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How Evictions from Subsidized Housing Routinely Violate the Rights of Persons with Mental Illness

Meghan P. Carter*

¶1 People with severe and persistent mental illness are too often evicted from their housing for reasons that are truly related to a disability, in violation of state and federal law.[1] Evictions are quick and can be initiated and concluded without any consideration of whether a tenant has a disability, despite the fact that a person with a disability has a legal right to receive a reasonable accommodation that will keep the person in his or her housing. Landlords generally do not propose reasonable accommodations for tenants with mental illness of their own volition, and tenants often lack the information and resources necessary to advocate for reasonable accommodations from their landlords. Once an eviction process has begun, there are few mechanisms to ensure that persons with severe and persistent mental illness are able to defend their right to remain in their housing. Further, the courts continually fail to make the promise of the Fair Housing Amendments Act of 1988 (FHAA) and Americans with Disabilities Act (ADA) a reality for tenants with severe and persistent mental illness, as the courts too often rubber-stamp evictions from public housing without inquiry into disability status or thought given to what will happen to tenants once they are evicted. For people with mental illness,[2] these evictions may lead to homelessness, or institutionalization that violates the integration mandate of the ADA.

¶2 This Comment begins with a discussion in Part I of why evictions of persons with mental illness from subsidized housing are particularly devastating. Part II outlines the housing rights afforded tenants of subsidized housing generally, and the additional rights tenants with disabilities are due under existing law. Part III describes the disjuncture between what is guaranteed on paper and implemented in the courts, and how these laws ultimately fail to provide proper safeguards against eviction for people with severe and persistent mental illness. In Part IV, this Comment makes a few suggestions to address recurring problems, including that courts enforce specific due process rights for persons

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[1] *See, e.g.*, Fair Housing Act (Title VIII of the Civil Rights Act of 1968), Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601–19 (2006)); Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

[2] This Comment uses "people-first" terminology that emphasizes the person rather than the disability. For a description of people-first language, as well as a clinical overview of mental illness and mental disabilities, see JOHN PARRY & ERIC Y. DROGIN, MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY: A COMPREHENSIVE REFERENCE MANUAL FOR LAWYERS, JUDGES AND MENTAL DISABILITY PROFESSIONALS 49–53 (A.B.A. 2007).

with mental illness facing eviction or a loss of housing subsidies. This Comment also suggests that states implement specialized tribunals to address the difficulties individuals with mental illness often face in housing, with the goal of retaining housing where at all possible. The stakes are too high and the repercussions too widespread for Congress, the U.S. Department of Housing and Urban Development (HUD), and the courts to continue to ignore the recurring problems faced by tenants with mental illness.

I. Stable Housing is Especially Important for Individuals with Mental Illness

¶3 Simply put, reliable housing is necessary for well-being, particularly for persons with severe and persistent mental illness.[3] Instability, especially in housing, can be a major source of stress and can trigger or worsen the effects of mental illness. Studies and common sense indicate that individuals with severe mental illnesses who have adequate housing experience fewer complications and are less likely to have co-occurring disorders, such as substance abuse, that exacerbate mental illnesses.[4] Further, individuals in stable housing are more likely to adhere to their treatment plans, which can help cognition and aid social function.[5] The necessity of providing people who have a severe mental illness with safe and stable housing is recognized by federal housing laws, but rubber-stamp evictions undermine this intended right, with disastrous results for this often fragile segment of society.

¶4 Evictions hit persons with disabilities with a particular punch because of the difficulty of obtaining housing in the first place.[6] People with disabilities have encountered deep-rooted stigmatization and outright discrimination for decades, and that stigma and discrimination continues.[7] A study of the Chicago rental market conducted by HUD in 2005 found that people with disabilities faced discrimination in up to half of inquiries they made regarding renting apartments.[8] The HUD study found that "the net

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[3] *See, e.g.*, Latisha R. Brown, Comment, *The McKinney Act: Revamping Programs Designed to Assist the Mentally Ill Homeless,* 33 COLUM. J.L. & SOC. PROBS. 235, 236 (2000) ("Further intensifying the problem is the symbiotic relationship between homelessness and mental illness: some social scientists and doctors view homelessness and mental illness as an interrelated phenomenon, believing '(1) severe psychiatric problems may result in homelessness; or conversely, (2) homelessness may produce or exacerbate symptoms of mental illness.'" (internal citations omitted)); Adele O'Sullivan et al., *Mental Illness, Chronic Homelessness: An American Disgrace*, HEALING HANDS (HCH Clinicians Network, Nashville, Tenn.), Oct. 2000, at 1, *available at* http://www.nhchc.org/Network/HealingHands/2000/October2000HealingHands.pdf.

[4] O'Sullivan et al., *supra* note 3, at 1.

[5] *Id*.

[6] *See, e.g.*, Aisha Anderson Bierma, Julie Nepveu & James Wilkinson, *"We Can't Meet Your Needs": Fair Housing Opens Doors to Housing with Services*, 42 J. POVERTY L. & POL'Y. 251, 251-60 (2008), *available at* http://www.povertylaw.org/clearinghouse-review/issues/2008/september-october-2008-clearinghouse-review/bierma (discussing illegal housing criteria that keep individuals with disabilities out of housing); Christina Kubiak, *Everyone Deserves A Decent Place To Live: Why the Disabled Are Systematically Denied Fair Housing Despite Federal Legislation*, 5 RUTGERS J.L. & PUB. POL'Y 561 (2008) (discussing the discrimination and financial barriers people with disabilities face in housing).

[7] Justice Thurgood Marshall described the history of discrimination against persons with cognitive impairments as "[a] regime of state-mandated segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 462 (1985) (Marshall, J., concurring). *See also, e.g.*, Buck v. Bell, 274 U.S. 200 (1927) (upholding a statute that called for sterilization of the "unfit," including people with mental retardation, for the protection and health of the state).

[8] U.S. DEP'T OF HOUS. AND URBAN DEV., DISCRIMINATION AGAINST PERSONS WITH DISABILITIES:

measures of systematic discrimination against persons with disabilities are generally higher than the net measures of discrimination on the basis of race and ethnicity."[9] The study stated that "persons with disabilities face more frequent adverse treatment in the Chicago area rental market than African Americans or Hispanics."[10]

¶5 While discrimination is devastating to all protected classes, additional entrenched factors combine to impede housing opportunities for low-income persons with mental disabilities. Individuals with disabilities have a higher rate of poverty than working-age individuals without disabilities and are therefore less likely to be able to afford a market-rate apartment.[11] Data from 2007 demonstrates that over 2.6 million working-age people with mental disabilities live in poverty (excluding those who are institutionalized).[12] People with mental disabilities[13] have the highest poverty rate of any group of individuals with a disability[14] and the lowest median annual income for working-age people.[15] In the United States, nearly one-third of all working-age, non-institutionalized people who have a mental disability live in poverty.[16]

¶6 Compounding these difficulties, the number of Americans with psychological disabilities is on the rise. Already, four of the ten leading causes of disability in the United States are mental disorders: major depression, bipolar disorder, schizophrenia, and obsessive-compulsive disorder.[17] Major depressive disorder will be the leading cause of disability internationally for women and children by 2020.[18] Further, the United States is fighting wars in Iraq and Afghanistan that have resulted in more veterans with mental health issues, such as post-traumatic stress disorder.[19] To add to that, the rising cost of

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BARRIERS AT EVERY STEP (2005), *available at* http://www.huduser.org/publications/hsgspec/dds.html.

[9] *Id.* at 54.

[10] *Id.*

[11] WILLIAM ERICKSON & CAMILLE LEE, CORNELL UNIV. REHAB. RESEARCH AND TRAINING CTR. ON DISABILITY DEMOGRAPHICS AND STATISTICS, 2007 DISABILITY STATUS REPORT: UNITED STATES 34 (2008), *available at* http://www.ilr.cornell.edu/edi/DisabilityStatistics.

[12] *Id*. at 35.

[13] *Id*. The 2007 figures come from the 2007 Disability Status Report, which uses American Community Survey (ACS) data to craft its estimates. The ACS defines disability on the basis of three questions: "(1) Does this person have any of the following long-lasting conditions: (a) blindness, deafness, or a severe vision or hearing impairment? (Sensory Disability); (b) a condition that substantially limits one or more basic physical activities such as walking, climbing stairs, reaching, lifting, or carrying? (Physical Disability) (2) Because of a physical, mental, or emotional condition lasting six months or more, does this person have any difficulty in doing any of the following activities: (a) learning, remembering, or concentrating? (Mental Disability); (b) dressing, bathing, or getting around inside the home? (Self-Care Disability) (3) Because of a physical, mental, or emotional condition lasting six months or more, does this person have any difficulty in doing any of the following activities (asked of persons ages 16 and older): (a) going outside the home alone to shop or visit a doctor's office? (Go-Outside-Home Disability); (b) working at a job or business? (Employment Disability). A person is coded as having a disability if he or she or a proxy respondent answers affirmatively for one or more of these six categories." *Id.* at 44.

[14] *Id*. at 34.

[15] *Id.* at 33.

[16] The Report states that 31.7% is the poverty rate for working-age people who reported a mental disability. *Id*. at 34–35.

[17] DepressionPerception.com, Depression Facts and Statistics, http://www.depressionperception.com/depression/depression_facts_and_statistics.asp (last visited Mar. 1, 2010).

[18] NAMI.org, About Mental Illness, http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Mental_Illness/About_Mental_Illness.htm (last visited Apr. 1, 2010).

[19] *See*, *e.g*., William Finnegan, *The Last Tour*, NEW YORKER, Sept. 29, 2008, *available at*

housing and the loss of subsidized housing units from federal programs[20] have been devastating for persons with cognitive and psychological disabilities with limited incomes, such as individuals who receive Social Security Insurance (SSI), Social Security Disability Insurance (SSDI), or Veterans' benefits.[21] Funding for housing for low-income housing programs has decreased as rents have risen.[22] Given the rise in the occurrence of mental illness, poverty among persons with mental illness, and escalating housing costs, it is increasingly important for the United States to maintain housing policies that will promote mental health and ensure adequate and affordable housing for low-income individuals whose mental illness qualifies as a disability.[23]

¶7 Indeed, the ability to live in federal subsidized housing can be what keeps low-income people with mental illness afloat and independent. Persons with mental illness face a looming risk of losing their ability to live independently if they lose their low-income housing, and, instead, become institutionalized or warehoused in nursing homes.[24] This is particularly problematic because states spend far more money supporting people in long-term care through Medicaid than they dedicate to encouraging and supporting independent living for people with mental illness.[25] As a result, once a person with a mental illness enters a nursing home or institution, she may end up having to stay in the institution for financial reasons, even when she would prefer to live in the community, and medical professionals agree that she could live independently.[26] This is

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http://www.newyorker.com/reporting/2008/09/29/080929fa_fact_finnegan.

[20] For years, the U.S. Housing Act required public housing authorities to rebuild any demolished units. That requirement was repealed when section 18 of the U.S. Housing Act was amended by the Quality Housing and Work Responsibility Act of 1998. The National Housing Law Project (NHLP) estimates that "at least 130,000 public housing rental units have been designated for permanent removal without replacement since 1995," a figure based on a report from the HUD Special Application Center, *Field Office Demo/Dispo Units Total Recap* (Nov. 5, 2001), and HOPE VI revitalization site profiles and summaries for fiscal years 1999–2001, available at http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/. NAT'L HOUS. LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS 15/3 (3d ed. 2004) [hereinafter NHLP HUD HOUSING PROGRAMS].

[21] ANN O'HARA ET AL., PRICED OUT IN 2006: THE HOUSING CRISIS FOR PEOPLE WITH DISABILITIES (2006), *available at* http://www.tacinc.org/Pubs/PricedOut_2006/PO in2006.htm.

[22] *Id*. ("During the past eight years [from 1998–2006], as housing programs that can help the lowest-income people with disabilities were slashed, modest one bedroom rents rose . . . from 69 percent to 113.1 percent of SSI.").

[23] *See* WORLD HEALTH ORG., FACT SHEET NO. 220, MENTAL HEALTH: STRENGTHENING MENTAL HEALTH PROMOTION (2007), *available at* http://www.who.int/mediacentre/factsheets/fs220/en/index.html (listing "housing policies" under "Cost-effective interventions exist to promote mental health, even in poor populations").

