possession is insufficient for eviction, or that the illegal business must be connected to the property. This informational asymmetry is exacerbated by the lack of a right to counsel in civil proceedings. Finally, for some tenants, it simply may not be worth the stress of going through the process of litigation.¹⁰¹ Because there is no data tracking what happens to tenants affected by the NEP, it is impossible to know why so few cases are fully litigated. What *is* clear from the numbers is that, in practice, most tenants affected by the NEP do not receive any judicial process at all.

Additionally, because eviction proceedings are civil in nature, the procedural protections afforded to criminal defendants are not available to tenants who challenge the factual and legal grounds for their evictions. For example, the exclusionary rule for evidence obtained in an illegal search does not generally apply in civil cases.¹⁰² Also, unlike in criminal cases, landlords are entitled to adverse inferences if the tenant does not take the stand.¹⁰³ Moreover, narcotics evictions, unlike regular evictions, do not require that the landlord serve the tenant with notice of the termination of the lease unless the action implicates federally funded or rent controlled hous-

⁹⁷ *Id.*

⁹⁸ *Id.* at 7.

⁹⁹ This is the explanation most favorable to the underlying aims of the NEP.

¹⁰⁰ See Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659, 661-63 (2006).

¹⁰¹ In my experience at the Housing Clinic at Harvard Law School I saw many people facing eviction agree to vacate their apartments even though they had strong arguments for possession simply to avoid the stress of court.

¹⁰² See *People v. Drain*, 73 N.Y.2d 107, 110 (N.Y. 1989) (“[T]he application and scope of the exclusionary rule is ascertained by balancing the foreseeable deterrent effect against the adverse impact of suppression on the truth-finding process.”).

¹⁰³ See *Marine Midland Bank v. John E. Russo Produce Co.*, 50 N.Y.2d 31, 434-44 (N.Y. 1980).

ing.¹⁰⁴ Discovery rights normally afforded to civil litigants are also limited in summary process eviction cases.¹⁰⁵ Finally, and perhaps most importantly, civil litigants are not entitled to counsel. A 1993 study of New York City Housing Courts found that ninety-eight percent of landlords were represented by counsel, as compared to twelve percent of tenants.¹⁰⁶ This statistic is generally reflected in NEP suits: only fourteen percent of the 2,150 cases litigated by the Manhattan NEP between June 1988 and August 1994 resulted in trials in which the tenant was represented by counsel.¹⁰⁷ Securing counsel for tenants facing eviction in NEP cases is especially difficult in light of federal regulations that prohibit organizations funded by the Legal Services Corporation from representing any person in a public housing eviction proceeding if that person has been criminally charged with or has been convicted of the illegal sale, distribution, or manufacture of a controlled substance, or of possession of a controlled substance with the intent to sell or distribute.¹⁰⁸ Given the scope and complexity of the overlap of housing and criminal law, tenants in narcotics eviction proceedings are particularly vulnerable: “[t]hey must fend for themselves in forums that have been designed by and for attorneys, in which the culture and language are alien to them, and where they face experienced counsel who represent” both the landlord and the District Attorney.¹⁰⁹

A difference between the NEP and a criminal proceeding – and one of the most commonly cited “advantages” of the NEP – is the lower burden of proof.¹¹⁰ Unlike in criminal prosecutions, in narcotics evictions a landlord

¹⁰⁴ NYCHA v. Harvell, 731 N.Y.S.2d 919, 920-21 (N.Y. Sup. Ct. 2001) (“[A] termination notice is not generally required to maintain an illegal use proceeding, since such a proceeding is founded upon statutory authority and not the termination of a lease”).

¹⁰⁵ See FINN, *supra* note 32, at 6.

¹⁰⁶ See Laura Abel, *Make ‘You Have a Right to a Lawyer’ a Reality in Housing Court*, TENANT INQUILINO, Mar. 2005, at 3-4, available at http://www.brennancenter.org/content/resource/make_you_have_the_right_to_a_lawyer_a_reality_in_housing_court/ (last visited Mar. 12, 2008).

¹⁰⁷ See FINN, *supra* note 32, at 6.

¹⁰⁸ 45 C.F.R. § 1633.3 (2003). The prohibition does not apply when a charge has been dismissed or the person has been acquitted of the illegal drug activity. 45 C.F.R. § 1633.2 (2003).

¹⁰⁹ Barbara Mule & Michael Yavinsky, *Saving One’s Home: Collateral Consequences for Innocent Family Members*, 30 N.Y.U. REV. L. & SOC. CHANGE 689-90 (2006). A study of the Bronx Housing Court in 2007 revealed that the Bronx NEP actually appeared for the landlord in most cases, sitting at counsel table, and even conducting trials. McGregor Smyth, “Bronx Narcotics Eviction Proceedings Report,” (Bronx Defenders 2007) (on file with author).

¹¹⁰ See *Perdomo v. Morgenthau*, 2007 WL 4554371, at *2 slip op. 27535 (N.Y. Sup. Ct. Nov. 7, 2007) (“Arresting and prosecuting drug traffickers in these apartment buildings often fail to solve the problem because the crime cannot be proved beyond a reasonable doubt.”). In *Perdomo*, the court held that the Manhattan NEP did not have the authority to mandate its approval of a settlement agreement between a landlord and a tenant. In this case, the tenant’s attorney was forced to file a declaratory judgment action to prevent the NEP from blocking an agreement with the landlord. *Id.*

need only prove her claim by a preponderance of the evidence.¹¹¹ The petitioning landlord, or in some cases the district attorney, only needs to present evidence “warranting the conclusion that the premises are being used for an illegal business,” rather than proving a specific instance of criminal conduct.¹¹² Thus, while most narcotics eviction cases involve the discovery of some quantity of drugs, some cases proceed entirely on circumstantial evidence.¹¹³ Because the NEP coordinates cooperation between landlords and the police, the production of evidence of drug activity is rarely an issue.

2. *Legal Doctrine*

The relaxed burden of proof is closely related to the legal standard for eviction under the Bawdy House laws. In order to prevail in a narcotics eviction action, the petitioner must first show that the apartment was used for purposes of an illegal business (i.e., drug dealing).¹¹⁴ In order to satisfy this requirement, the “use” must be habitual or customary and not merely a single isolated incident¹¹⁵ and must amount to a business (mere personal use is insufficient).¹¹⁶ Moreover, there must be a “nexus” between the alleged drug activity and the premises in question.¹¹⁷ Both the “use” and “nexus” requirements, however, have been relaxed considerably, undermining one of the program’s basic moral justifications.¹¹⁸

Second, in cases where the tenant of record is not the alleged drug dealer, the petitioner must also show that the tenant knew of and acquiesced in the illegal drug activity in her apartment.¹¹⁹ Because in most cases initiated by the NEP the tenant of record is not the suspected drug dealer, the requirements of knowledge and acquiescence take on added importance.¹²⁰ The requirement that the tenant knew of and acquiesced in the drug dealing

¹¹¹ 1895 Grand Concourse Assocs. v. Ramos, 685 N.Y.S.2d 580, 582 (N.Y. Civ. Ct. 1998). Of course, this is the standard of proof in the vast majority of civil cases, with a few notable exceptions.

¹¹² See *id.* at 582; FINN, *supra* note 32, at 2.

¹¹³ See FINN, *supra* note 32, at 3 (“Even if the police do not recover any drugs, the program may still bring civil action if there is other convincing evidence that the premises are being used in connection with a narcotics operation. Such evidence may include materials for processing and packaging drugs or records of drug transactions.”).

¹¹⁴ RRW Realty Corp. v. Flores, 686 N.Y.S.2d 278, 281 (N.Y. Civ. Ct. 1999). The Bawdy House laws also create a presumption of illegal use when a tenant has two drug convictions in a one year period. See *supra* note 29.

¹¹⁵ Lituchy v. Lathers, 232 N.Y.S.2d 627, 627 (N.Y. Sup. Ct. 1962).

¹¹⁶ Ramos, 685 N.Y.S.2d at 582-83.

¹¹⁷ Flores, 686 N.Y.S.2d at 281.

¹¹⁸ See ARJS Realty Corp. v. Perez, No. 51220(U), 2003 WL 22015784, at *2 (N.Y. Civ. Ct. Aug. 14, 2003) (inferring use from presence of drugs on premises); City of New York v. Rodriguez, 531 N.Y.S.2d 192 (N.Y. Civ. Ct. 1988) (finding nexus where drug activity took place in front of multi-family building).

¹¹⁹ Ramos, 685 N.Y.S.2d at 511 (citing Lloyd Realty Corp. v. Albino, 552 N.Y.S.2d 1008, 1010 (N.Y. Civ. Ct. 1990)).