[24] *See, e.g*., Lisa A. Rone, Op-ed, *Reform Care for Mentally Ill*, CHI. TRIB., Dec. 29, 2009, at 16, *available at* http://www.chicagotribune.com/news/opinion/chi-1229vplettersbriefs0dec29,0,5173115.story?obref=obnetwork.

[25] MOLLY O'MALLEY WATTS, KAISER COMM'N ON MEDICAID & UNINSURED, MONEY FOLLOWS THE PERSON: AN EARLY IMPLEMENTATION SNAPSHOT 3 (2009), *available at* www.hcbs.org/moreInfo.php/doc/2680 ("There is a well-known bias in Medicaid policy that extends an entitlement to nursing facility care to Medicaid beneficiaries when medically necessary, but does not entitle needy individuals to comparable community-based services.").

[26] *See* NAT'L ALLIANCE ON MENTAL ILLNESS (NAMI), GRADING THE STATES 2009, at xi (2009), *available at* http://www.nami.org/gtsTemplate09.cfm?Section=Overview1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=75091 ("Few states are developing plans or investing the resources to address long-term housing needs for people with serious mental illnesses."); *see also* Department of Health & Human Services, OCR Olmstead Enforcement Success Stories,

true despite findings that community services often cost less and achieve more than institutional care.[27]

¶8 Where an individual has a mental illness and lives in poverty, the need to retain consistent and safe housing is at its apex. Tenants evicted from subsidized housing face permanent loss of their federal rent subsidy[28] and, thus, their access to affordable housing. When tenants lose their subsidy, they often "lose housing which is decent, safe, and sanitary, and are forced back into the market of substandard housing which ordinarily is all that is available to very low-income people."[29] In geographic areas where the poor are economically squeezed out of the private housing market, "evicted subsidized housing tenants will be forced to move in on a temporary basis with friends or relatives or, in extreme cases, become homeless."[30] To make matters worse, the risk of "prolonged homelessness" is highest for persons with severe mental illness, as "these individuals are among the most vulnerable, not only to multiple co-morbidities including substance abuse, but also to stigmatization, exploitation, and brutal victimization."[31] The confluence of poverty, discrimination, and potential homelessness or institutionalization, combined with the increase in the incidence of mental illness creates a special problem that must be addressed directly within existing civil rights and housing law.

II. THE EXISTING LEGAL FRAMEWORK TO KEEP PEOPLE WITH DISABILITIES INDEPENDENT

A. Subsidized Housing Options for People with Mental Disabilities

¶9 The purpose of subsidized housing assistance is to "[aid] low-income families in obtaining a decent place to live and [to promote] economically mixed housing."[32] Indeed, to qualify for subsidized housing, a prospective tenant must have an income within HUD's specified limits.[33] In addition to providing housing for families generally, state and local public housing authorities (PHAs), as well as individual owners subsidized

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http://www.hhs.gov/ocr/civilrights/activities/examples/Olmstead/successstoriesolmstead.html (last visited Apr. 19, 2010) (offering examples from people with disabilities who filed formal complaints with the HHS Office of Civil Rights in order to assert their right to live independently, outside of a nursing home).

[27] WATTS, *supra* note 25, at 3. In response, Congress passed "Money Follows the Person" (MFP) to encourage states to continue to provide financial support to people with mental illness and other disabilities as they transition from institutions to homes. *See* Deficit Reduction Act of 2005 § 6071, Pub. L. No. 109-171, 120 Stat. 4, 102 (2006). MFP is in its early stages, but thirty-one states have used federal funds available through the Centers for Medicaid and Medicare to transition hundreds of seniors, people with physical disabilities, and people with mental illness into independent housing. WATTS, *supra* note 25, at 4. The thirty-one states together set a goal of transitioning 2282 people with mental illness from institutions and nursing homes into the community; this number is unfortunately only a small portion of the 37,731 total transitions planned. *Id*. Unsurprisingly, the participating states indicated that a major challenge in the program is "[i]dentifying safe, affordable, and accessible community housing for MFP participants." *Id.* at 2. Although the progress these states have made is laudable, it is meaningless if people with severe and persistent disabilities are evicted from their hard-won housing without an opportunity to contest their evictions.

[28] 24 C.F.R. § 982.552(c)(1)(iii) (2009) ("The PHA may at any time deny program assistance for an applicant . . . [i]f a PHA has ever terminated assistance under the program for any member of the family.").

[29] NHLP HUD HOUSING PROGRAMS, *supra* note 19, at 14/19.

[30] *Id.*

[31] O'Sullivan et al., *supra* note 3, at 1.

[32] 42 U.S.C. § 1437f(a) (2006).

[33] 24 C.F.R. § 982.201 (2009).

through HUD, have recognized the particular needs of seniors and people with disabilities, and have subsequently developed housing specifically for these groups.[34] Extracted data regarding mental illness is not available through HUD, but there is much support for the proposition that a considerable percentage of individuals with mental illness rely on subsidized housing.[35] Data for 2008 reveals that approximately one-third of public housing households and one-third of Housing Choice Voucher Program households include an individual who has a disability.[36]

¶10 "Subsidized housing"[37] encompasses a number of different programs financed by HUD and state and local PHAs. Public housing programs were first established under the Housing Act of 1937.[38] The three most common housing programs are (1) traditional public housing, (2) project-based Section 8, and (3) tenant-based Section 8 Housing Choice Voucher Program (HCVP). HUD also provides for Section 811 housing, which is specifically designed for individuals with mental illness. Each of these programs is further described below.

¶11 Traditional public housing consisted of "subsidized projects" comprised of buildings operated by state or local PHAs.[39] Housing in this form still exists, and PHAs oversee all aspects of such programs, subject to federal rules and regulations.[40] Once in this housing, a tenant has a right to remain: the lease agreements automatically renew every year unless terminated for good cause.[41]

¶12 Section 8 of the Housing Act of 1937, as amended in 1974, establishes the subsidized housing assistance payment program commonly referred to as "Section 8."[42]

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[34] *See, e.g.*, Title VI of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672; Admission to, and Occupancy of, Public Housing, 24 C.F.R. §§ 960.401–960.408 (2009).

[35] *See, e.g.*, Sandra Newman & Howard Goldman, *Putting Housing First, Making Housing Last: Housing Policy for Persons with Severe Mental Illness*, 165 AM. J. PSYCHIATRY 1242, 1242–48 (2008) ("Most individuals with severe and persistent mental illness are poor, relying on Social Security Insurance and/or Social Security Disability Insurance payments that, at best, amount to roughly a poverty-level income. Even though many receive food stamps, Medicaid, and/or Medicare, which are of enormous help in meeting basic needs for food and medical care, these in-kind benefits do not pay the rent.").

[36] NAT'L CTR. FOR HEALTH IN PUB. HOUS., CARE FOR PUBLIC HOUS. RESIDENTS, DEMOGRAPHICS FACTS: RESIDENTS LIVING IN PUBLIC HOUSING (2008), *available at* http://www.healthandpublichousing.org/pdfs/Demographics%20Fact%20Sheet.pdf (based upon HUD's January 2008 Resident Characteristics Report). In Chicago, Housing Choice Voucher Program and Wait List demographic information from the Chicago Housing Authority's *Plan for Transformation Year 6* report indicates that in June 30, 2004, there were 35,872 heads of household in Chicago (meaning that 35,872 people were listed as the lead occupant of a unit), and the number of handicapped/disabled heads of households totaled 11,963. CHI. HOUS. AUTH., FY2005 ANNUAL PLAN, PLAN FOR TRANSFORMATION YEAR 6 app. 7 (Nov. 1, 2004). Thus, approximately 33% of the heads of households in the Chicago HCVP are individuals with disabilities. *Id.* I am thankful to Charles Petrof of the Legal Assistance Foundation of Metropolitan Chicago for bringing this statistic to my attention.

[37] I generally use the term "subsidized housing" rather than "public housing" because it better captures the essence of the programs: in all programs, the rent is partially paid by the government and the amount that the tenant will contribute to rent is determined by household income. Traditional "public housing" is generally considered to be the programs governed by 24 C.F.R. pt. 966, while "subsidized housing" covers both the programs governed by 24 C.F.R. pt. 966 (public housing) and 24 C.F.R. pt. 982 (Housing Choice Voucher Programs).

[38] Pub. L. No. 412, 50 Stat. 888 (codified at 42 U.S.C. § 1437 (2006)).

[39] 42 U.S.C. § 1437f (o)(6)(B), (8)(A) (2006); Evictions from Certain Subsidized and HUD-Owned Projects, 24 C.F.R. § 247.2 (2009).

[40] The regulations that PHAs must follow are located at 24 C.F.R. §§ 901.1–999.325 (2009).

[41] Evictions from Certain Subsidized and HUD-Owned Projects, 24 C.F.R. § 247.3 (2009).

[42] Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437f (2006)).

Section 8 includes both Section 8 project-based subsidies, where the rental subsidy is tied to the apartment or "unit," and Section 8 tenant-based subsidies, where the tenant receives the rental subsidy and then applies that subsidy to an apartment found on her own.[43]

¶13 Section 8 project-based developments consist of buildings owned by private companies that have contracts for housing assistance payments (HAPs) with HUD.[44] Under Section 8 project-based vouchers, building owners enter into HAP contracts with PHAs, and dedicate a certain number of the units in their building to low-income individuals who have received project-based vouchers.[45] Rental assistance is tied to the unit, but after one year, a tenant may apply to relocate to a new unit without losing the assistance.[46] In these project-based developments, like in traditional public housing, the tenant's lease agreement automatically renews every year unless the lease has been terminated for good cause.[47]

¶14 In contrast to project-based vouchers, the Section 8 HCVP is a tenant-based assistance program that allows tenants who receive the vouchers to move into regular market rate apartments with rental assistance from HUD.[48] Ostensibly, the goal of the HCVP is to dissolve traditional housing projects to de-concentrate poverty and give greater flexibility to tenants to choose where they will reside, within certain guidelines. Rental assistance remains with the tenant, so she can move from one apartment to another without losing that assistance simply because of the move.[49] Tenants who receive vouchers identify units that meet the standards set by the PHA, and give the PHA proof of household size and income on a regular basis in order to demonstrate continuing compliance with the PHA's requirements.[50] The PHA then issues a voucher to the tenant that specifically designates the unit and tenant(s) who will use the voucher.[51] Tenants and PHAs pay rent directly to private landlords.[52]

¶15 Because HCVP is described as a voluntary program for landlords, courts have held that a private landlord cannot be required to accept voucher holders as tenants.[53] However, some cities[54] and states[55] have passed laws to combat discrimination on this

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[43] 42 U.S.C. § 1437f(c); Section 8 Tenant Based Assistance: Housing Choice Voucher Program, 24 C.F.R. § 982.1(b)(1) (2009).
[44] 24 C.F.R. § 983.202.
[45] NHLP HUD HOUSING PROGRAMS, *supra* note 20, at 1/43.
[46] *Id.*
[47] 42 U.S.C. § 1437f(o)(7)(c) ("[D]uring the term of the lease, the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause.").
[48] § 1437f(o); Section 8 Tenant Based Assistance: Housing Choice Voucher Program, 24 C.F.R. § 982.1 (2009).
[49] 24 C.F.R. § 982.1.
[50] § 982.551(b)(2) (calling for a "regularly scheduled reexamination . . . of family income and composition").
[51] § 982.1(b)(2).
[52] § 982.1(a)(1).
[53] *See, e.g.*, Salute v. Stratford Greens Garden Apts., 136 F.3d 293 (2d Cir. 1998) (a landlord of private housing may refuse to accept Section 8 tenants on the basis of their participation in the Section 8 program).
[54] *See, e.g.*, CHICAGO, ILL., MUN. CODE § 5-8-020 (2002) ("It is further declared to be the policy of the City of Chicago that no owner, lessee, sublessee, assignee, managing agent, or other person, firm or corporation having the right to sell, rent or lease any housing accommodation, within the City of Chicago, or any agent of any of these, should refuse to sell, rent, lease, or otherwise deny to or withhold from any person or group of persons such housing accommodations because of his race, color, sex, gender identity, age, religion,

basis by prohibiting landlords from refusing to rent based on the renter's source of rental income. In keeping with the notion that landlord participation is voluntary, a private landlord is not required to continue in the program after the lease term has expired.[56] Unlike Section 8 project-based vouchers and traditional public housing, Section 8 tenant-based vouchers are not treated as entitlements: once the term of the lease has expired, the landlord may decide to discontinue the lease for business or economic reasons,[57] or to use the unit for non-residential or personal use.[58] In circumstances where the landlord's reasons for terminating the lease are not related to the tenant's breach of the lease, the tenant may request to move with her voucher (such a process is called acquiring "moving papers").[59] When the private landlord terminates the lease agreement or the tenant wishes to move, the PHA issues a new set of moving papers to the tenant, provided that the tenant has not violated her obligations under the program and has lived in the unit for more than one year.[60] During the HCVP lease term, the owner of the unit may not terminate the lease unless there is good cause stemming from actions by the tenant.[61]

¶16 HUD also subsidizes supportive housing for people with disabilities. The Section 811 Program of Supportive Housing for Persons with Disabilities funds non-profit efforts by property owners to build and operate supportive housing for persons with disabilities.[62] The goal of the program is to provide supportive housing that is equipped to serve persons with disabilities. The owner must focus on "the promotion of the welfare of persons with disabilities."[63] The program explicitly requires that the owners of the housing "ensure that the residents are provided with any necessary supportive services that address their individual needs."[64] The program has been evaluated as "well-suited" to meet the needs of people with mental illness, but the program is plagued by deficient funding.[65]

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disability, national origin, ancestry, sexual orientation, marital status, parental status, military discharge status *or source of income of such person or persons* or discriminate against any person because of his race, color, sex, gender identity, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military discharge status *or source of income* in the terms, conditions, or privileges or the sale, rental or lease of any housing accommodation or in the furnishing of facilities or services in connection therewith." (emphases added)).

[55] *See, e.g.*, CONN. GEN. STAT. §§ 46a–64(a) (1975) ("It shall be a discriminatory practice . . . [t]o deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of race, creed, color, national origin, ancestry, sex, marital status, age, *lawful source of income*, mental retardation, mental disability or physical disability, including, but not limited to, blindness or deafness of the applicant, subject only to the conditions and limitations established by law and applicable alike to all persons." (emphasis added)).

[56] Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 575, 112 Stat. 2518 (codified at 42 U.S.C. § 1437f(d)(1)(B)(ii) & (iii) (2006)); 24 C.F.R. § 983.257(b) (2009); *see also* §§ 982.302(b), 982.310(d)(2) (indicating that if a landlord chooses to participate, the landlord must enter into at least a year-long contract that can only be severed for breach of the lease, but that after the term has ended, the landlord need not enter into another lease with the tenant).

[57] 24 C.F.R. § 982.310(d)(iv).

[58] § 982.310(d)(iii).

[59] § 982.353.

[60] § 982.314; § 982.353.

[61] 42 U.S.C. § 1437f(o)(7)(c); 24 C.F.R. § 982.310.

[62] 42 U.S.C. § 8013(b) (2006); Supportive Housing for the Elderly and Persons with Disabilities, 24 C.F.R. § 891.100 (2009).

[63] 24 C.F.R. § 891.305.

[64] § 891.100(a).

[65] Newman & Goldman, *supra* note 35, at 1245; Technical Assistance Collaborative, New Section 811

¶17 In July 2009, an act to improve Section 811 housing passed the House and was referred to the Senate, where it still remains at the time of this Comment's publication.[66] If passed, the bill would simplify the process by which Section 811 sponsors compete for grants to participate, and the bill would allow investment from programs like the Low-Income Housing Tax Credit to fund supportive housing developments.[67] Passage of this bill would increase the permanent housing options that are so desperately needed for people with mental illness who strive to remain independent.[68] An important caveat, however, is that Section 811 funding must not be utilized to create housing that encourages segregation and isolation in violation of the integration mandate of the ADA.

B. Protections for Tenants in Subsidized Housing

¶18 Subsidized housing is intended for people who cannot afford market-rate apartments. This housing is premised on the recognition that without subsidies, the tenants would not be able to afford housing on their own. Loss of subsidized housing can have serious consequences for tenants. Courts have long recognized the severe consequences that flow from evictions from subsidized housing for tenants.[69] Thus, evictions from subsidized housing are only allowable where the landlord can demonstrate good cause for the eviction.[70] During the lease term, an eviction will stand only if there is good cause for the eviction that is specific to the tenant or a member of his or her family.[71]

¶19 Aside from the substantive requirement of good cause for an eviction, tenants facing eviction from subsidized housing have procedural rights under local, state, and federal law. Generally, tenants' rights include the right to receive adequate notice of the grounds for eviction and the right to a meaningful opportunity to be heard, sometimes *before* the initiation of eviction proceedings.[72] PHAs and federally subsidized landlords must comply with HUD regulations regarding eviction procedures, as well as state law requirements.[73] These procedural protections are often included in leases, as well.[74]

Legislation, http://www.tacinc.org/Program_Policy/Sect811_legisltn.html (last visited Apr. 1, 2010).

[66] Frank Melville Supportive Housing Investment Act of 2009, H.R. 1675, 111th Cong. (2009), *available at* http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1675.RFS:.

[67] CONSORTIUM FOR CITIZENS WITH DISABILITIES, FRANK MELVILLE SUPPORTIVE HOUSING INVESTMENT ACT OF 2009 (H.R. 1675): MAJOR CHANGES TO SECTION 811 SUPPORTIVE HOUSING FOR PERSONS WITH DISABILITIES PROGRAM REINTRODUCED IN U.S. HOUSE OF REPRESENTATIVES (2009), *available at* http://www.nami.org/Template.cfm?Section=Issue_Spotlights&template=/ContentManagement/ContentDisplay.cfm&ContentID=82878.

[68] *See, e.g.*, NAMI Legislation Action Ctr., New Report Documents Housing Crisis Faced By Consumers Living on SSI (Apr. 13, 2009), http://capwiz.com/nami/issues/alert/?alertid=13133661; Nat'l Low Income Hous. Coal., Congress Returns with Robust Housing Agenda (Sept. 4, 2009), http://www.nlihc.org/detail/article.cfm?article_id=6389&id=19.

[69] NHLP HUD HOUSING PROGRAMS, *supra* note 20, at 14/19 n.215.

[70] For a much more detailed analysis than I can present here, see NAT'L HOUS. LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS, 2006–2007 SUPPLEMENT 14/1–14/40 (3d ed. 2007) [hereinafter NHLP 2007 SUPPLEMENT]. The Housing Law Project manuals offer staggeringly comprehensive information on virtually every facet of low-income housing.

[71] 42 U.S.C. § 1437f(o)(7)(c) (2006); 24 C.F.R. § 982.310 (2009).

[72] NHLP HUD HOUSING PROGRAMS, *supra* note 20, at 14/78. Most of the HUD programs list the federal procedural protections in regulations, see, for example, 24 C.F.R. §§ 880.607, 982.310 (2009).

[73] NHLP HUD HOUSING PROGRAMS, *supra* note 20, at 14/109; *see also* 24 C.F.R. § 247.6(c) (2009) ("Eviction—State and local law. A tenant may rely on State or local law governing eviction procedures where such law provides the tenant procedural rights which are in addition to those provided by this

1. Good Cause is Normally Required for Evictions from Subsidized Housing

¶20 The statutes and federal regulations on subsidized housing require that tenancy be terminated only where a lease violation is serious, referred to generally as a "good cause" requirement for evictions.[75] A landlord may evict a tenant for material noncompliance with the rental agreement,[76] nonpayment of rent,[77] material failure to carry out obligations under a state landlord and tenant act,[78] certain criminal activity,[79] alcohol abuse,[80] or other good cause.[81]

¶21 Good cause must be specific to the tenant: in public housing and project-based Section 8, good cause does *not* include a business or economic reason, or desire to use the unit for other purposes.[82] Under the HCVP, however, the private landlord may evict for business, economic reasons, or desire to use the unit for a nonresidential or personal purpose, but only after the lease term has ended.[83] Under the HCVP, good cause does not include the PHA's failure to pay its portion of the rent.[84] Additionally, good cause must be previously known by a tenant: a landlord must give prospective notice that certain conduct will be considered good cause for termination before a court will find that such conduct justifies an eviction.[85]

2. Tenants Must Receive Adequate Notice

¶22 When terminating a tenancy, the landlord must provide written notice that specifically lists the grounds for eviction, as well as the procedural rights that the tenant has.[86] Many states allow a tenant to "cure" a violation within the notice period.[87] Under the HCVP, the landlord must also notify the PHA.[88] After the notice has been issued and

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subpart, except where such State or local law has been preempted under part 246 of this chapter or by other action of the United States."). For programs not governed by Part 247, including Section 811 housing and Section 8 project-based housing, HUD requires that terminations be in accordance with HUD regulations and state and local law. NHLP HUD HOUSING PROGRAMS, *supra* note 20, at 109–10; *see also* 24 C.F.R. § 880.607(b).

[74] 24 C.F.R. § 966.4(e)(8) (2009).

[75] *See, e.g.*, 42 U.S.C. § 1437d(l)(5).

[76] 24 C.F.R. § 247.3(a)(1).

[77] §§ 247.3(c)(4), 966.4(l)(2)(i); *see also* NHLP HUD HOUSING PROGRAMS, *supra* note 20, at 14/22–14/28.

[78] § 247.3(a)(2).

[79] 24 C.F.R. §§ 5.858, 5.859 (2009).

[80] § 5.860 (providing for eviction for a pattern of alcohol abuse when it is in violation of a lease provision that calls for eviction upon this ground).

[81] 24 C.F.R. §§ 247.3, 983.257.

[82] § 247.3. Some courts have even required that eviction for non-payment of rent be shown to have been within the tenant's control. *See* NHLP HUD HOUSING PROGRAMS, *supra* note 20, at 14/22–14/28.

[83] 24 C.F.R. § 982.310(d)(iii) & (iv) (2009).

[84] § 982.310(b)(1).

[85] 24 C.F.R. §§ 247.3(b), 880.607(b)(2) (2009).

[86] NHLP HUD HOUSING PROGRAMS, *supra* note 20, at 14/87–95; 42 U.S.C. §§ 1437d(k)(1), (l)(4) (2009).

[87] *See, e.g.*, ALA. CODE § 35-9A-421(a) (1975) ("If the breach is not remedied within the 14 days after receipt of the notice to terminate the lease, the rental agreement shall terminate on the date provided in the notice to terminate the lease unless the tenant adequately remedies the breach before the date specified in the notice, in which case the rental agreement shall not terminate.").

[88] NHLP HUD HOUSING PROGRAMS, *supra* note 20, at 14/96.

the notice period has expired, the landlord must file an eviction action, win the court action, and, in most states, pay the sheriff to enforce the judgment.[89]

¶23 Sometimes, because of an eviction or for other good cause, a PHA may wish to terminate a tenant's assistance. In these circumstances, the PHA must promptly notify the tenant in writing, specifying the reasons for the denial and the process for requesting an informal review or hearing by the housing authority to contest the determination.[90] If the tenant submits a timely request for an informal hearing, the PHA may not terminate assistance until the hearing officer issues a decision affirming the initial determination.[91] If the PHA or private landlord has not followed the prescribed procedures, that deficiency may be used as a basis for dismissal of the action.[92]

3. Tenants Must Have a Meaningful Opportunity to Be Heard

¶24 Federal law and HUD regulations grant a tenant an opportunity to be heard in a grievance hearing before the PHA initiates an eviction.[93] HUD regulations specifically require that a hearing officer or panel preside, and that the complainant "be afforded a fair hearing."[94] This includes (1) an opportunity to examine PHA documents, (2) representation by counsel or other representative, (3) an opportunity to have a private hearing, (4) an opportunity to present evidence, arguments, contesting the PHA's evidence, and examining witnesses, and (5) the issuance of a decision that is based on the facts presented at the hearing.[95]

C. Rights Guaranteed to Tenants with Disabilities in Subsidized Housing

¶25 In addition to protections provided to all tenants in subsidized housing, state and federal law guarantee additional rights to individuals with disabilities, including severe and persistent mental illness. It is important to note that having a mental illness does *not* mean that a person has a disability per se.[96] Many individuals with mental illness are high functioning and do not have a disability.[97] Additionally, some individuals with

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[89] Eviction, 24 C.F.R. § 247.6 (2009); Owner Termination of Tenancy, 24 C.F.R. § 982.310(e–h) (2009); *see also* Lawrence R. McDonough, *Wait A Minute! Residential Eviction Defense in 2009 Still Is Much More Than "Did You Pay the Rent?"*, 35 WM. MITCHELL L. REV. 762, 771 (2009).