¹²⁰ See Austin, *supra* note 75.

is intended to protect an innocent tenant from being punished¹²¹ for behavior over which she could exert no control. Thus, the claim that the tenant of record did not know of or acquiesce in the drug activity occurring in her apartment is known commonly as the “innocent tenant defense.” As noted above, the innocent tenant defense is consistent with Professor Levinson’s contention that collective sanctions are justified in circumstances in which the target of the sanction is in the best position to regulate the undesirable conduct.¹²²

The standard for acquiescence, however, has been relaxed nearly to the point of non-existence. New York courts often infer acquiescence on the part of the tenant of record on the basis of the quantity of drugs or paraphernalia found in the apartment even when there is no direct evidence of acquiescence.¹²³ And at times, judges have taken accusatory tones with tenants claiming that they did not know of the drug activity in their apartments: “There comes a time when one must look, and when one looks, he must see. Convenient indifference should not be confused with pardonable ignorance.”¹²⁴ While there is some truth in this statement, it also suggests that there is an implicit evidentiary presumption of acquiescence at work in many narcotics eviction cases.

In the wake of *Rucker*, some New York courts attempted to eliminate the innocent tenant defense altogether by interpreting the Bawdy House laws to no longer require knowledge or acquiescence to justify an eviction. Such was the case in *ARJS Realty Corp. v. Perez*.¹²⁵ On July 8, 2002, New York City police executed a search warrant at the Lower East Side apartment of Luz Perez.¹²⁶ While searching the bedroom of Ms. Perez’s son, Maximo, police discovered a plastic bag containing cocaine, fifty small ziplock bags, one “Palmscale” and one electronic scale, drug paraphernalia, and a gun from under the bed. Maximo was subsequently arrested and incarcerated on drug charges.¹²⁷ Shortly thereafter, Ms. Perez received an eviction notice from her landlord, charging that the apartment had been used for an illegal

¹²¹ Eviction is not a “punishment” in the legal sense. *City of New York v. Wright*, 618 N.Y.S.2d 938, 939 (N.Y. Sup. Ct. 1994). In *Wright*, despite a scathing dissent, the court upheld the Bawdy House laws against a constitutional attack, finding that “[t]he eviction in the case at bar is purely remedial in nature and not designed for retributive or deterrent purposes” and thus did not violate the Constitution’s prohibition against double jeopardy. *Id.*; see also *Hudson v. United States*, 522 U.S. 93, 100 (1997) (holding that if the measure was not intended by the legislature to be criminal, courts must then determine “whether the statutory scheme was so punitive either in purpose or effect . . . as to transform what was clearly intended as a civil remedy into a criminal penalty”). Such legal distinctions, however, likely mean very little to a mother who loses her apartment due to the actions of her son. In such a case, eviction feels clearly punitive. That the power to evict rests in the office of the city’s criminal prosecutor makes it seem all the more punitive.

¹²² Levinson, *supra* note 78, at 378-86.

¹²³ See *Perez*, 2003 WL 22015784, at *2.

¹²⁴ *City of New York v. Goldman*, 356 N.Y.S.2d 754, 758 (N.Y. Civ. Ct. 1974).

¹²⁵ *Perez*, 2003 WL 22015784, at *2-3.

¹²⁶ *Id.* at *1.

¹²⁷ *Id.*

business.¹²⁸ At trial, Ms. Perez asserted the innocent tenant defense, arguing that the landlord had failed to prove that she knew of or acquiesced in the illegal actions of her son.¹²⁹ In deciding against Ms. Perez, Judge Cyril Bedford held that the Bawdy House laws did not explicitly provide for an innocent tenant defense and that “New York courts had judicially engrafted upon the statute the requirement of proof of the tenant’s knowledge and acquiescence.”¹³⁰ Judge Bedford provided a brief history of the innocent tenant defense, asserting that the requirement of proving knowledge and acquiescence had gradually eroded to the point of irrelevance.¹³¹ The death knell for the innocent tenant defense was Judge Bedford’s citation of *Rucker*. RPL section 231, Bedford asserted, was the “logical equivalent” of the federal Anti-Drug Abuse Act of 1988 (the law for federal public housing) and therefore should be read accordingly to impose strict liability on leaseholders.¹³² Thus, the Court ordered Ms. Perez’s eviction and asserted: “In allowing the Respondent to be evicted, the Court is not condemning Respondent ‘for the sins’ of her son, the Court is merely enforcing the legislative intent as expressed in RPL section 231”¹³³

Despite Judge Bedford’s efforts in *Perez*, it seems that the innocent tenant defense has survived in New York courts, though its application is rather haphazard.¹³⁴ Cases in which tenants successfully assert the innocent tenant defense seem to be determined more by the sympathy evoked by the tenant than by the evidence of knowledge of and acquiescence in drug activity.¹³⁵

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Perez*, 2003 WL 22015784, at *2.

¹³¹ *Id.*

¹³² *Id.* The Court found, in the alternative, that Ms. Perez had in fact acquiesced in the drug dealing, but gave little factual support for the finding. *Id.* at *4. While it is beyond the scope of this Note to fully examine the Court’s method of statutory interpretation, it is worth noting that Judge Bedford set aside a long-standing interpretation of a state statute that had been on the books since the 1800s in light of the Supreme Court’s interpretation of a more recent, and arguably unrelated, statute.

¹³³ *Id.* at *3.

¹³⁴ Compare *Perez*, 2003 WL 22015784, at *3 (finding that tenant of record had acquiesced where police found a gun, drugs, drug paraphernalia under her son’s bed), with *Lloyd Realty Corp. v. Albino*, 552 N.Y.S.2d 1008, 1009-10 (N.Y. Civ. Ct. 1990) (finding that the tenant of record, who was sleeping in her bedroom when police entered the apartment and found drugs and drug paraphernalia around the house and a gun in the oven, did not acquiesce in drug activity).

¹³⁵ See, e.g., *Normandy Realty Inc. v. Boyer*, 773 N.Y.S.2d 186, 188 (N.Y. Civ. Ct. 2003) (noting respondent’s age and illness); *1895 Grand Concourse Assocs. v. Ramos*, 685 N.Y.S.2d 580, 582 (N.Y. Civ. Ct. 1998) (finding against eviction of mother of seven despite police finding multiple bags of drugs on multiple occasions); *Albino*, 552 N.Y.S.2d at 1009 (not requiring eviction of 68-year-old single mother of eight despite police finding drugs on kitchen table and a gun in the oven while respondent was in the apartment).

3. *The Fifth Amendment Bind*

The civil nature of narcotics eviction proceedings poses an interesting problem for tenants who wish to challenge the evidence against them. Because the NEP initiates narcotics evictions after reviewing executed search warrants, many respondents, or their family members, are involved in parallel criminal proceedings. Parallel proceedings arising from the same underlying conduct present a unique set of problems for defendants facing eviction.¹³⁶ Specifically, testimony given in an eviction hearing may be used in any parallel criminal prosecutions, creating a tension with defendants' Fifth Amendment right against self-incrimination.¹³⁷ While the testimony of the accused drug dealer may be necessary to a just outcome in the eviction proceeding, its use in the civil proceeding may jeopardize her criminal defense.¹³⁸ Thus, there is a serious disincentive for criminal defendants to testify in narcotics eviction actions.

The Fifth Amendment bind arises in two separate but comparable situations. The first situation involves cases in which the target of the underlying criminal action is also the named tenant in the eviction action. For example, a tenant may want to testify at the eviction trial and concede that drugs were found in the apartment, but argue that they were only for personal use. Doing so, however, would jeopardize the adversarial nature of any underlying criminal proceeding. In cases where the tenant of record is also the alleged drug dealer, courts have held that this tension does not amount to "compulsion" for Fifth Amendment purposes and have refused to grant stays in civil proceedings to resolve the tension.¹³⁹

The second, more common situation arises in cases in which the target of the underlying criminal prosecution *is not* the named tenant in the eviction proceeding. In such cases, the defendant in the criminal case is not a party to the eviction proceeding, but *is* likely the most important witness for the civil eviction case. Thus, the person most capable of showing that the drugs found were strictly for personal use, or that the tenant of record did not acquiesce, must decide whether to sacrifice her own criminal case in order to save the tenant of record's lease.

¹³⁶ See generally Douglas Kim, *Asset Forfeiture: Giving Up Your Constitutional Rights*, 19 CAMPBELL L. REV. 527 (1997); Jay A. Rosenberg, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390 (1988); Rossbacher, *supra* note 64; Note, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 HARV. L. REV. 1023 (1985).

¹³⁷ See Note, *supra* note 136, at 1026 ("The most serious friction caused by parallel proceedings — affecting both the accused and other civil litigants — arises from the fifth amendment privilege against self-incrimination.").

¹³⁸ *Id.*

¹³⁹ See 54 West 16th Street Apartment Corp. v. Dawson, 684 N.Y.S.2d 400, 405 (N.Y. Civ. Ct. 1998). In *Dawson*, the court held that Dawson was not entitled to a stay of his holdover eviction proceeding, even though he would potentially be forced to choose between preserving his Fifth Amendment right against self-incrimination and losing the proceeding. *Id.* Federal courts similarly have been unsympathetic to criminal defendants' requests for stays in parallel civil proceedings. See *Baxter v. Palmigiano*, 425 U.S. 308, 319-20 (1976).