[90] 24 C.F.R. §§ 982.554, 982.555.

[91] § 982.555(a)(2) ("In the cases described in paragraphs (a)(1)(iv), (v) and (vi) of this section, the PHA must give the opportunity for an informal hearing before the PHA terminates housing assistance payments for the family under an outstanding HAP contract.").

[92] *See, e.g.*, Chi. Hous. Auth. v. Harris, 275 N.E.2d 353 (Ill. 1971).

[93] 42 U.S.C. § 1437d(k) (2006); 24 C.F.R. § 966.50 (2009).

[94] 24 C.F.R. § 966.56(b) (2009).

[95] § 966.56(a), (b)(1)–(5). This provision also requires that the PHA provide accommodations for hearing participants with disabilities at the hearing itself. § 966.56(h).

[96] HUD identifies three ways a person may qualify as "disabled": (1) If he or she is determined to be disabled for purposes of the Social Security Act, 42 U.S.C. § 423 (2006); (2) If he or she is determined "to have a physical, mental or emotional impairment that: (a) is expected to be of long, continued, and indefinite duration; (b) substantially impedes his or her ability to live independently; and (c) is of such a nature that such ability could be improved by more suitable housing conditions;" and (3) If the person qualifies as a person with a developmental disability under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6001(5) (2006). *See* 24 C.F.R. § 5.403 (2009).

[97] For a thoughtful consideration of the issue of mental illness and the law, see ELYN SAKS, REFUSING CARE: FORCED TREATMENT AND THE RIGHTS OF THE MENTALLY ILL 32–43 (2002).

mental illness may consider themselves significantly impaired in some circumstances, but not in a way that inheres in the idea of "disability" reflected in the federal regulations promulgated by HUD.

¶26 For those tenants who have an impairment that meets the statutory definition of "disability," state and federal law requires certain procedural and substantive protections, particularly, the right to request and receive a reasonable accommodation.[98] Additionally, the regulations urge consideration of "mitigating factors," including disability status, before evicting tenants from subsidized housing.[99]

¶27 Also, the integration mandate of the ADA must be kept in mind when considering evictions of people with mental illness. Under the landmark decision *Olmstead v. L.C.*, unjustified institutionalization is illegal discrimination under the ADA.[100] *Olmstead* requires that people with disabilities have the opportunity to live in the least restrictive setting that is suitable for them.[101] Evictions of persons with mental illness from subsidized housing that lead to unjustified institutionalization result in *Olmstead* violations. Stopping unjust evictions before they occur is an important way to ensure that the integration mandate of the ADA is upheld for people with mental illness.

1. Reasonable Accommodations

¶28 A critical success in the fight against discrimination in housing came in 1988 with the passage of the Fair Housing Amendments Act of 1988 (FHAA).[102] The FHAA amended Title VIII of the Civil Rights Act of 1968 to include disabilities, thus ensuring that "a housing provider cannot deny a housing opportunity because of characteristics or behavior related solely to a person's disability."[103]

¶29 After the FHAA, the Fair Housing Act (FHA) requires that landlords make "reasonable accommodations in rules, policies, practices, or services, when such accommodations are necessary to afford such a person equal opportunity to use and enjoy a dwelling."[104] When applied to the eviction context, compliance with the FHAA "means that even when a tenant without a disability would legitimately be subject to eviction, a landlord cannot necessarily evict a tenant with a disability solely because of behavior related to the tenant's disability."[105] The landlord *must* make reasonable changes in policies and practices in order to accommodate a tenant with a disability.[106] The

[98] A landlord is required to consider and accommodate a person's disability under the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(A) (2006). This requirement is echoed by the states. *See, e.g.*, 775 ILCS 5/3-102.1(C) (2007).
[99] 24 C.F.R. § 982.552(c)(2)(i) (2009).
[100] Zimring *ex rel.* Olmstead v. L.C., 527 U.S. 581, 587 (1999).
[101] *Id*. This is generally referred to as the "integration mandate," which is codified at 28 C.F.R. § 35.130(d) (2009) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.").
[102] Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619.
[103] 42 U.S.C. § 3604(f)(1) (2006).
[104] § 3604(f)(3)(B).
[105] BAZELON CTR. FOR MENTAL HEALTH LAW, FAIR HOUSING INFORMATION SHEET # 4: USING REASONABLE ACCOMMODATIONS TO PREVENT EVICTION (2003) [hereinafter BAZELON CTR. FAIR HOUSING INFO. SHEET], http://www.bazelon.org/issues/housing/infosheets/fhinfosheet4.html.
[106] *Id.*; 42 U.S.C. § 3604(f)(3)(B) ("[D]iscrimination includes . . . a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.").

requirement that a landlord make a reasonable accommodation to allow a qualified tenant to enjoy the housing applies to any "dwelling," whether or not it is federally subsidized.[107]

¶30 To receive a reasonable accommodation under the FHAA, individuals must first demonstrate that they have a disability or are regarded as having a disability; and, second, they must propose an accommodation.[108] The FHAA *requires* accommodation if the accommodation is reasonable and necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling.[109] Failure or refusal to provide a tenant a reasonable accommodation is actionable discrimination,[110] comparable to "affirmative acts of rejection."[111]

¶31 Under the FHAA, and echoed in state law, a landlord's failure to consider and reasonably accommodate a person's disability can form the basis for a court's refusal to allow an eviction.[112] A tenant may raise a request for a reasonable accommodation as a defense to an eviction proceeding by demonstrating that the tenant has a disability that the landlord knew or should have known of, that the tenant requested a reasonable accommodation that would be necessary for the tenant to enjoy the apartment, and that the landlord did not grant it.[113]

¶32 Accommodating persons with mental illness may require thinking outside the box, but acknowledging and working to overcome disabilities—real or perceived—is required, including in public housing.[114] Accommodations that allow a person with a psychological disability to live in public housing include allowing a personal assistant or aide to live in or frequent the unit, authorizing a payee to make rental payments on behalf of the tenant in a timely fashion, or resisting filing for an eviction when a person's conduct that is related to his disability has led to an alleged lease violation.[115] The

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[107] BAZELON CTR. FAIR HOUSING INFO. SHEET, *supra* note 105; *see also* 42 U.S.C. § 3602(b) (defining dwelling as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof").

[108] 42 U.S.C. § 3602(b); *see also* Douglas v. Kriegsfeld Corp., 884 A.2d 1109, 1122 (D.C. 2005) ("Under the Fair Housing Act, a landlord 'is only obligated to provide a reasonable accommodation' to a tenant 'if a request for the accommodation has been made.' A tenant who requests a 'reasonable accommodation,' moreover, should 'make clear[]' to the landlord that 'she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of her disability.'").

[109] 42 U.S.C. §3604(f)(3)(B); *see also* Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 782–83 (7th Cir. 2002) ("A public entity must reasonably accommodate a qualified individual with a disability by making changes in rules, policies, practices, and services when needed.").

[110] 42 U.S.C. § 3613(a)(1)(A) (2006) ("An aggrieved person may commence a civil action in an appropriate United States district court or State court.").

[111] *Douglas*, 884 A.2d at 1120.

[112] *See, e.g.*, City Wide Assocs. v. Penfield, 564 N.E.2d 1003, 1005–06 (Mass. 1991) (holding an eviction action to be discriminatory and unlawful because reasonable accommodations for the tenant's handicap existed); Cobble Hill Apts. Co. v. McLaughlin, 1999 WL 788517, at *4 (Mass. Dist. Ct. June 23, 1999) (holding that in order to sustain an eviction, landlord must demonstrate that it made individualized accommodations for the tenant's mental disability prior to eviction).

[113] *Douglas*, 884 A.2d at 1129.

[114] *See* 42 U.S.C. § 3608 (2006) (the Fair Housing Act requires HUD to administer its programs to affirmatively further fair housing); *see also* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION 21–23 (2009) (noting that § 3608's affirmative duties applies to all federal programs and activities, and that some courts have held that these duties also extend to local public housing authorities, whereas other courts have been reticent to extend § 3608 beyond the federal government).

[115] Interview with Kenneth M. Walden, Civil Rights Team Leader/Senior Att'y, Access Living (Sept. 17, 2009); *see also* Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 336 (2d Cir. 1995) (upholding an injunction

Bazelon Center for Mental Health Law shares a wonderful example of a reasonable accommodation for a tenant whose mental illness caused auditory hallucinations:

> [I]n an early case, *Citywide Associates v. Penfield*, 409 Mass. Super. Ct. 140, 564 N.E.2d 1003 (Mass. 1991) . . . a trial court in Massachusetts ruled in favor of a tenant in an eviction action when the tenant was able to show that damage to her walls was caused because she hit them with sticks or threw water on them in order to drive away voices she hears (auditory hallucinations). One measure employed to eliminate this behavior was that she was given a "nerf" bat to use when striking the walls so that less damage would result.[116]

¶33 Put simply, reasonable accommodations are required under the law, and must be utilized to keep people with mental illness in their housing.

2. Consideration of Mitigating Circumstances

¶34 In determining whether to impose a sanction like termination of benefits after a violation of the lease is found, a PHA is granted discretion to consider "all relevant circumstances such as . . . mitigating circumstances related to the disability of a family member."[117] This language was added in 2001 to specifically permit consideration of a disability as an argument against eviction, presumably even when there may be a proper basis for termination.[118] This is a separate and distinct consideration from a reasonable accommodation. Requesting that a PHA consider one's disability status as a mitigating circumstance allows a disability that is unrelated to the underlying allegations to be taken into account. The provision illustrates HUD's policy decision to show mercy in circumstances where a person deserves a second chance before being cut off from housing benefits.

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requiring an apartment building owner to provide a tenant with a nervous system disease a parking space ahead of others on the waiting list); United States v. Cal. Mobile Home Park Mgmt. Co., 29 F.3d 1413, 1417 (9th Cir. 1993), *rev'd*, 107 F.3d 1374 (9th Cir. 1997) (holding that a landlord may have to assume a reasonable financial burden in order to reasonably accommodate tenants with disabilities); *see generally* Gretchen M. Widmer, Note, *We Can Work It Out: Reasonable Accommodation and the Interactive Process Under the Fair Housing Amendments Act*, 2007 U. ILL. L. REV. 761 (2007) (discussing how the "interactive process" in which a landlord and tenant will work together in order to determine potential reasonable accommodations upholds the anti-discriminatory goals of the FHAA).

[116] BAZELON CTR. FAIR HOUSING INFO. SHEET, *supra* note 105.

[117] 24 C.F.R. § 982.552(c)(2)–(c)(2)(i) (2009) ("In determining whether to deny or terminate assistance because of action or failure to act by members of the family . . . (i) The PHA may consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure.").

[118] Responses to Public Comments, Screening and Eviction for Drug Use and Other Criminal Activity, 66 Fed. Reg. 28776, 28782–28783 (May 24, 2001); *see also* Baldwin v. Hous. Auth. of Camden, N.J., 278 F. Supp. 2d 365, 371 (D.N.J. 2003).

3. Courts Must Weigh an Individual's Right to Live in the Least Restrictive Setting Against an Eviction

¶35 The Americans with Disabilities Act (ADA) was a critical success for people with disabilities.[119] The ADA is a civil rights statute, intended "to invoke the sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."[120]

¶36 Eliminating discrimination on the basis of disability in housing means ensuring that persons with disabilities live independently in housing that is integrated with the broader community. In *Olmstead v. L.C.*, the Supreme Court stated that the ADA requires that states provide community-based, integrated services to persons with disabilities.[121] These services are necessary when (1) that person wants to live independently, (2) the person's treating professionals "have determined that community placement is appropriate," and (3) community placement can be "reasonably accommodated, taking into account the resources available to the [s]tate and the needs of others with . . . disabilities."[122] Writing for the majority in *Olmstead*, Justice Ginsburg stated:

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. . . . Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.[123]

Defending against evictions of people with mental illness from public housing is another way of ensuring that the *Olmstead* mandate is enforced.

¶37 In implementing Title II of the ADA, the Department of Justice promulgated the "integration regulation," which states that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[124] Thus, removal of patients from institutions is sought when a less restrictive setting would be suitable for that person.[125] The goal is independent, unrestricted living for all persons with disabilities—just like any other person in the United States.

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[119] *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b)(1), 104 Stat. 327, 328–29 (the purpose of the Act is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.
[120] 42 U.S.C. § 12101(b)(4) (2006).
[121] Zimring *ex rel.* Olmstead v. L.C., 527 U.S. 581, 587 (1999).
[122] *Id*.
[123] *Id*. at 600–01.
[124] General Prohibitions Against Discrimination, 28 C.F.R. § 35.130(d) (2009).
[125] *See Olmstead*, 527 U.S. at 587.

¶38 On the ten-year anniversary of *Olmstead*, President Obama named 2009 the "Year of Community Living." He directed federal agencies to form new partnerships to promote integrated living situations for people with disabilities.[126] HUD, for instance, was instructed to make 1000 housing vouchers available for people with disabilities who are transitioning from institutions to the community.[127] The government vowed to aggressively address the barriers that prevent many Americans with disabilities from enjoying meaningful lives as part of their communities.

¶39 It is up to lawyers, in combination with social workers and mental health professionals, to work with people with disabilities to help them stay in the "least restrictive settings." To that end, we must make certain that due process works to ensure that qualified tenants, especially those with mental impairments, have the opportunity to vindicate their rights and ultimately remain in their subsidized housing.

III. Rights in a Vacuum: How the Law Fails to Address Problems Faced by Persons with Mental Illness in Evictions or Subsidy Termination Hearings

¶40 Congress has demonstrated a commitment to eliminating discrimination on the basis of disability in housing,[128] providing housing opportunities to qualified low-income individuals,[129] and preventing homelessness among persons with mental illness.[130] However, the safeguards to ensure that low-income persons with mental illness in subsidized housing are able to *remain* in suitable housing are severely lacking.

¶41 In practice, there is no opportunity for persons with mental illness to raise meaningful defenses to eviction or termination proceedings. Tenants often appear pro se in housing court.[131] Unrepresented, these tenants are placed at a severe disadvantage in the process.[132] They face the local PHA counsel, who have likely been retained because of their expertise. While housing court is often a stressful experience for pro se plaintiffs generally, it can be even more difficult for individuals with mental disabilities, particularly given the stigma of self-identifying.[133] Social science literature indicates that people with mental health issues sometimes hide their mental disabilities because they have faced stigma and discrimination after past disclosures.[134] People with mental illness

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[126] Press Release, White House, Office of the Sec'y, President Obama Commemorates Anniversary of *Olmstead* and Announces New Initiatives to Assist Americans with Disabilities (June 22, 2009), *available at* http://www.whitehouse.gov/the_press_office/President-Obama-Commemorates-Anniversary-of-Olmstead-and-Announces-New-Initiatives-to-Assist-Americans-with-Disabilities.

[127] *Id.*; Press Release, U.S. Dep't of Hous. & Urban Dev., HUD to Offer Housing Assistance to 4,000 Americans with Disabilities: Agency Seeking Comment on How to Allocate Vouchers to Support Independent Living (Jun. 22, 2009), *available at* http://www.hud.gov/news/release.cfm?content=pr09-095.cfm.

[128] *See* Fair Housing Act (Title VIII of the Civil Rights Act of 1968), Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601–19 (2006)).

[129] Housing Act of 1937, Pub. L. No. 412, 50 Stat. 888 (codified at 42 U.S.C. § 1437 (2006)).

[130] Stewart B. McKinney Homeless Act of 1987, Pub. L. No. 100-77, 101 Stat. 482 (codified as amended at 42 U.S.C. § 11301 (2006)).

[131] *See* Lawyers' Comm. for Better Hous., No Time for Justice: A Study of Chicago's Eviction Court 9 (2005) [hereinafter No Time for Justice] (studying Chicago's eviction courts).

[132] *See* Brief for Disability Law Center as Amicus Curiae Supporting Plaintiff-Appellee at 4, Carter v. Lynn Hous. Auth., 880 N.E.2d 778 (Mass. 2008) (No. SJC-C9785).

[133] *Id.* at 1–2.

[134] *See id*. at 17–18.

report feelings of anxiety before and after disclosure, low self-esteem, and social isolation.[135] In a social science study that interviewed one hundred people who receive mental health treatment, 95% reported that stigma and discrimination affected them permanently.[136] A legal situation that requires a person to openly discuss a mental health problem—such as disclosing a disability in order to raise an affirmative defense to eviction—can add more stress and discomfort to the process. Thus, where a mental health issue is apparent to the court, the court should bear the onus of inquiring—tactfully—whether the person has a disability that she would like to be considered with regard to a reasonable accommodation or as a mitigating circumstance. To require a person with a mental disability to offer this evidence on his or her own is a burden that does not consider the realities of mental illness stigma.[137]

¶42 Further, housing court is a revolving door for tenants.[138] The Lawyers' Committee for Better Housing conducted a study of Chicago's eviction courts in the fall of 2002, and found that the hearings were excessively brief and cursory. "[J]udges only asked tenants if they had a defense in 27% of the cases. When the judge did ask for a defense, tenants presented a defense 55% of the time. If the judge didn't ask for a defense, tenants presented a defense only 9% of the time."[139] It is almost unfathomable that a severely mentally ill individual would be able to put forth a meaningful defense under these circumstances. The failure to appoint a lawyer or guardian, and instead relying upon the tenant's ability to retain counsel or represent himself fails to consider the capacities and circumstances of tenants with mental disabilities in eviction cases.

¶43 Housing law fails to ensure that the rights that are guaranteed to persons with disabilities are met, and that the individual capacities of persons with mental illness are considered. First, the law has developed to allow evictions of tenants, including tenants with disabilities, based on actions of people in their household without requiring that the tenant had knowledge of the household member's conduct.[140] Second, evictions deny procedural due process to tenants with mental illness because the provided procedure does not ensure that the person actually received notice in all circumstances, and there is no right to free legal counsel, despite the magnitude of the loss that a person faces when evicted. Third, there is no judicial inquiry into whether a reasonable accommodation could allow a tenant to remain in his or her housing. Instead, the duty to propose a reasonable accommodation lies with the tenant, who may not know that they even have

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[135] *See id*. at 18 (citing OTTO F. WAHL, TELLING IS RISKY BUSINESS: MENTAL HEALTH CONSUMERS CONFRONT STIGMA 142 (1999)).
[136] *Id*.
[137] *Id.* at 5. This duty already exists in, for instance, social security disability hearings. The Administrative Law Judge (ALJ) has a "duty to inquire" in order to develop the record where a tenant is unrepresented. *See, e.g.*, Heckler v. Campbell, 461 U.S. 458, 470–71 (1983) (Brennan, J., concurring) ("[T]here is a 'basic obligation' on the ALJ . . . to develop a full and fair record, which obligation rises to a special duty . . . to scrupulously and conscientiously explore for all relevant facts." (internal citations omitted)).
[138] *See* NO TIME FOR JUSTICE, *supra* note 131, at 4 ("During an 11 week period, the monitors observed 763 eviction cases at 26 morning calls. . . . Hearings last an average of 1 minute and 44 seconds, a decrease of nearly 50% from the 3 minutes observed in 1996. The average length of hearings in which the tenant had legal representation has increased since 1996, but decreased in hearings where only the landlord had representation. . . . Of 763 cases observed, both parties were represented by legal counsel in only 33 instances (4% of the cases). Tenants were represented by counsel approximately 5% of the time when they were present at the hearing.").
[139] *Id.*
[140] Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002).

the right to a reasonable accommodation under the Fair Housing Act, never mind any understanding of how to enforce that right in a courtroom. Evictions from public housing of people with mental health issues are especially problematic because they can result in the permanent loss of a housing subsidy for the individual or family, which could result in homelessness or institutionalization.[141]

A. The Law Allows Eviction of Innocent Tenants With Disabilities Based on Acts of Third Parties

¶44 Under *Department of Housing and Urban Development v. Rucker*, a tenant may be evicted for the illegal activity of a household member, regardless of whether or not the tenant actually knew of the illegal activity.[142] The Supreme Court unanimously[143] held that "42 U.S.C. § 1437d(l)(6) unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity."[144] The current status of the law is that a public housing tenant may be evicted for "criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household . . . *or other persons under the tenant's control*."[145] Underlying *Rucker* is the idea that the eviction is justified because the person was "under the control" of the head of household, an assumption that does not hold true for all people with disabilities who are the heads of household. Thus, it is vitally important to determine whether an offending individual is a household member or "guest" under the "tenant's control."[146] This, however, can be tricky when the tenant is a person with mental illness and, therefore, may not be able to observe and control others in a way contemplated by HUD.

¶45 The tenant-respondents in *Rucker* were "so-called 'innocent' tenants"[147] subject to eviction for illegal acts by third parties who were allegedly under the control of the tenants. In *Rucker*, the Court noted in a footnote that "Respondents Rucker and Walker also raised Americans with Disabilities Act claims that are not before this Court,"[148] but made no inquiry into the nature of their disabilities or the reasonableness of granting an accommodation for their disabilities. Instead, disability played no role in the *Rucker* decision because the Court found that "Congress has directly spoken to the precise

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[141] *See* 24 C.F.R. § 982.552(c)(1)(iii) (2009) ("The PHA may at any time deny program assistance for an applicant . . . [i]f a PHA has ever terminated assistance under the program for any member of the family."); *cf.* Latisha R. Brown, *The McKinney Act: Revamping Programs Designed to Assist the Mentally Ill Homeless,* 33 COLUM. J.L. & SOC. PROBS. 235, 241–46 (2000) (discussing programs that were fostered by the McKinney Act that focused on the mentally ill homeless).

[142] 535 U.S. 125 (2002); *see generally* 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, 743–757 (2004) (discussing the one-strike policy, *Rucker*'s interpretation of it, and reactions of lower courts and HUD in response to the ruling).

[143] Justice Breyer took no part in the consideration or decision of *Rucker*.

[144] *Rucker*, 535 U.S. at 130.

[145] 42 U.S.C. § 1437d(l)(6) (2006) (emphasis added).

[146] *See, e.g.*, Charlotte Hous. Auth. v. Fleming, 473 S.E.2d 373, 375–376 (N.C. Ct. App. 1996) (refusing to evict tenant because of PHA's failure to prove son was a guest at the time of his illegal activity).

[147] *Rucker*, 535 U.S. at 129.

[148] *Id.* at 130 n.3.

question at issue"[149] regarding criminal activity and guests, and stopped its analysis there.[150] A consequence of *Rucker*, then, is that the Court perhaps unknowingly prioritizes crime control over the Fair Housing Act. Further, a one-size-fits-all vicarious liability justification for eviction fails to account for the role that disability can play in lives of the people with disabilities.

¶46 After *Rucker*, the best line of defense for an "innocent" tenant, including an innocent tenant with a disability, who would otherwise be evicted under a *Rucker* vicarious liability scheme would be to assert a state law right to cure the deficiency.[151] In *Housing Auth. of Covington v. Turner*, the Kentucky Court of Appeals held that *Rucker* does not preempt the state law right to cure a lease violation, holding that the public housing tenant in *Turner* could remedy the breach of the lease caused by illegal drug activity in her apartment by forbidding her nephew, a guest who brought drugs into her apartment without her knowledge, from visiting her apartment again.[152] Thus, in states or in leases where a tenant has a right to cure an alleged violation, this is another avenue of defense that should be explored before a tenant is evicted.