As *1895 Grand Concourse Assoc. v. Ramos* illustrates, the testimony of the alleged drug dealer may be necessary to safeguard the interests of innocent tenants.¹⁴⁰ In *Ramos*, a private landlord brought eviction proceedings against tenant Ramos under section 711(5) at the request of the NEP after police recovered drugs and drug paraphernalia during two searches.¹⁴¹ Ramos shared the apartment with her husband and seven children.¹⁴² Ramos's husband pled guilty to a B misdemeanor for possession of a controlled substance; charges against all other members of the family were dropped.¹⁴³ At the eviction proceeding, Ramos's husband took the stand and testified that he used cocaine for personal consumption but had kept his use a secret from the rest of the family.¹⁴⁴ The court deemed Ramos's husband credible and held that the landlord had failed to prove that Ramos, the tenant of record, knew or should have known of the illegal use.¹⁴⁵ As a result, Ramos and her seven children were allowed to stay in the apartment where they had lived for twenty-five years.¹⁴⁶ Because Mr. Ramos had already pled guilty to the underlying criminal charges, he was able to testify in the eviction proceeding freely, without fear of self-incrimination or future prosecution. Had the eviction proceeding taken place before a final resolution of the underlying criminal case, however, Mr. Ramos would have been forced to choose between testifying in the eviction proceeding and remaining silent to preserve the adversarial nature of the criminal proceeding.

It is almost never in the interest of a criminal defendant to testify in a civil proceeding to facts that are pertinent to the criminal case. Thus, the person with the most relevant information about the underlying facts of the civil case is also the person least likely to testify. While forcing a defendant to make this choice may be fair when framed as a personal decision with effects limited to the defendant/tenant, it is decidedly less so when the fate of potentially innocent tenants hangs in the balance. In each case, the rights and interests of potentially innocent tenants are held hostage by the tensions created by parallel civil and criminal proceedings. The Fifth Amendment bind is particularly troubling in light of the fact that the District Attorney's Office is the opposing party in both the civil and criminal proceedings, as the NEP prosecutes narcotics evictions by proxy. This arrangement potentially grants prosecutors disproportionate and arguably illegitimate leverage in both criminal plea negotiations and eviction proceedings.

¹⁴⁰ 685 N.Y.S.2d 580 (N.Y. Civ. Ct. 1998).

¹⁴¹ *Id.* at 581.

¹⁴² *Id.* at 582.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 582-83.

¹⁴⁶ *Ramos*, 685 N.Y.S.2d at 583.

4. *Prosecutorial Discretion*

Because the legal process in narcotics eviction cases is so limited, and because the legal standards have been significantly relaxed, the most important decision-making and filtering occurs not in the courtroom but in the prosecutor's office. The statutory regime underpinning the NEP and its subsequent interpretation by courts vests virtually unfettered discretion in the hands of prosecutors. Thus, the NEP itself bears the lion's share of the responsibility for protecting innocent tenants in choosing which cases to litigate in the first place.

The prosecutors' decision-making process is essentially a black box. The NEP first reviews all narcotics-related search warrants executed by the police. Cases may also be referred by the police or by community members directly. According to the NEP, prosecutors then "review[] each case individually," being "careful not to seek eviction where fairness requires a different remedy."¹⁴⁷ The District Attorney's Office, however, has never made public exactly *how* it decides when fairness demands a remedy other than eviction.

The NEP does not seek evictions in the majority of cases it screens. According to statistics published by the National Institute of Justice, between June 1988 and August 1994 the NEP litigated only 2,150 cases of the 5,305 cases it screened.¹⁴⁸ While it is impossible to know the make-up of the body of cases *not* litigated, it seems likely that the initial screening phase is the most significant protection for innocent tenants, as the vast majority of cases initiated by the NEP result in displacement for the tenant. In 1,198 of the cases litigated by the NEP, the tenants vacated the premises before court action became necessary while 807 cases resulted in court-ordered evictions.¹⁴⁹ Thus, ninety-three percent of the cases instigated by the NEP resulted in the tenant vacating the premises. Of the remaining cases, two percent were either dismissed by the court or voluntarily withdrawn.¹⁵⁰

Given the opacity of the NEP's screening process, it is virtually impossible to determine whether the program has been successful in protecting innocent tenants (including those whose activity does not constitute an illegal business). One explanation for the high rate of vacating/evicted tenants, of course, is that the NEP's internal screening process has been successful in weeding out weak cases before they get to court. It seems equally plausible, however, that the NEP's high success rate can be attributed to the expedited nature of the proceedings, lower evidentiary burdens, and lax interpretations of the Bawdy House laws rendered by courts sympathetic to the aims of the program. That cases like *Perez* actually make it to trial suggests that un-

¹⁴⁷ Special Litigation Bureau, *supra* note 32; *see also* FINN, *supra* note 32, at 2.

¹⁴⁸ FINN, *supra* note 32, at 5.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* Five percent of cases were settled. *Id.*

checked prosecutorial discretion may not be entirely adequate to ensure that the policy targets only those people who are actually in a position to prevent the undesired criminal behavior. No matter how the NEP's success rate is interpreted, it is clear that prosecutors in the NEP wield an extraordinary amount of discretionary power.

Criminal prosecutors' discretionary power is already substantial and creates the potential for abuse.¹⁵¹ The NEP gives prosecutors yet another option to choose from an already extensive "menu" of criminal remedies and sanctions.¹⁵² The Bawdy House laws allow the District Attorney's Office to commandeer the property rights of private landlords and utilize them for criminal law ends without having to adhere to the important procedural protections of criminal proceedings.¹⁵³ Professor Mary Cheh has argued that the prolific use of criminal *and* civil tools in attacking antisocial behavior should trigger "a reexamination of how prosecutors' offices are perceived and organized."¹⁵⁴ While such a reexamination of the prosecutorial function is beyond the scope of this Note, it is important to mention here that under the auspices of the NEP, prosecutors exercise much broader power over the social organization of the communities they serve.¹⁵⁵ Whether or not a family is evicted under the NEP is determined more by decisions made behind closed doors at the District Attorney's Office than by judges interpreting the law, making fair and uniform application of the policy unlikely, if not impossible.¹⁵⁶ The following section looks beyond the normative critique of the NEP (i.e., the insufficient protection of innocent third parties) and addresses some of the policy considerations that should be taken into account when evaluating the program.

¹⁵¹ See, e.g., Donna Coker, *Forward: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827 (2003) (addressing racial disparities in the criminal justice system in light of prosecutorial discretion); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998) (same).

¹⁵² William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548 (2004). Professor Stuntz argues that the expansive scope of the "menu" available to prosecutors — broad and overlapping substantive criminal prohibitions, sentence-enhancing statutes, and the like — is largely the product of political, legal, and social structures that make creating new criminal prohibitions and increasing punishment politically attractive for legislators. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006) [hereinafter *The Political Constitution*].

¹⁵³ Cheh, *supra* note 63, at 1347 (noting that some civil remedies "permit the government to enlist and even conscript citizens to prosecute, sue, and shun criminals").

¹⁵⁴ *Id.* at 1328.

¹⁵⁵ See *infra* Part III.

¹⁵⁶ This problem is exacerbated by the fact that relatively few narcotics eviction cases are actually contested with the assistance of counsel. Without consistent adversarial testing, it is no wonder that the theoretically strict legal standards of the Bawdy House laws have eroded so significantly.

C. *Weighing the Social Costs and Benefits*

Putting aside the question of whether it is normatively appropriate to sanction innocent tenants of record for the criminal actions of subtenants and other occupants, the NEP also presents a difficult set of policy questions pertaining to the social costs and benefits of the program. There can be no doubt that the District Attorney's Office's campaign to stem the corrosive influence of the drug trade is an important one. In addition to the direct negative effects of drug use, perhaps the greatest social cost of the drug trade is increased violence and decreased public safety. Drug dealers often take over public/common spaces — parks, apartment lobbies, or entire public housing projects — and enforce their authority through intimidation and violence. Many would argue that the interests of the innocent tenants who fail to control the illegal behavior of their subtenants pale in comparison to the interests of the truly innocent community residents that take no part in the drug trade.¹⁵⁷ The NEP serves as a mechanism for wresting control of public spaces from drug dealers and returning them to the law-abiding community.