B. Procedural Rights Guaranteed to Tenants Do Not Provide Meaningful Notice and Opportunity to Be Heard when the Tenant has a Mental Illness

¶47 Public housing tenants have the right to defend their housing against improper evictions under the Due Process Clause of the U.S. Constitution.[153] The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[154] When a plaintiff alleges that state actors have failed to provide a fair process, a court must determine "whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty, or property,'"[155] and, if so, the court must then "decide what procedures constitute 'due process of law.'"[156] Essentially, due process requires that a person or discernible group be given adequate notice and an opportunity to be heard prior to a state action that may adversely affect them.[157]

¶48 Within the public benefits realm, *Goldberg v. Kelly*[158] and *Mathews v. Eldridge*[159] are the leading cases for determining whether the requirements of procedural due process have been met. *Goldberg* established that procedural due process guarantees that welfare recipients have a right to an evidentiary hearing before their benefits can be terminated.[160] A fair hearing must include an opportunity to be heard "at a meaningful time in a

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[149] *Id.* at 136 (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).
[150] *Id.*
[151] I am thankful to the Housing Project at the Legal Assistance Foundation of Metropolitan Chicago for bringing this case and line of argument to my attention.
[152] 295 S.W.3d 123 (Ky. Ct. App. 2009).
[153] *See, e.g.*, Vance v. Hous. Opportunities Comm'n, 332 F. Supp. 2d 832, 841 (D. Md. 2004); Baldwin v. Hous. Auth. of City of Camden, N.J., 278 F. Supp. 2d 365, 386 (D.N.J. 2003); *see also* Note, *Procedural Due Process in Government Subsidized Housing,* 86 HARV. L. REV. 880, 903–10 (1973).
[154] U.S. CONST. amend. XIV, § 1.
[155] *Baldwin*, 278 F. Supp. 2d at 377 (citing Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000)).
[156] *Id.*
[157] Goldberg v. Kelly, 397 U.S. 254, 261 (1970).
[158] *Id*.
[159] 424 U.S. 319 (1976).
[160] *Goldberg*, 397 U.S. at 261.

meaningful manner."[161] These rights are generally afforded through HUD regulations and state law, but "[i]f the regulations are silent on the point in question, [a lawyer may] argue that the tenants are entitled to the right in question either directly under the Due Process Clause or under the regulations as interpreted in light of the Due Process Clause."[162]

¶49 In practice, *Goldberg*, as applied by the courts in the housing context, establishes at least five requirements for the termination process employed by a housing authority: (1) timely notice from the housing authority stating the basis for the proposed termination, (2) an opportunity by the tenant to confront and cross-examine each witness relied on by the housing authority, (3) the right of the tenant to be represented by counsel, (4) a decision that sets forth the reasons based upon evidence adduced at the hearing, and (5) an impartial decision-maker.[163]

¶50 *Goldberg* sets the standard for a hearing before termination of benefits that are vital to the livelihood and survival of the participant,[164] but it is also helpful to look to the balancing test in *Mathews v. Eldridge*, which evaluates the efficacy of the procedures that are required when there has been a deprivation of life, liberty, or property. The Court in *Mathews* recognized that "due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances, . . . [but rather] is flexible and calls for such procedural protections as the particular situation demands."[165] The Court considered three main factors: (1) the importance of the interest to the individual (the more important, the more process will be provided); (2) the ability of additional procedures to increase the accuracy of fact-finding (the more probable that additional procedures will lead to better fact-finding, the higher likelihood that the Court will require them); and (3) the burdens imposed on the government by requiring the procedures (the more burdensome and expensive, the less likely the Court will require them).[166]

¶51 Under the *Mathews* balancing test, it is clear that procedural due process is denied to persons with mental illness in pre-subsidy termination hearings and eviction proceedings for two main reasons. First, there is no requirement that the evicted tenant, who may have a mental illness, receive actual notice. Second, as is the case in other civil contexts, courts fail to provide lawyers to tenants with mental illness, thus depriving many tenants of the opportunity to be heard in a meaningful manner before eviction.

1. Lack of Notice

¶52 Even when landlords follow prescribed eviction procedures to evict a public housing tenant, the eviction may proceed without *actual* notice explicitly given to or explained to the tenant. This is because state laws allow landlords to proceed with

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[161] *Id.* at 267 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
[162] NHLP HUD HOUSING PROGRAMS, *supra* note 20, at 14/79.
[163] Clark v. Alexander, 85 F.3d 146, 150 (4th Cir. 1995) (citing *Goldberg*, 397 U.S. at 266–71); *see also* Caulder v. Durham Hous. Auth., 433 F.2d 998, 1003–04 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971) (applying *Goldberg* to Section 8 terminations).
[164] 397 U.S. 254.
[165] Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (internal citations omitted).
[166] *Id*. at 334, 342.

eviction procedures by giving notice by publication if in-person notice attempts have failed.[167]

¶53 This is precious little protection for a right that is constitutionally protected under the Due Process Clause. When someone owns a home and is delinquent on her property tax, the Supreme Court has held that notice by publication in a local newspaper of intent to sell the house is insufficient.[168] In *Jones v. Flowers*, the state sent two letters to the landowner over two years via certified mail that were returned undelivered. The state then published notice in the Arkansas *Democrat Gazette* before selling the house.[169] The Court held that Arkansas was required by the Due Process Clause of the Fourteenth Amendment to "take additional reasonable steps to attempt to provide notice to the property owner before selling his property."[170] The Court reasoned that the state may not take someone's home away without giving that person a clear opportunity to reclaim her property. The same rationale should apply to apartments, particularly low-income housing, which is a safety net for the poorest people in America.

¶54 Yet the Court has stopped short of requiring proof of actual, in-person service before public housing tenants are evicted. In *Greene v. Lindsey*, the Court rejected the practice of eviction notification by posting on apartment doors, but noted that "history and . . . practical obstacles . . . have allowed judicial proceedings to be prosecuted . . . on the basis of procedures that do not carry with them the same certainty of actual notice that inheres in personal service."[171] The Court found notification of eviction by posting on an apartment door to be insufficient, but favorably stated that notice by mail "surely go[es] a long way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defense despite a continuing interest in the resolution of the controversy."[172]

¶55 The Court did not state precisely how much effort the state must make to reach the tenant in order to satisfy due process, but stated that "[a]n elementary and fundamental requirement of due process . . . is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections."[173] Therefore, when the landlord cannot reach the tenant and instead files notice by publication, the notice will stand if it is reasonably designed to give notice to the tenant.

[167] For example, Chicago allows "constructive service" by publication if the landlord or sheriff is unable to serve the tenant after two attempts. The eviction notices are posted at the Daley Center, where, in practice, only attorneys look at the notices. Illinois state law states that constructive service is permissible only if "the plaintiff, his or her agent, or attorney files a forcible detainer action, . . . and is unable to obtain personal service on the defendant or unknown occupant and a summons duly issued in such action is returned without service stating that service cannot be obtained, then the plaintiff, his or her agent or attorney may file an affidavit stating that the defendant or unknown occupant is not a resident of this State, or has departed from this State, or on due inquiry cannot be found, or is concealed within this State so that process cannot be served upon him or her, and also stating the place of residence of the defendant or unknown occupant, if known, or if not known, that upon diligent inquiry the affiant has not been able to ascertain the defendant's or unknown occupant's place of residence." 735 ILCS § 5/9-107 (2002).

[168] Jones v. Flowers, 547 U.S. 220, 239 (2006).

[169] *Id*. at 224.

[170] *Id*. at 225.

[171] Greene v. Lindsey, 456 U.S. 444, 449–55 (1982).

[172] *Id*. at 455.

[173] *Id.* at 449–50 (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

¶56 Expecting persons with developmental or psychological disabilities to search "public" records to ensure that their housing has not been terminated ignores the practical realities of living with a disabling mental illness. Although "in many, if not most, jurisdictions, the general duty of care imposed on adults with mental disabilities is the same as that for adults without mental disabilities,"[174] there is a fundamental difference between recognizing that persons with mental illness should be held responsible for intentional or negligent acts,[175] and imposing an affirmative duty on individuals to search for eviction proceedings.

¶57 Allowing notice by publication rather than insisting upon in-person service is proper in many circumstances, such as when there are a large number of people affected by a general rule.[176] Here, the practical requirements that call for a notice of eviction by publication are wholly absent: the evicted party resides in a discernible location, and the number of occupants is indicated on the lease. If that party is mentally ill, it should be considered a reasonable accommodation that the landlord, sheriff, or perhaps a caseworker, ensures that the tenant has in fact received notice.

¶58 A fair application of the *Mathews* balancing test would require that we err on the side of requiring in-hand notice to persons with mental illness who face eviction from public housing.[177] First, the extra steps are justified by the importance of the interest to the individual. Without receiving notice of eviction, the tenant may not realize that she is being evicted. She surely stands to lose her current housing if evicted, and may lose the right to the housing subsidy, which could lead to homelessness if she has no resources.[178]

¶59 Second, *Mathews* asks us to weigh the probability that the additional procedures will lead to better fact-finding.[179] Here, the difference between receiving in-person notice and having the notice posted would likely be the difference between the tenant appearing for the termination hearing or remaining unaware of the eviction until it is too late. If she appears, she at least has some opportunity to present a case. If not, she does not, and only the landlord's version of the facts is available to the administrative law judge or hearing officer. Thus, the second step of *Mathews* balancing favors a requirement of in-person

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[174] Creasy v. Rusk, 730 N.E.2d 659, 661 (Ind. 2000); *see* RESTATEMENT (SECOND) OF TORTS § 283B (1965).

[175] Swift v. Fitchburg Mut. Ins. Co., 700 N.E.2d 288, 292 n.9 (Mass. App. Ct. 1998) ("As a general rule, mentally disabled persons are liable for their torts (they are held to the standard of a reasonable person in the circumstances)."); Gould v. Am. Family Mut. Ins., 543 N.W.2d 282, 287 (Wis. 1996) (holding that people with mental disabilities can be found liable for negligence and must be held to same standard of care as those without disabilities, though mental disability can be a factor in determining liability).

[176] For example, allowing rules, proposed rules, and notices by the federal government to be published in the Federal Register is a proper, practical way to ensure that all potential classes of affected persons obtain notice because the potential classes affected are not always foreseeable, and locating each class member would be impracticable. However, notice by publication where the name and address of the person to be served could by found by "due diligence" fails to meet procedural due process requirements. Roberts v. Cameron-Brown Co., 410 F.Supp. 988, 997 (S.D. Ga. 1975) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950)).

[177] Mathews v. Eldridge, 424 U.S. 319 (1976).

[178] MADELEINE R. STONER, THE CIVIL RIGHTS OF HOMELESS PEOPLE: LAW, SOCIAL POLICY, AND SOCIAL WORK PRACTICE 100 (1995) ("For all of these extremely poor at-risk people, eviction is identifiable at the singular point in time at which they either become homeless, or are at the greatest danger of becoming homeless. . . . A major study of homelessness in Chicago found that 30% of those interviewed said that eviction caused them to seek emergency shelter or other forms of temporary housing." (internal citations omitted)).

[179] *Mathews*, 424 U.S. at 335.

service because the hearing officer will have the opportunity to hear both sides of the story rather than entering default judgment for the landlord without any fact-finding.

¶60 Finally, we must consider the burdens that would be imposed on the government by requiring the procedures.[180] Concededly, having a sheriff serve eviction papers in-hand to a person with a disability who resides in public housing requires more public resources than allowing the notice to be posted in a public location. However, sheriffs routinely serve eviction notices, and the landlords routinely pay sheriffs for this service. Evictions are very costly to landlords generally, and especially when they have to oust the tenant after winning in court or before an agency. If the tenant has notice and appears, and then loses on the merits, the tenant will be aware that her possession rights have been terminated and she is more likely to collect her belongings and vacate on her own.

¶61 Further, requiring in-person notice will reduce the number of cases that are filed by tenants with severe and persistent mental illness after a default judgment has been filed against them. Fully resolving these cases up front, rather than after the landlord believes she has received closure via default judgment, may reduce the burden on the judiciary, as there will be more cases decided on the merits rather than default judgment being entered and then litigated.

¶62 The importance of the interest to the tenant, the ability of the procedure (i.e., required in-person service) to lead to better fact-finding, and the non-burdensome quality of the procedures, as well as the government's interest in judicial efficiency and fairness all point to invalidating notice by publication and ceasing the practice, especially where the tenant is mentally ill.

2. A Person with a Mental Disability Needs an Advocate in Order to Truly Have a Meaningful Opportunity to Present a Defense

¶63 People with mental disabilities are diverse and have varied interests, talents, and abilities, but may exhibit characteristics of impairment in cognitive functioning that would greatly interfere with a plaintiff's or tenant's ability to represent herself in court. In *Atkins v. Virginia*, the U.S. Supreme Court recognized that some people with developmental disabilities have a diminished capacity to understand and process information, to reason and communicate, and to control impulses such that execution of the person violates the Constitution's prohibition against cruel and unusual punishment.[181] Similarly, one psychiatric study of the effects of mental retardation on the ability to make "independent and reasoned choices" concluded that relying on the consent of adults with moderate mental retardation in high-risk situations would be unethical.[182]

¶64 In other circumstances, courts have recognized that the special circumstances of persons with other mental disabilities, including mental illness require stronger procedural due process protections, including appointment of counsel: "[C]ourts have ordered that mentally ill prisoners, probationers, and parolees be provided with representation in some types of administrative disciplinary hearings prior to a proposed

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[180] *Id*.

[181] Atkins v. Virginia, 536 U.S. 304, 318 (2002).

[182] Brief for Disability Law Ctr. as Amicus Curiae Supporting Plaintiff-Appellee at 4, Carter v. Lynn Hous. Auth., 880 N.E.2d 778 (Mass. 2008) (No. SJC-C9785) (citing Celia Fisher et al., *Capacity of Persons With Mental Retardation to Consent to Participate in Randomized Clinical Trials*, 163 AM. J. PSYCHIATRY, 1813, 1820 (2006)).

administrative deprivation of liberty."[183] Yet, there is still no right to counsel in eviction cases or in loss of benefits cases for any litigant, even those who are indigent or suffering with mental illness, or psychological or developmental disabilities.[184]

¶65 Persons with mental disabilities can request, however, that a guardian ad litem be appointed for a limited (e.g., in conjunction with a court case) guardianship. This is an extreme measure: appointment of a guardian, even for a specific duration and a limited scope, takes away the person's ability to act on his own behalf.[185] Appointment of a guardian ad litem is also troublesome because, generally, a friend or family member serves as a guardian, which requires, of course, that a person for whom a guardian is appointed have a friend or family member that they can trust with this duty, and also affirmatively undertake steps toward having a guardian appointed. Moreover, at least one court has held that due process does not require the appointment of a guardian ad litem to protect the interests of persons with mental illness (as a group) in housing court or in an administrative proceeding.[186]

¶66 Because neither in-person notice nor legal representation is guaranteed, the law frequently allows evictions of people with severe and persistent mental illness to occur without giving the tenant meaningful notice and opportunity to respond. Thus, the federal regulations governing evictions from public housing and state laws that pertain to evictions fail to ensure procedural due process rights to tenants with severe mental illness.

C. The Burden to Raise a Reasonable Accommodation Request or Consideration of Mitigating Circumstances Rests with the Tenant, and with Little Judicial Oversight

¶67 Under the FHAA, if a tenant with a disability requests a reasonable accommodation that would keep him or her in housing, it must be granted. A refusal to take affirmative steps to accommodate persons with a disability may violate Section 504 of the Rehabilitation Act.[187] However, this protection has no meaning unless the tenant has the foresight to raise the accommodation request; courts do not hold that a landlord has a

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[183] Robert T. Drapkin, *Protecting the Rights of the Mentally Disabled in Administrative Proceedings*, 39 CATH. LAW. 317, 322 (2000) (citing Parker v. Califano, 644 F.2d 1199, 1203 (6th Cir. 1981) (due process disallows administrative res judicata to bar a claimant who belatedly introduces an issue of mental illness); Shrader v. Harris, 631 F.2d 297, 302 (4th Cir. 1980) (denial of benefits to someone unable to prosecute a claim due to mental disability constitutes a violation of due process); Vitek v. Jones, 445 U.S. 480, 496–97 (1980) (counsel must be provided to prisoners suffering from mental disabilities where the state seeks to treat them as mentally ill and warehouse them in a segregated setting).

[184] Lassiter v. Dep't of Soc. Serv., 452 U.S. 18 (1981); *see also* Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS 699 (2006) (explaining that courts have not held that a constitutional right to counsel exists in the eviction context, although due process, public policy, and international law support the proposition that people who risk losing their homes must have a right to counsel despite ability to pay); Deborah Rhode, *Access to Justice: Connecting Practice to Principles*, 17 GEO J. LEGAL ETHICS 369, 375 (2004) ("[A]lthough that [*Lassiter*] standard is not unreasonable on its face, courts have applied it in such restrictive fashion that counsel is almost never required in civil cases.").

[185] For a discussion of how appointment of a guardian may violate the integration mandate articulated in *Olmstead v. L.C.*, see Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157 (2010).

[186] Blatch *ex rel.* Clay v. Hernandez, 360 F. Supp. 2d 595, 614–15 (S.D.N.Y. 2005).

[187] Nathanson v. Med. Coll. of Penn., 926 F.2d 1368, 1385 (3rd Cir. 1991) (citing Alexander v. Choate, 469 U.S. 287, 301 n.20).

duty to accommodate when a request has not been raised.[188] Requiring persons with mental illness to raise accommodation requests ignores the circumstances of the person with the mental illness. Courts, housing authorities, and landlords must take the FHAA mandate seriously and share the responsibility of accommodating people with mental illness in housing. To do otherwise would allow neutral housing policies to have an adverse effect on people with disabilities, in contravention of the ADA and Section 504 of the Rehabilitation Act.

¶68 One state supreme court has led the way in ensuring that the rights of people with disabilities are met in housing. The Massachusetts Supreme Judicial Court (SJC) in *Carter v. Lynn Housing Authority* held that due process requires that hearing officers presiding over housing subsidy termination proceedings affirmatively assist people with disabilities in presenting defenses that make use of a disability, rather than merely providing rote proceedings.[189] The plaintiff in *Carter* was Pamela Carter, a pro se litigant whose Section 8 HCVP benefits were terminated in an administrative hearing due to allegations that she had damaged her apartment. Ms. Carter had a hearing disability that was "obvious to the court" but that she did not raise.[190] Under the regulations, Ms. Carter could have discussed her disability and requested (1) a reasonable accommodation (which may have been unavailing here because the reason for termination was damage to the apartment, which was likely unrelated to her hearing disability) and/or (2) consideration of her disability as a "mitigating circumstance" that would militate against eviction and/or loss of HCVP benefits.

¶69 On review, the SJC found that the hearing officer erred by failing to indicate that he had considered "all relevant circumstances,"[191] and remanded the matter to the hearing officer "with instructions to provide the plaintiff with the opportunity to produce evidence of any relevant circumstances, to acknowledge as potentially mitigating any relevant circumstances, and to indicate affirmatively in his ruling the basis on which he chose to exercise or not his discretion."[192]

¶70 Chief Justice Margaret Marshall wrote for the SJC in *Carter*. In *Carter*, the court held that "the decision of a hearing officer must, at a minimum, reflect factual determinations relating to the individual circumstances of the family (based on a preponderance of the evidence at the hearing) . . . ."[193] In particular, the hearing officer must acknowledge that he has discretion to take "all relevant circumstances (including mitigating circumstances) into account; and [he must] indicate whether he either did or did not choose to exercise that discretion in favor of mitigating the penalty (here termination of Section 8 benefits) in a particular case."[194] *Carter* analogizes the role of

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[188] *See, e.g.*, Andover Hous. Auth. v. Shkolnik, 820 N.E.2d 815, 826 (Mass. 2005) ("A housing authority cannot accommodate a disability that it does not know exists. This is especially true where the nature of the disability is not readily apparent on observation.").
[189] Carter v. Lynn Hous. Auth., 880 N.E.2d 778 (Mass. 2008).
[190] *Id.* at 785 n.15 ("[T]he Housing Court judge noted that '[t]he tenant also is clearly disabled (she has a significant hearing impairment that is obvious to this court),' and there is nothing to suggest that the same disability was not obvious to the hearing officer.").
[191] *Id*. at 780 (citing 24 C.F.R. § 982.552(c)(2)(i)).
[192] *Id.* at 787 (citing 24 C.F.R. § 982.552(c)(2)(i)).
[193] *Id.* at 785 (citing 24 C.F.R. § 982.552(c)(2)(i)).
[194] *Id.* at 786.

the hearing officer in housing subsidy termination cases to that of a judge dealing with an unrepresented party at trial (i.e., a neutral fact-finder seeking information).[195]

¶71 Notably, *Carter* places an affirmative duty on the hearing officer to ensure that the process followed in Section 8 proceedings are more than Kabuki theater, and encourages leniency toward tenants with disabilities:

> [I]t is reasonable to expect the hearing officer to make inquiry about relevant circumstances that are obviously presented by the situation. For example, the hearing officer might ask, "Are there any other facts that I should know about, particularly those relating to the extent of the participation in the incident of the family member involved, the disability of any family member in the household, or the effects that termination of assistance might have on other family members who weren't involved in this incident?" Such an inquiry by a hearing officer does not place an unworkable burden on him or her.[196]

¶72 The Disability Law Center,[197] in their amicus brief to the *Carter* court, supported the ultimate requirement of meaningful process that considers the circumstances of individuals with disabilities in administrative proceedings.[198] The amicus noted that "many people with disabilities have cognitive limitations which may impair their ability to describe a known disability to a hearing officer."[199] Further, the amicus noted the realities of the stigma attached to self-identifying as having a disability:

> In light of the stigma associated with mental illness and other disabilities, such a rule [holding that evidence of a disability may not be considered by a reviewing trial court when a pro se tenant fails to disclose his or her impairment at the administrative hearing, even when such disability has already been established before, or is apparent to the housing authority] would, if left standing, unduly burden the administrative process with procedural barriers that fail to account for widespread social stigma and prejudice. Such a result will undermine the efforts made by Congress and the U.S. Supreme Court to ensure comprehensive integration and to eliminate the stigma that attaches to a diagnosis of mental illness.[200]

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[195] *Id.* at 787 n.17.

[196] *Id.*

[197] The Statement of Interest that accompanies the Amicus Curiae brief states, "[t]he Amicus Curiae submitting this brief, the Disability Law Center, is a statewide private nonprofit organization that is federally mandated to protect and advocate for the rights of individuals with disabilities. Since 1978, the Law Center has provided a full range of legal assistance to people with disabilities in Massachusetts, including legal representation, regulatory and legislative advocacy, and education and training on the legal rights of people with disabilities." Brief of Disability Law Ctr. as Amicus Curiae Supporting the Plaintiff-Appellee at 4, Carter v. Lynn Hous. Auth., 880 N.E.2d 778 (Mass. 2008) (No. SJC-C9785).

[198] *Id.*

[199] *Id.*

[200] *Id.*

¶73 Notably, *Carter* more carefully delineates between a "reasonable accommodation"[201] and a "mitigating circumstance."[202] As described above, a reasonable accommodation is a change in housing policy or practice that would account for a person's disability (e.g., establishing a payee who will timely pay the tenant's rent to the landlord where the tenant has a documented disability such as chronic depression that interferes with the tenant's ability to make timely rent payments). The accommodation is both connected to the disability (chronic depression) and the reason for the proposed eviction (tardy rent payments).

¶74 Recognizing disability as a mitigating circumstance distinct from a reasonable accommodation defense allows consideration of a disability that is unrelated to the underlying allegations considered at the administrative hearing. The regulations authorize two procedural steps before terminating a tenant's Section 8 assistance. First, a tenant must have an opportunity for an informal hearing to determine whether sufficient grounds exist to terminate housing assistance.[203] Next, if a violation is found, a housing authority is granted discretion to consider "all relevant circumstances such as . . . mitigating circumstances related to the disability of a family member."[204] The regulations reflect HUD's understanding that not all violations warrant immediate cession of housing assistance, particularly when a family member is a person with a disability. Unfortunately, unlike the result in *Carter*, consideration of mitigating circumstances is rarely required by the courts.