While the need to rid buildings of rampant drug use and drug dealing is undoubtedly a valid and important concern, courts and policymakers have consistently invoked it to the exclusion of all other policy and equitable considerations. Judges deciding narcotics eviction cases often treat drug dealing and drug dealers as one and the same, as the judge in *Kellner* did by analogizing drug dealers to a cancer that “must be completely cut out.”¹⁵⁸ Evicted families, however, do not simply cease to exist; they must go *somewhere*. Crime-prevention rhetoric often obscures this reality. People are not cancer, and eviction cannot simply “get rid of . . . drug dealers and users” once and for all.¹⁵⁹ Courts and prosecutors have largely refused to acknowledge that evicted tenants do not simply vanish into thin air once an eviction has been executed. For many, if not most, low-income tenants, eviction leads to immediate homelessness.¹⁶⁰

By and large, the burden of the NEP's collective sanctioning regime falls on female heads of households.¹⁶¹ This fact stems from the social structure of many poor neighborhoods as well as the nature of drug trafficking. Single-parent, female-headed households make up a disproportionate num-

¹⁵⁷ For a similar discussion of the costs and benefits of drug policy and the crack epidemic, see RANDALL KENNEDY, *RACE CRIME, AND THE LAW* 373-76 (1997).

¹⁵⁸ *Kellner v. Cappellini*, 516 N.Y.S.2d 827, 831 (N.Y. Civ. Ct. 1986).

¹⁵⁹ *Id.*

¹⁶⁰ *See, e.g., United States v. Robinson*, 721 F. Supp. 1541, 1544 (D.R.I. 1989) (“An order of forfeiture [of respondent's federally subsidized lease] would be, in effect, a sentence of homelessness for the defendant and her three young children.”); *see also United States v. Leasehold Interest in 121 Nostrand Ave., Apt. 1-C, Brooklyn, N.Y.*, 760 F. Supp. 1015, 1029 (E.D.N.Y. 1991); *infra* note 169.

¹⁶¹ *See Gray, supra* note 36.

ber of households in areas of highly concentrated poverty.¹⁶² Furthermore, recent studies suggest that low-level drug dealers, overwhelmingly young men, are likely to live with their mothers or other family members. One study of the economic behavior of drug dealing gangs in Chicago suggests that low-level drug dealers (“foot-soldiers”) tend to make hourly wages below the federal minimum wage.¹⁶³ As a consequence, “gang members below the level of gang leaders live with family because they cannot afford to maintain their own residences.”¹⁶⁴ Indeed, the same study noted that in the neighborhood in which the gang operated, over seventy-five percent of all children lived in single-parent families.¹⁶⁵ As this research suggests, because of the nature of the drug trade and street-level drug dealing, programs like the NEP are likely to disproportionately affect families in which one member, often a young male, engages in illegal activity. And more often than not, it is single mothers that will have to bear the burden.¹⁶⁶ Indeed, a brief look at cases litigated in New York City’s Narcotics Eviction Part supports this assertion.¹⁶⁷

Professor Regina Austin writes of the “one-strike” policy in federally subsidized public housing:

Chief among those adversely impacted by the campaign have been poor single minority female heads of household, often senior citizens, who are living with their actual or adopted offspring, one or more of whom, usually an adolescent or young adult male child or grandchild, sells or possesses drugs. The mothers and grandmothers (though sometimes it is a sister, aunt, cousin, wife, or girlfriend) are in general innocent, often even ignorant, of any criminal activity, but are nonetheless held responsible for the conduct of the other occupants of their units.¹⁶⁸

The same is true in the context of private housing and the NEP. Judges in narcotics eviction cases will often deny that enforcement of the Bawdy House laws punishes parents for the actions of their children, while simultaneously chastising them for their passive (and sometimes unknowing) acqui-

¹⁶² See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 174-76 (1993); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 1-108 (1987).

¹⁶³ Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang’s Finances* 17 (Nat’l Bureau of Econ. Research, Working Paper No. 6592, 1998).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 7.

¹⁶⁶ One study of public housing in Chicago found that up to twenty-five percent of all “one-strike” evictions stemmed from juvenile arrests. Rodney, *supra* note 77, at 755. See generally Phyllis Goldfarb, *Counting the Drug War’s Female Casualties*, 6 J. GENDER RACE & JUST. 277 (2002).

¹⁶⁷ See, e.g., *supra* note 135. Indeed, virtually all cases reviewed for this paper involved female-headed households.

¹⁶⁸ Austin, *supra* note 75, at 275-76.

escence in the illegal activity.¹⁶⁹ An NEP case appearing in a recent report adopted by the New York State Bar Association illustrates the vulnerability of single parents:

Karen worked on the night shift at a hospital, and had lived in her Bronx apartment for over thirty years. She had never had any trouble with the landlord or the law, but had recently taken her son, James, into her home. Because James worked and kept his room clean with the door open, Karen never had any cause for concern until he was arrested dealing drugs in another neighborhood. When police found drugs hidden in small containers in the back of his closet, James was arrested and incarcerated. James and his mother immediately agreed that he could not return to her home. Nonetheless, the D.A. and landlord initiated eviction proceedings against Karen and her fourteen-year-old daughter. Karen fought the eviction for over a year during which the D.A. refused to settle, citing a zero tolerance policy for drug arrests. In the end, the case settled twenty minutes before the trial began, on the stipulation that Karen had suggested originally — that James not be allowed back into the apartment. If she had not been represented, she would likely have had to move.¹⁷⁰

While eviction may not amount to “punishment” in the legal sense,¹⁷¹ such distinctions have little meaning for a single mother being evicted because of the actions of her child.

Regardless of whether a family evicted under the Bawdy House laws should be deemed innocent in any moral sense, the collateral social costs of narcotics evictions are considerable. In 1993, one study estimated that evictions in general accounted for forty-four percent of the families entering homeless shelters in New York City.¹⁷² According to New York’s Coalition for the Homeless, in August 2006 there were, on average, 32,533 people residing in the New York City shelter system on a daily basis; that number

¹⁶⁹ In *Perez*, for example, the court wrote: “In allowing Respondent to be evicted, the Court is not condemning Respondent ‘for the sins’ of her son, the Court is merely enforcing the legislative intent as expressed in RPL § 231 of placing responsibility for illegal activity on a tenant who has the right to exert authority over the Premises which she leases and where she resides.” *ARJS Realty Corp. v. Perez*, 2003 WL 22015784, at *3 (2003). The Court, however, went on to say: “Respondent testified that she knew that her son had prior arrests and had been incarcerated. This acknowledgment creates more, not less, reason to have acquainted herself with her son’s activities.” *Id.*

¹⁷⁰ *Re-Entry and Reintegration*, *supra* note 84, at 225.

¹⁷¹ *See supra* note 121.

¹⁷² N.Y. COUNTY LAWYERS’ ASS’N, *THE NEW YORK CITY HOUSING COURT IN THE 21ST CENTURY: CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT?* 24 (2005) (estimating that preventing ten percent of the 25,000 total evictions each year would save the city government roughly seventy-five million dollars in direct shelter costs).

included 12,818 children.¹⁷³ Because the NEP likely disproportionately affects single-parent, female-headed households, women and children are the most likely to end up on the street.¹⁷⁴

There is often a striking disconnect between the policy justifications for narcotics-based evictions and federal, state, and local governments' social services obligations. An unexpected eviction may well throw a family into total chaos. In *New York County District Attorney's Office v. Oquendo*,¹⁷⁵ for example, the NEP sought to evict ten resident children and grandchildren of the alleged drug dealers.¹⁷⁶ The Court wrote, "[t]he spouse of a tenant as well as the tenant's children, grandchildren, servants, boarders and guests who live with the tenant, and who are not subtenants, can all be removed under a warrant of dispossession."¹⁷⁷ Thus, in *Oquendo*, ten people, all children and grandchildren of the tenants of record, faced homelessness because of the illegal activity of their family members. Homelessness, in turn, often leads to a number of other social problems: drug and alcohol dependency, poor healthcare, increased domestic violence, family disintegration, and increased incarceration rates. Homeless families, in particular, face a number of difficulties, such as disruption of education for children¹⁷⁸ and increased reliance on foster care. While children may not be taken from parents' custody solely on account of their homeless status,¹⁷⁹ many parents nonetheless face a serious risk of losing their children to foster care as a result of the problems attendant to being homeless.¹⁸⁰ Families are torn apart and scattered across the city by various city and state agencies. All of this, of course, sets the stage for future crime.¹⁸¹ Thus, in its attempt to create greater order

¹⁷³ Coalition for the Homeless, *Homelessness in New York City: The Basic Facts* (Sept. 2006), http://www.coalitionforthehomeless.org/advocacy/basic_facts.html (then follow "Charts Detailing the Homeless Shelter Population in New York City" hyperlink) (last visited Mar. 9, 2008). This represents a fifty-six percent increase from 1998. *Id.*

¹⁷⁴ Cf. Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 *FORDHAM URB. L.J.* 1215, 1221 (2003) (citing Nina Bernstein, *Use of Shelters Sets Record in New York*, *N.Y. TIMES*, Aug. 1, 2001, at A1; Jennifer Egan, *To Be Young and Homeless*, *N.Y. TIMES*, Mar. 24, 2002, at G32) ("[F]amilies with children represent one of the fastest growing segments of the homeless population, making up about one-quarter of the homeless population on a given day.").