¶75 The *Carter* framework brings the courts closer to HUD's intention that there be at least two distinct ways for an individual with severe and persistent mental illness to raise a disability as a defense in an administrative hearing or eviction proceeding: a person may request (1) a reasonable accommodation, and (2) consideration of the disability as a mitigating circumstance. Other cases have conflated the two or ignored the possibility of considering a disability to be a mitigating circumstance, thereby turning two opportunities to raise one's disability as a defense to eviction into just one.[205]

¶76 Ms. Carter's subsidy termination is an illustration of the discord between what is legislated by Congress and what happens in housing court. Ms. Carter had a disability: she had a severe hearing impairment that was obvious to the court. Yet, likely because she was pro se in the lower courts, she did not assert her rights as a person with a disability to a reasonable accommodation. She and her landlord agreed to a payment plan to cover the costs associated with the damage she allegedly caused to her unit, yet the Lynn Housing Authority still insisted on terminating her subsidy. Tenants should be able to choose not to discuss their disability if they wish, but the court must ensure that tenants are aware of their rights to request and receive reasonable accommodations. It is settled law that when given a reasonable accommodation request, a landlord must stop eviction proceedings at whatever stage they are in, even if the landlord was not made aware of the need for an accommodation until after the eviction notice was provided to the tenant,

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[201] *See* Section 8 Tenant Based Assistance: Housing Choice Voucher Program, 24 C.F.R. § 982.552(c)(2)(iv) (2009).
[202] *See* § 982.552(c)(2)(i).
[203] §§ 982.555(a)(1), 982.552(c)(1)(i).
[204] § 982.552(c)(2)(i).
[205] *See, e.g.*, Gaston v. CHAC, Inc., 872 N.E.2d 38 (Ill. App. Ct. 2007) (holding that a PHA must consider mitigating circumstances, including reasonable accommodation, as is required by federal public housing regulations, before terminating a voucher-holder's tenant-based assistance).

after the eviction was filed, or even on the courthouse steps.[206] Courts must step in and ensure that people with severe mental illnesses are able to use the right to a reasonable accommodation that Congress and HUD intend for them to have.

¶77 Further, courts must ensure that the circumstances of the tenant, especially including mental disabilities, are considered as mitigating circumstances when hearing officers determine whether to terminate a subsidy. The lower housing court in *Carter* indicated that the plaintiff not only had a disability, but also was too poor to afford a phone line.[207] Regardless, the Lynn Housing Authority pursued termination of Ms. Carter's public housing subsidy for damage allegedly caused to her apartment. Ms. Carter not only denied causing the damage, but also worked out the dispute with her former landlord, agreeing to a repayment plan that fit her limited income. Fewer evictions and subsidy terminations would hold if courts treated disability-as-a-mitigating-circumstance as a procedural right, requiring explicit consideration of mitigating circumstances as an affirmative step in the eviction process. The courts must continue to put the brakes on housing authorities who seek evictions from housing and termination of subsidies for minor lease infractions by persons with disabilities. Courts must require articulation of a specific reason why a mitigating circumstance does not call for rejection of the eviction.

IV. Addressing Problems

¶78 The law can and should ensure due process to persons with mental illness facing eviction or revocation of their housing subsidies. There are a number of changes that could be made to ensure that persons with mental illness have the opportunity to present a defense to an eviction action.

¶79 For housing to be truly fair, individuals who qualify for the housing must have the opportunity to overcome their disabilities and remain in the housing. There should be an affirmative duty on landlords to solve housing problems with community-based conversations rather than immediate resort to eviction proceedings. PHAs know when an individual in subsidized housing receives social security insurance (SSI) or social security disability insurance (SSDI) because the PHA knows the amount and source of the individual's income.[208] People who receive social security benefits have been

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[206] *See* Radecki v. Joura, 114 F.3d 115 (8th Cir. 1997).

[207] Carter v. Lynn Hous. Auth., No. 03-CV-0078 (Mass N.E. Hous. Ct. March 31, 2004) ("7. The tenant is extremely impoverished (at the present time she receives only Social Security death benefits; she lost her job as a substitute teacher's aide because she is unable to pay for a telephone); 8. The tenant also is clearly disabled (she has a significant hearing impairment that is obvious to this court); 9. Despite her poverty the tenant is now paying $20.00 per month to her previous landlord towards satisfying the waste damage judgment debt obligation.").

[208] The source of the tenant's income is known to the landlord or PHA because of the income verification paperwork the tenant must supply to demonstrate that she fits within the housing's income limits. *See also* Adapt of Phila. v. Phila. Hous. Auth., No. Civ.A. 98-4609, 2005 WL 3274331, at *4 n.6 (E.D. Pa. Aug. 29, 2005) ("We note that [24 C.F.R.] § 100.202 'does not prohibit' inquiries [to the nature and extent of an applicant's disability], when made to all applicants regardless of whether they have a handicap, to determine 'whether an applicant is qualified for a dwelling available only to persons with handicaps or to persons with a particular type of handicap,' and 'whether an applicant for a dwelling is qualified for a priority available to persons with handicaps or to persons with a particular type of handicap.' 24 C.F .R. §§ 100.202(c)(2) & (3). Further, the United States Department of Housing and Urban Development ('HUD') Accessibility Notices state 'PHA may verify a person's disability . . . to the extent necessary to ensure that applicants are qualified for the housing to which they are applying . . . [and] may require documentation of

deemed to meet the Social Security Act's definition of having a disability, and will likely be considered people with disabilities for the purposes of the FHAA. Therefore, every person in subsidized housing who receives SSI or SSDI has a right to reasonable accommodation in housing under the FHAA.[209] Landlords should work with their tenants who have disabilities to resolve housing matters and make accommodations before any judicial process is filed. Courts should require that landlords demonstrate that accommodations were considered and negotiations were exhausted before resort to the courthouse. Addressing housing problems outside of a court context not only serves the goals of the FHAA, but it also allows tenants and landlords to work together to solve problems with fewer obstacles and with less expense than recourse to the courts.

¶80 Second, a tenant should *always* have the right to raise a disability as a defense under the FHAA. Instead of ignoring disability status as an issue not before the court, each arbiter and reviewing judge in the eviction and subsidy termination context should consider whether the tenant has a disability and whether he or she has due process or statutory rights under the FHAA that could remedy the situation. If the individual has a disability, the court should then work with the parties to determine what type of reasonable accommodation could be made to ensure that the individual has a fair opportunity to utilize public housing. Eviction without consideration of a disability violates the FHAA and leads to a violation of the ADA if the evicted tenant becomes institutionalized by default as a result of the eviction.

¶81 Third, to ensure that the charges of the FHAA and ADA do not ring hollow, evictions and subsidy terminations of persons with mental illness should be handled by special courts, modeled after the "problem-solving courts" in New York that handle criminal matters with mentally ill offenders.[210] The New York mental health courts seek to "[equip the] courts with the tools necessary to perform meaningful assessments, identify appropriate treatment options and make connections to the mental health system,"[211] which they do by "provid[ing] judges with the means to make more informed decisions about cases involving offenders with mental illness."[212] In mental health courts, judges have the resources to perform meaningful assessments, identify suitable treatment options, and attempt to decriminalize mental health issues by offering support services that encourage recovery rather than imposing criminal sanctions or jail time.[213]

¶82 Similarly, a court system that recognizes the myriad problems faced by persons with mental illness and how these problems manifest themselves in housing could go a long way toward ensuring that mentally ill individuals can at least have access to the courts and a more meaningful opportunity to present defenses to termination and loss of

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the manifestation of the disability that causes a need for specific accommodation or accessible unit.").

[209] Some courts are already doing this right. For example, in *Boston Housing Authority v. Bridgewaters*, 898 N.E.2d 848 (Mass. 2009), the court noted that when a tenant receives SSI, the public housing authority is on notice that the tenant has a disability and, therefore, must consider a reasonable accommodation request, even when the housing authority claims the tenant is a threat due to assault of another tenant, because such behavior may be related to the tenant's disability, thereby making eviction on that basis illegal.

[210] NYCourts.gov, Mental Health Courts, http://www.nycourts.gov/courts/problem_solving/mh/home.shtml (last visited Mar. 1, 2009).

[211] *Id.*

[212] *Id.*

[213] Kathryn C. Sammon, Note, *Therapeutic Jurisprudence: An Examination of Problem-Solving Justice in New York*, 23 ST. JOHN'S J.L. COMM. 923, 950 (2008).

subsidy. The goal of the courts should be to find solutions that avoid the social costs of eviction. The court could adopt a more relaxed environment than housing court, which could reduce some of the stress associated with self-identification of a mental illness, and the court could also operate in largely closed proceedings to protect the privacy of the individuals involved, as in juvenile court.

¶83 Entrance into the court could be automatic if a tenant receives SSI or SSDI for a mental health issue. In such cases, the tenant would be automatically entered into mental health housing court if a subsidy termination or eviction were initiated against the tenant. The tenant could be given the opportunity to affirmatively opt out if he or she wishes. Tenants could also petition to enter the court by swearing an affidavit that they have a disability and wish to have their case handled by the special court.

¶84 Most importantly, mental health providers would be present in the courtroom to work with judges, tenants, and landlords to reach workable solutions that maintain housing. Mental health courts could bring together landlords, tenants, treatment providers, doctors, lawyers, activists, and family members to create a solution, such as adherence to a treatment plan or in-home provider visits, that will reduce the future potential of landlord-tenant disputes. Mental health housing court would diagnose the root cause of the landlord-tenant dispute and address it with a reasonable accommodation to address the underlying cause.

¶85 Funding for this project could come from expansion of the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI),[214] a federal program that provides funding for representation of mentally ill individuals. PAIMI "applies to individuals with mental illness who live in residential facilities, [and] authorizes formal grant allotments to Protection and Advocacy (P&A) systems in each state . . . to be used to (1) pursue administrative, legal, and other appropriate remedies to redress complaints of abuse, neglect, and rights violations, and (2) protect and advocate for the rights of individuals with mental illness through activities to ensure the enforcement of the U.S. Constitution, as well as federal and state statutes."[215] PAIMI funds are appropriate for this use, given the magnitude of potential loss that is presented in eviction and subsidy termination proceedings coupled with the inability of many persons with mental illness to navigate the proceedings that currently exist.

¶86 The mental health courts would seek to enforce the promise of the FHAA: to reasonably accommodate people with disabilities, including severe mental illness, such that they are able to remain in their housing. As in the criminal mental health courts, judges and participants would be more informed of the treatment options available, and then could draw from this knowledge to promote viable reasonable accommodations that would allow landlord-tenant disagreements to end with housing solutions rather than potential homelessness for the tenant. With mental health courts, judges and hearing officers would no longer ignore the right of persons with severe mental illness to remain independent by rubber stamping evictions and subsidy terminations.

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[214] 42 U.S.C. § 10801 (2006). "PAIMI" and "PAMII" are apparently synonymous: a 1988 amendment removed "mentally ill individual" and replaced it with "individual with mental illness" but the title of the Act did not change. 62 Fed. Reg. 53548-01 (Oct 15, 1997).

[215] Arlene S. Kanter, R. Blake Chisam & Christopher Nugent, *The Right to Asylum and Need for Legal Representation of People With Mental Disabilities in Immigration Proceedings*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 511, 513 (2001).

V. CONCLUSION

¶87 Subsidized housing must be provided on a fair and equal basis not only as a matter of law for the individuals who qualify for housing, but as a matter of good social policy. It is axiomatic that an individual needs to have reliable housing before he or she can function in society. A lack of decent, affordable, safe, and independent housing is a significant barrier to full participation in community life for people with serious mental illnesses.[216] Millions of people with serious mental illnesses lack housing that meets their needs.[217] We must ensure that people with mental illness who are in safe, decent, affordable housing remain in it.

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[216] THE PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA 30–31 (2003), *available at* http://www.mentalhealthcommission.gov/reports/FinalReport/downloads/FinalReport.pdf.

[217] *Id.*