¹⁷⁵ 553 N.Y.S.2d 973 (N.Y. Civ. Ct. 1990).

¹⁷⁶ *Id.* at 974-75.

¹⁷⁷ *Id.*

¹⁷⁸ See Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 *U. TOL. L. REV.* 545, 565 (2005) (discussing how homelessness and transient living "disrupts a child's education, emotional development, and sense of well-being"); see also Hafetz, *supra* note 174, at 1257 ("Most homeless children do not attend school regularly, are forced to shuttle between different schools in a given academic year, attain lower education achievement standards, and have more emotional and behavior problems than other school children.").

¹⁷⁹ See *Martin v. Gross*, 524 N.Y.S.2d 121, 125 (N.Y. Sup. Ct. 1987).

¹⁸⁰ See Hafetz, *supra* note 174, at 1257.

¹⁸¹ See Carey, *supra* note 178, at 566. See also *FIGHT CRIME: INVEST IN KIDS Ohio*, Abandoning Ohio's Most Vulnerable Kids: Impact on Crime of Proposed Federal Withdrawal of Foster Care Funding Pledge (2005), <http://www.fightcrime.org/reports/ohfostercare.pdf> (last visited Mar. 12, 2008).

in high crime neighborhoods, the NEP also creates a risk of throwing the lives of evicted families into disarray and undermining long-term community safety goals. Unfortunately, however, many policymakers simply turn a blind eye to these diffuse, yet potentially devastating negative consequences. This is especially troubling in light of the absence of hard evidence that the NEP actually reduces or deters crime overall.

III. CREATING ORDER THROUGH DISORDER

As discussed above, the disorganizing effects and physical dislocation resulting from an eviction may be devastating for an affected family. The negative effects of such dislocation, however, extend beyond the evicted family to the entire community, which must bear the burden of increased social service costs and community instability. Recent research suggests that the disorganization that occurs within a family that has been evicted is not dissimilar from or unrelated to the disorganization that occurs at the neighborhood level when large numbers of residents are involuntarily displaced.

A. *Social Organization Theory*

The critique of the NEP that follows is rooted in the sociological tradition of social organization theory.¹⁸² Within the fields of criminology and sociology, the idea that a community's social organization plays a central role in explaining variations in crime rates dates back to the work of Clifford Shaw and Henry McKay in 1942.¹⁸³ Shaw and McKay, writing about rates of juvenile delinquency in Chicago, challenged the traditional notion of criminality, which posited that criminality could primarily be attributed to the individual characteristics of offenders (economic status, employment status, genetic traits, etc.). Shaw and McKay instead argued that the social organization of a community — its kinship and friendship networks, churches, and other voluntary associations — plays a central role in influencing individual behavior.¹⁸⁴ The underlying lesson of Shaw and McKay's findings, and the one picked up by the social organization theorists that followed, was that the robustness of a community's civic and social life plays an important, if not central, role in determining its crime rate. As one commentator explains, "[t]he hypothesis of the social organization theorists is straightforward: When the processes of community social organization are prevalent and strong, crime and delinquency should be less prevalent, and vice versa."¹⁸⁵

¹⁸² The arguments here are an expansion of the project started by Professor Tracey Meares. Meares, *supra* note 11 (examining tough drug sentencing in light of social organization theory).

¹⁸³ CLIFFORD R. SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY AND URBAN AREAS* 321 (1942). See also Clear et al., *supra* note 11, at 34; Meares, *supra* note 11, at 191-92.

¹⁸⁴ SHAW & MCKAY, *supra* note 183, at 320.

¹⁸⁵ Meares et al., *supra* note 13, at 1189-90.

Since the pioneering work of Shaw and McKay, social organization theorists have attempted to understand the dynamics of social organization and the ways in which social networks influence individual criminal behavior. Subsequent research has revealed a complicated relationship between social organization and crime.¹⁸⁶ Social scientists have looked to factors such as poverty (and disadvantage more generally), ethnic heterogeneity, residential mobility, single-parent families, and structural density in their attempt to identify the sources of social disorganization and crime.¹⁸⁷ Acknowledging that multiple disorganizing factors are often present in areas of concentrated poverty, social scientists have developed a method of measuring “concentrated disadvantage” that combines a number of disorganizing factors.¹⁸⁸ Identifying ways in which neighborhoods can mitigate the crime-generative effects of concentrated disadvantage is one of the central concerns of present-day criminologists.

Increasingly, the concept of social capital, most prominently expounded by Robert Putnam in his book *Bowling Alone*,¹⁸⁹ has become central to the endeavor of understanding the origins of crime. Social capital refers to “the ways in which individuals and communities create trust, maintain social networks, and establish norms that enable participants to act cooperatively toward the pursuit of shared goals.”¹⁹⁰ High levels of social capital are generally thought to contribute to a community’s wellbeing in any number of areas, including crime reduction.¹⁹¹

The ability to collectively exert informal social control over its members is a central component of a community’s social capital. “Informal social control” is “the capacity of a group to regulate its members according to desired principles — to realize collective, as opposed to forced, goals.”¹⁹² It is this aspect of social capital that is most pertinent to the issue of crime prevention. Informal social controls exist at various levels of social organization — families, schools, occupational ties, neighborhoods, and community and civic organizations. The work of Professor Robert Sampson provides the greatest support for the hypothesis that the existence of dense and robust networks of community ties and mutual trust, among individuals

¹⁸⁶ See DAVID HALPERN, *SOCIAL CAPITAL* 124 (2005).

¹⁸⁷ See Clear et al., *supra* note 11, at 34.

¹⁸⁸ The measure of concentrated disadvantage combines percentage of families receiving public assistance, percentage of individuals who are unemployed, percentage of female-headed households with children, and percentage of residents who are black. *Id.* at 43-44.

¹⁸⁹ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) [hereinafter *BOWLING ALONE*]. See also ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1994).

¹⁹⁰ Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 529 (citing HALPERN, *supra* note 186, at 1-19). Robert Putnam compares social capital to civic virtue. See *BOWLING ALONE*, *supra* note 189, at 19.

¹⁹¹ See *BOWLING ALONE*, *supra* note 189, at 308.

¹⁹² Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918, 918 (1997).

and at the community level, leads to lower levels of criminality.¹⁹³ Basic social ties — family, friends, school, and employment — form the building blocks of informal social control,¹⁹⁴ and at the individual level, robust social, familial, and economic ties are causally related to an individual's avoidance of criminal behavior.¹⁹⁵ As the strength of a person's social ties increases, so too does the personal cost of deviant behavior.¹⁹⁶ Viewed through this lens, homelessness that results from an eviction is problematic precisely because it weakens these familial and social ties that work to curb criminal behavior.

At the community level, the force of informal social controls on crime is largely dependent on the existence of mutual trust and solidarity among neighbors.¹⁹⁷ Decreases in neighborhood social cohesion often lead to increases in crime,¹⁹⁸ and studies have found that neighborhoods where residents report that they frequently get together with their neighbors have lower crime rates than neighborhoods where residents are more atomized.¹⁹⁹ Again, Robert Sampson's work has been crucial to the development of an understanding of the relationship between social networks and a community's ability to self-regulate crime. Sampson, along with Stephen Raudenbush and Felton Earls, combined the concepts of social cohesion (mutual trust, etc.) and informal social control into a single concept that they termed "collective efficacy."²⁰⁰ Collective efficacy is defined as social cohesion among neighbors combined with their willingness to intervene on behalf of the common good.²⁰¹ Sampson et al. found that a neighborhood's collective efficacy mediated a substantial portion of the association of residential stability and disadvantage with measures of violence.²⁰² Stated another way, the existence of mutual trust and a willingness to intervene on a

¹⁹³ See HALPERN, *supra* note 186, at 115; Robert J. Sampson & John H. Laub, *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control*, 27 L. & SOC'Y REV. 285, 285-312 (1993).

¹⁹⁴ These social ties are "a carrot, not just a stick," in that they discourage criminal behavior and also give people a reason to adhere to societal norms. HALPERN, *supra* note 186, at 115.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 117.

¹⁹⁷ Sampson et al., *supra* note 192, at 919 ("At the neighborhood level, however, the willingness of local residents to intervene for the common good depends in large part on conditions of mutual trust and solidarity among neighbors.").

¹⁹⁸ See Clear et al., *supra* note 11, at 35.

¹⁹⁹ *Id.* (citing P.E. Bellair, *Social Interaction and Community Crime: Examining the Importance of Neighborhood Networks*, 35 CRIMINOLOGY 677, 677-704 (1997) (finding that "getting together with neighbors" had a negative impact on burglary, auto theft, and robbery)).

²⁰⁰ Sampson et al., *supra* note 192, at 918-19.

²⁰¹ *Id.* Collective efficacy was measured by asking community residents various questions about (1) the likelihood that their neighbors could be counted on to intervene in various situations — e.g., children skipping school and hanging out on the street corner — and (2) social cohesion — e.g., whether neighbors generally get along with one another. *Id.* at 919-20. Sampson et al. found that collective efficacy was the largest predictor of violent crime, even controlling for friendship and kinship ties, organizational participation, and neighborhood services. *Id.* at 921-23. See also HALPERN, *supra* note 186, at 125.

²⁰² Sampson et al., *supra* note 192, at 923.

neighbor's behalf mitigated the crime-generative influence of factors traditionally associated with areas of concentrated poverty.²⁰³ In communities with high levels of collective efficacy, neighbors are more likely to actively discourage behavior such as loitering, drug use, and other forms of incivility that may lead to more serious criminality.²⁰⁴

One of the central lessons of Sampson's work is that governmental crime prevention policy should endeavor to reinforce communities' ability to self-regulate crime. Traditional law enforcement serves this purpose by removing barriers to the creation of social capital. There is no doubt that crime is corrosive of social capital and community stability. One study by Wesley Skogan found that high levels of crime in a neighborhood lead people to limit social activity and isolate themselves, inhibiting the formation of informal social controls.²⁰⁵ The removal of criminals and other "disorderly" people (primarily through incarceration) is commonly thought "to promote community cohesion by reducing both the fear of crime and the existence of disorder that contribute to isolation and anonymity" through the incapacitation of the sources of disorder.²⁰⁶

Judges and law enforcement officials have largely adopted this argument wholesale in justifying the NEP. While some acknowledge the risk of negative collateral consequences for innocent tenants, most observers unquestioningly assume that the NEP is an effective law enforcement tool.²⁰⁷ As one New York judge said:

If there is a finding that drugs are being sold from an apartment, that means that the innocent tenants in the apartment building are suffering and that drug dealing could spread if left unchecked. So drug eviction cases should be dealt with quickly In these cases, justice done quickly and fairly is justice done for all.²⁰⁸

²⁰³ Thus, a neighborhood's collective efficacy is closely related to the human capital possessed by individual neighborhood residents. One of the most important implications of this research is that, contrary to the tenets of Broken Windows/order maintenance theory, which posit that neighborhood disorder causes more serious crime, community disorder and crime likely have a *common* root. Robert J. Sampson & Stephen Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 *AM. J. SOC.* 603, 637-39 (1999).

²⁰⁴ See HALPERN, *supra* note 186, at 125.

²⁰⁵ Clear, *supra* note 13, at 190 (citing WESLEY SKOGAN, *DISORDER AND DECLINE* (1990)).

²⁰⁶ Clear et al., *supra* note 11, at 38-39 (citing GEORGE L. KELLING & CATHERINE COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1997)). For a powerful critique of Broken Windows theory and the orderly/disorderly distinction, see HARCOURT, *supra* note 55.

²⁰⁷ See *Escalera v. N.Y. Housing Authority*, 924 F. Supp. 1323, 1331 (S.D.N.Y. 1996) ("Achieving speedy evictions of drug-traffickers . . . is an effective means of disrupting the drug market and thereby attacking the problems associated with drug dealing and use."). Though there is scant empirical evidence that programs like the NEP actually decrease overall levels of drug-related activity, assertions such as this one are commonplace in narcotics eviction cases.

²⁰⁸ FINN, *supra* note 32, at 6 (quoting Judge Eileen Bransten).

The simplicity of the argument is appealing: the best way to deal with a problem is to get rid of it. There is no doubt that drugs, and crack cocaine in particular, pose a number of very serious problems for poor urban communities. Rampant drug dealing in apartment buildings, private or public, presents a host of problems and safety concerns for residents that go well beyond the negative effects of personal drug use.²⁰⁹ Communities, especially poor communities in which landlords are unresponsive to the needs and rights of tenants, need ways to control their own neighborhoods, and are often the most insistent in demanding better police protection and crime prevention mechanisms.²¹⁰

B. Coercive Mobility

Thus, at first glance, the theory underlying the NEP seems intuitive and uncontroversial: if removing drug dealers and their families from the community eliminates a barrier to the creation of social capital and collective efficacy,²¹¹ then the NEP should succeed from the perspective of social organization theory as well as on traditional deterrence grounds.²¹² By evicting drug dealers and their families from apartment buildings, the argument goes, the NEP makes it possible for other building residents to form relationships, build trust, and lay the groundwork for the self-regulation of disorderly and criminal behavior.

Recently, however, Todd Clear and Dina Rose have challenged this “addition through subtraction”²¹³ approach to law enforcement by taking seriously the collateral consequences of criminal justice policies, namely the dislocation and displacement of community residents.²¹⁴ In trying to explain variations in the ability of communities to self-regulate, social scientists have consistently focused on residential mobility as a strong predictor of crime.²¹⁵ High rates of residential mobility within a community are generally thought to inhibit the creation of social capital and weaken residents’ bonds of mutual trust and solidarity, likely leading to increases in crime.²¹⁶ Mobil-

²⁰⁹ See Valerie D. White, *Modifying the Escalera Consent Decree: A Case Study on the Application of the Rufo Test*, 23 *FORDHAM URB. L.J.* 377, 402-3 (1996).

²¹⁰ Sampson & Raudenbush, *supra* note 203, at 611. See also Meares, *supra* note 11, at 198-99.

²¹¹ Here, I bracket the issue of whether a family can ever truly be “removed” from a community. As the above discussion on homelessness demonstrates, evicted families do not simply vanish into thin air. See *supra* Part II.

²¹² See *supra* Part II for a discussion of the creation of incentives for the heads of households to exert greater control over other residents.

²¹³ Clear, *supra* note 13, at 181. The cancer analogy in *Kellner* is a prime example of the “addition by subtraction” rhetoric. See *supra* text accompanying note 22.

²¹⁴ See Rose & Clear, *supra* note 11, at 441-43; see also James P. Lynch & William Sabol, *Effects of Incarceration on Social Control in Communities*, in *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* (Mary Pattillo et al. eds.) (2004).

²¹⁵ *Id.*

²¹⁶ See WILSON, *supra* note 162, at 58; Clear et al., *supra* note 11, at 36.

ity (1) produces residential areas in which neighbors are isolated from one another and “are constrained from engaging in the collective action that sustains self-regulation”²¹⁷; (2) impedes social integration and cohesion²¹⁸; and (3) reduces residents’ commitment to the neighborhood.²¹⁹ In short, high rates of residential mobility impede neighborhoods’ collective efficacy.²²⁰ Clear and Rose write:

In a place where one’s neighbors turn over rapidly, there is less incentive to get to know them and more disincentive to rely on them in times of need. When one lives in an area with a sense of being there only temporarily, one has little reason to join local social groups or develop interdependent ties to others.²²¹

The destabilization and rise in crime that occurs in inner-city neighborhoods when large numbers of residents move to the suburbs is the classic illustration of the effects of residential mobility on social organization.²²²

In their examination of the effects of formal state social control (police, prosecution, incarceration) on the sources of informal social control (families and neighborhoods), Clear and Rose begin by recognizing that incarceration is itself a form of residential mobility.²²³ Thus, they argue, this type of “coercive mobility” may act as a disorganizing factor in neighborhoods in much the same way traditional mobility does.²²⁴ Their crucial insight, novel to some and obvious to others, is that there is a dynamic interplay between state-sponsored crime prevention measures and mechanisms of informal social control.²²⁵

Of course, the mobility resulting from incarceration is distinct from the traditional notion of mobility. Incarceration, unlike traditional residential mobility, removes specifically selected people from neighborhoods because of their criminal behavior: “The hard-and-fast assumption of incarceration

²¹⁷ Clear, et al., *supra* note 11, at 36 (citing Robert J. Sampson, *Linking the Micro- and Macro-Level Dimensions of Community Social Organization*, 70 *SOC. FORCES* 43, 43-64 (1991)).

²¹⁸ *Id.* (citing R.D. Crutchfield, M.R. Geerken & W.R. Gove, *Crime Rate and Social Integration: The Impact of Metropolitan Mobility*, 20 *CRIMINOLOGY* 467, 467-78 (1982)).

²¹⁹ *Id.* (citing B.D. Warner & G.L. Pierce, *Reexamining Social Disorganization Theory Using Calls to the Police as a Measure of Crime*, 31 *CRIMINOLOGY* 837, 837-864 (1993)).

²²⁰ See Sampson et al., *supra* note 192, at 923 (“Together, three dimensions of neighborhood stratification — concentrated disadvantage, immigration concentration, and residential stability — explained 70% of the neighborhood variation in collective efficacy.”).

²²¹ Clear et al., *supra* note 11, at 36.

²²² See generally MASSEY & DENTON, *supra* note 162; WILSON, *supra* note 162.

²²³ Clear et al., *supra* note 11, at 37. Clear et al. argue that incarceration only recently became a significant source of residential mobility as a result of the 500% increase in rates of incarceration since the 1970s. *Id.*

²²⁴ *Id.*

²²⁵ Rose & Clear, *supra* note 11, at 441-42. Formal state social control (traditional law enforcement) has been seen as existing separate and apart from the neighborhood/community context. *Id.* State intervention is generally seen as a “response[] to crime” rather than an ecological factor in its own right. Clear et al., *supra* note 11, at 35; see also Meares, *supra* note 11, at 191-92; Meares et al., *supra* note 13, at 1186-93.

as a tool of public safety is that removing these people from their communities subtracts only (or primarily) the problems they represented for their places, and thereby leaves those places better.”²²⁶ Nonetheless, Clear and Rose note that coercive mobility is a double-edged sword: while incarceration promotes community safety on the one hand, it also disrupts community stability on the other.²²⁷ Because high concentrations of incarceration may be a significant disorganizing factor, Clear and Rose suggest that frequent coerced mobility in neighborhoods with already weak social capital would damage the sources of neighborhood collective efficacy. The researchers hypothesize the existence of a tipping point at which the disorganizing effect of high levels of coerced mobility in a neighborhood outweigh the public safety effect, thus undercutting prospective crime prevention goals.²²⁸ They argue that, under certain circumstances, the coerced removal of residents from poor and disadvantaged neighborhoods — even of those thought to be involved in criminal activity — may undermine a community’s ability to self-regulate and exercise informal social control over crime by further disrupting the creation of social networks and associations.²²⁹

Subsequent research tends to support their hypothesis. In a 2003 empirical study of neighborhoods in Tallahassee, Florida, Clear, Rose and two other colleagues attempted to measure the impact of incarceration rates in one year on crime rates in the subsequent year.²³⁰ Though limited in scope,²³¹ the data largely supported their hypothesis. Clear et al. found that at low levels, incarceration had a negative effect on crime in the following year, “but, after a certain concentration of residents is removed from the community through incarceration, the effect of additional admissions [to prison] is to increase, not decrease, crime.”²³²

C. Coercive Mobility and the NEP

As should be evident from the preceding analysis, narcotics evictions fit squarely within the model of coercive mobility. Through the aggressive use

²²⁶ Clear, *supra* note 13, at 181. This belief is premised on the mistaken idea that people removed from the community through incarceration on the whole make negative net contributions to the community. *Id.*

²²⁷ Clear et al., *supra* note 11, at 39 (recognizing the “dual impact” of incarceration).

²²⁸ Rose & Clear, *supra* note 11, at 467-71.

²²⁹ *Id.*

²³⁰ Clear et al., *supra* note 11, at 36. Clear et al. used two measures of incarceration—admission rates and release rates — and controlled for traditional variables of social disorganization. *Id.* at 42-44.

²³¹ *Id.* at 55 (noting that data is insufficient to provide a complete test of the model).

²³² *Id.* Clear et al. also found the release of large numbers of ex-offenders into a community tends to lead to an increase in crime. *Id.* at 55-56. *But see* James P. Lynch & William J. Sabol, *Assessing the Effects of Mass Incarceration on Informal Social Control in Communities*, 3 *CRIMINOLOGY & PUB. POL’Y* 267, 276 (2004) (noting that empirical evidence is unclear and inconclusive, but that incarceration likely has both positive and negative effects on social control mechanisms).

of summary eviction proceedings, the NEP conscripts private landlords into acting as agents of the District Attorney's Office in order to displace large numbers of families from their homes. The research of Clear et al. suggests that the disorganization that occurs within a family that has been evicted from an apartment and plunged into homelessness is not dissimilar from or unrelated to the disorganization that occurs at the neighborhood level when large numbers of residents move or are involuntarily displaced. When tenants are evicted, the bonds that serve as mechanisms of informal social control are broken or severely strained. Seen from this perspective, the NEP is just another contributor to the constant "population churning" that exists in many areas of concentrated poverty.²³³ Narcotics evictions disrupt the creation of social capital at the family level (as discussed in the preceding section on homelessness) *and* at the community level. Thus, the NEP likely creates an often-unrecognized conflict between a community's interest in lower crime and its interest in stability. Because narcotics evictions often result in the dislocation of entire families, rather than solely the alleged drug dealer (as in the criminal context), the negative social effects are likely heightened.

Social science research focusing on social capital, community efficacy, and coercive mobility suggests that considering how the law is actually *experienced* by the people and communities most directly affected may hold the key to understanding the effectiveness of any given policy or legal reform. The drug-dealing-as-cancer argument put forward by many advocates of the NEP simply fails to take into account the dynamic forces at work in neighborhoods of concentrated disadvantage.

Viewed in this light, the typical debate over the NEP and other programs like it — pitting immediate crime prevention against individuals' interest in procedural fairness and the desire to avoid the infliction of unnecessary hardships on sympathetic tenants — does not provide an adequate framework for assessing the true costs and benefits of the program. The work of Clear et al. suggests that the question of whether or not the eviction of a particular individual will ultimately benefit a community and promote public safety in the long run depends not just on the facts of the particular situation, but on an assessment of the community dynamics as a whole. In communities where social capital and collective efficacy are already relatively weak, the costs in neighborhood stability and the ability to self-regulate crime in the future may actually outweigh the immediate benefits to community safety. In order to ensure that the NEP does not do more harm than good, policymakers must look past the interests of the individuals involved in any particular case to the effects on neighborhood dynamics. It is

²³³ Clear et al., *supra* note 11, at 38. State control over the spatial distribution of "criminals" puts tremendous strains on the personal ties — family and community relationships — that actually make rehabilitation and reintegration possible. The state's control over space not only leads to problems such as homelessness, but it also weakens individuals' family and community bonds.

evident from this analysis that the protections and filtering mechanisms in place within the NEP framework are inadequate to distinguish properly between those tenants who should stay and those who should go (as their fates are inextricably intertwined). While it seems likely that the use of narcotics-based evictions, properly calibrated to community dynamics, could function as an effective tool for increasing public safety, there is presently no way to tell if the NEP in fact accomplishes this aim. And given the relatively weak filters and controls currently in place, policymakers should have little confidence that it does.

IV. CONCLUSION

While there is little empirical evidence to suggest that the NEP is an effective public safety tool, it is certainly an intuitively appealing response to the serious problem of drug-related crime in poor neighborhoods. Contrary to much of the rhetoric surrounding the NEP, however, narcotics evictions are not costless for society. The aggressive use of the Bawdy House laws, disproportionately affecting single mothers and their children, results in the dislocation of entire families and too often leads to homelessness and all of its attendant problems. These evictions not only impose great costs on the affected families, but also on society as a whole, which must bear the costs of increased homelessness, drug and alcohol dependency, disruptions in children's education, family disintegration, and reliance on the foster care system. Moreover, recent research suggests that the interplay between crime and law enforcement is far more complicated than previously assumed by policymakers. Under certain circumstances, narcotics-based evictions may actually destabilize communities and undermine their ability to self-regulate crime. The problems associated with coercive mobility are significant, and in an age of mass incarceration and continuous neighborhood reshuffling, public safety interventions, especially those that result in the dislocation of thousands of families, must be carefully calibrated to ensure that they do not do more harm than good.

While this article has focused on New York City's NEP, its ultimate aim is much broader in scope. Analysis of the NEP through the lens of social organization theory exposes a deeper, more disturbing trend in the administration of criminal justice in the United States. More and more, crime has become the lens through which policymakers see the world, and criminal justice mechanisms have become states' primary tools for governing low-income communities. Professor Jonathan Simon has argued that since the drastic rise in crime in the 1960s, the United States has increasingly pursued a strategy of "governing through crime."²³⁴ Simon's argument is that the United States is "experiencing not a crisis of crime and punishment but a crisis of governance that has led [it] to prioritize crime and punishment as

²³⁴ See *Governing Through Crime 1997*, *supra* note 1, at 173.

the preferred contexts for governance.”²³⁵ Crime, Simon argues, becomes the funnel through which all other policy interventions flow.

A critical look at the NEP supports Professor Simon’s thesis and suggests that this single-minded focus on crime leads policymakers to ignore the broader long-term social implications of criminal justice interventions. Many social issues that were traditionally the domain of various governmental bodies and civil society groups now fall within the ever-expanding authority of the criminal prosecutors. Civil remedies, like narcotics evictions, have played a crucial role in this transformation, allowing law enforcement officials greater access to people’s everyday lives. For example, according to the National Institute of Justice, one of the most important advantages of using civil remedies is the increased ability to control behavior that may be beyond the scope of the criminal law:

In some cases, a criminal prosecution cannot be initiated against antisocial behavior. Without enabling civil legislation, police officers in Los Angeles could not seize weapons from the mentally ill without having probable cause to arrest them for a crime. It is often difficult to prosecute batterers who limit themselves to verbal threats against their partner, while a civil protection order can enjoin such behavior.²³⁶

Moreover, policymakers increasingly attach consequences to criminal behavior that affect people’s housing options. Residential restrictions for registered sex offenders is one example of this trend.²³⁷ While such programs address important public safety issues, such expansions of the criminal justice project may lead to serious unintended negative consequences. This certainly seems to be the case with the NEP.

Indeed, by putting all of our eggs in the criminal justice basket, we run the risk of letting our zeal to be tough on crime blind us to the long-term consequences of our actions. According to Professor Tracey Meares, law enforcement officials have largely ignored the lessons of social organization theory over the past sixty plus years.²³⁸ She argues that what is needed is “a theory that holistically and systematically assesses the costs and benefits of the current regime . . . in order to determine whether today’s ‘get tough’ approach really benefits those who have the most to gain — and to lose — from it.”²³⁹

²³⁵ *Id.* Professor Simon writes, “We govern through crime to the extent to which crime and punishment become the occasions and the institutional contexts in which we undertake to guide the conduct of others (or even of ourselves).” *Id.* at 174. See also GOVERNING THROUGH CRIME 2007, *supra* note 1.

²³⁶ PETER FINN & MARIA O’BRIEN HYLTON, USING CIVIL REMEDIES FOR CRIMINAL BEHAVIOR: RATIONALE, CASE STUDIES, AND CONSTITUTIONAL ISSUES 2 (1994).

²³⁷ See Geraghty, *supra* note 3 (discussing Georgia’s sex offender laws).

²³⁸ See Meares, *supra* note 11, at 192.

²³⁹ *Id.* at 193.

The first step in such a holistic evaluation of the NEP, and other programs like it, requires policymakers to acknowledge that the program does not exist in a vacuum. The neighborhoods in which the lion's share of narcotics-based evictions occur are also likely to be the neighborhoods hardest hit by high rates of incarceration, prisoner re-entry, building condemnations and foreclosures, and deportations.²⁴⁰ Clear et al. note that coercive mobility may actually be the dominant force of movement in and out of many areas of concentrated poverty.²⁴¹ While incarceration is the most dramatic, and perhaps most visible, manifestation of coercive mobility, it is by no means the sole mechanism. This article has argued that narcotics evictions are also a significant form of coercive mobility. People living in areas of concentrated poverty are continually being moved from one place to another against their will. The residents of neighborhoods with high concentrations of poverty are the most likely to become homeless in the face of downward economic shifts and increased unemployment. The combined effect of these policies/phenomena is a constant shuffling, and reshuffling, of neighborhood residents.²⁴²

A holistic approach to narcotics evictions would require the NEP to take the full scope of factors affecting community stability into account in calibrating the aggressiveness with which it pursued narcotics evictions. The analysis here suggests that law enforcement officials must look beyond traditional criminal justice deterrence metrics — rates of incarceration, probability of arrest, severity of penalties — and take into account factors like residential mobility, when calibrating any crime prevention measure to the needs of the community. In a related context, Professor Duncan Kennedy has argued that housing policies should be tailored according to the neighborhood dynamics of low-income communities in order to bring about an optimal level of improvement in living conditions without pricing poor residents out of the community.²⁴³ A similar approach to the narcotics eviction context would require the administrators of the NEP to ascertain an optimal rate of residential mobility for any given community, somewhere below the tipping point posited by Clear and Rose, and to set policy accordingly. While such an approach would be conceptually and practically complex, it would allow the NEP to take advantage of the benefits of narcotics evictions without destabilizing neighborhoods and undermining the ultimate aim of the NEP, public safety.

The complexity and broad scope of such an undertaking beg the question whether the District Attorney's Office is the proper institution to administer programs like the NEP. One symptom of the "governing through crime" phenomenon has been the grant of increased power and discretion to

²⁴⁰ See generally MASSEY & DENTON, *supra* note 162; WILSON, *supra* note 162.

²⁴¹ Clear et al., *supra* note 11, at 37.

²⁴² *Id.* at 38.

²⁴³ Duncan Kennedy, *Legal Economics of U.S. Low Income Housing Markets in Light of Informality Analysis*, 4 J. L. Soc'y. 71, 87-91 (2002-2003).

criminal prosecutors. As an institution, however, the District Attorney's Office seems particularly ill-suited to internalize all of the social costs of programs like the NEP when making policy decisions. Placing the power to enforce the Bawdy House laws in the hands of criminal prosecutors was one of the NEP's most important innovations; it is also the aspect of the program that has received the least criticism. Criminal prosecutors are generally held accountable for dutifully prosecuting crime and promoting community safety. Prosecutors typically are *not* held politically accountable for the collateral costs of their policies and, therefore, do not fully internalize the social costs. Professor William Stuntz has explored the implications of this disconnect in depth.²⁴⁴ The disconnect is especially significant when prosecutors abandon their traditional criminal law function and use civil law techniques to influence broader social arrangements.²⁴⁵ The collateral consequences of eviction are of a magnitude and kind not generally associated with criminal law enforcement (though similar consequences are certainly present in that context as well). In the current system, prosecutors make virtually all of the important decisions pertaining to the eviction of tenants under the Bawdy House laws.²⁴⁶ Yet, there is no institutional feedback mechanism to ensure that these decisions are informed by a complete understanding of the relevant costs and benefits.²⁴⁷

This observation suggests that while the NEP may be a valuable public safety tool if properly calibrated to account for the various negative externalities outlined in this article, the District Attorney's Office may not be the appropriate decision-making body to administer the program. The power to enforce such nuisance abatement laws might better be entrusted to an institution with a broader scope, one that encompasses all associated public welfare concerns and internalizes the relevant costs, such as the city's Law Department or the state Attorney General. These institutions regularly engage in civil litigation on behalf of the local and state governments and are adept at making these sorts of cost/benefit analyses. Placing decision-making authority in one of these alternative bodies would help ensure political accountability and the internalization of the collateral costs of enforcement.

²⁴⁴ *The Political Constitution*, *supra* note 152, at 786-91.

²⁴⁵ *Cf.* Suk, *supra* note 3, 42-64 (discussing use of "stay away" orders in domestic violence cases as regulation of family arrangements).

²⁴⁶ It is an open question whether any governmental agency, especially institutions like the District Attorney's Office that are defined at least in part by their independence from the political process, should be vested with both criminal *and* civil law enforcement powers. While it is beyond the scope of this Note to fully consider the larger issue, it seems likely that such a concentration of power in the case of the NEP may actually serve as an impediment to a comprehensive approach to the problems it purports to address.

²⁴⁷ This is especially true because the District Attorney is elected and is not accountable for other areas of the city's budget. Moreover, most district attorneys in New York City are elected in off-year elections, belying any claims to a mandate. *See* Jonathan P. Hicks, *Staten Island District Attorney is Re-elected in One of City's Few Contested Races*, N.Y. TIMES, Nov. 7, 2007, at B4.

Indeed, the power to enforce the Bawdy House statutes and other nuisance abatement laws has not traditionally rested in the District Attorney's Office.²⁴⁸ Prior to 1988, New York City's Corporation Counsel, the legal arm of the Mayor's Office, was the sole city agency charged with taking affirmative civil action against individuals. As part of the Mayor's Office, the Corporation Counsel is in a better position, and arguably obligated by necessity, to take into account a broad range of the city's obligations and priorities in its decision-making process. Because evictions are likely to have serious and far-ranging negative consequences that are beyond the institutional capacity of the district attorney to manage, the program might be better suited for the Office of the Corporation Counsel or some other similarly situated mayoral branch. As an institution, the District Attorney's Office has an extremely limited capacity to assess the social costs associated with narcotics evictions, namely homelessness and diminished collective efficacy; its primary currency is crime, not overall social welfare.

While the NEP theoretically creates significant social benefits in the form of increased public safety in particular buildings,²⁴⁹ society must also bear many of the collateral costs of narcotics evictions. As this Note demonstrates, the NEP creates a serious risk that people with no direct connection to drug-related crime — a disproportionate number of them single mothers and their children — will be made homeless and suffer other disruptions as a result of such evictions. Moreover, this Note's social organization critique suggests that seeking large numbers of evictions in places with already weak informal social controls may actually have the unintended consequence of undermining a community's ability to self-regulate crime in the future. Addressing social problems through discrete, isolated, though well-intentioned policy and legal initiatives without understanding the broader effects may ultimately prove to be self-defeating. Policymakers should make real efforts to learn the lessons of social organization theory from the last sixty years and recognize that their greatest allies in regulating criminal behavior are communities themselves.

²⁴⁸ See *supra* note 31.

²⁴⁹ As has been discussed elsewhere in this Note, the NEP has been unable to provide anything more than anecdotal evidence of the program's contribution to overall public safety.