

# Exile from Main Street\*

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Deborah N. Archer\*\*

## ABSTRACT

*There is a growing web of policing-based housing policies that prohibit people who have had contact with the criminal legal system from living in public, subsidized, or private rental housing. This web of restrictions is consistent with America's broader embrace of exile in response to perceived threats and is rapidly expanding against a backdrop of mass criminalization. While individual policing-based housing policies have received some scholarly attention, little has been written about their cumulative impact and the central role that mass criminalization plays in locking people out of housing. When the full array of restrictions on public and private housing is scrutinized, it becomes clear that stable and affordable housing is put out of reach for many. The desire to punish and exclude has overwhelmed the need to provide housing, opportunity, and second chances. As more municipalities and public housing authorities adopt policing-based housing policies, housing options constrict. As a result, individuals who have contact with the criminal legal system, and their families, are effectively exiled — cast out by society.*

*This Article examines how the entanglement of policing-based housing policies and the criminal legal system threatens to push already marginalized people further to the edges of society, while also circumscribing the mobility of people of color who have the means and desire to live in integrated spaces. The Article encourages a more holistic analysis of these policies, a decoupling of the criminal legal system from housing policy, and increased efforts to stem the tide of mass criminalization to prevent perpetual punishment and exile.*

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\* The title is a variation on the Rolling Stones album *Exile on Main Street*. The album title and artwork were intended to evoke the idea of exile within American life, and a feeling of “isolation, grinning in the face of a scary and unknown future.” Brady Gerber, *Robert Frank: The Photographer Behind 'Exile On Main Street'*, INT'L MUSIC BLOG (Aug. 3, 2015), <https://www.headphonenation.net/robert-frank-the-photographer-behind-exile-on-main-st/>, archived at <https://perma.cc/M96F-BA2L>.

\*\* Associate Professor of Clinical Law and Co-Faculty Director of the Center on Race, Inequality, and the Law, New York University School of Law. I thank Richard Buery, I. Bennett Capers, Kim Forde-Mazrui, Rigel Oliveri, Tony Thompson, Melissa Murray, and Michael Pinard for their insightful suggestions and comments on earlier drafts. The article also benefited from conversations with Vicki Been, Peggy Cooper-Davis, Andrew Scherer, and Jason Parkin. I also appreciate the helpful comments I received from participants at the 2019 Culp Colloquium at Duke Law School and the Fourth National People of Color Legal Scholarship Conference. I am grateful to Nelson Castaño, Camil Sanchez-Palumbo, and Sarah Taitz for their excellent research assistance. The editors of the Harvard Civil Rights-Civil Liberties Law Review offered excellent editorial assistance. I gratefully acknowledge support from the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law.

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## INTRODUCTION

Throughout the United States, and across the political spectrum, there is a growing consensus about the deleterious and racially discriminatory impacts of excluding people from civil society based on their prior contacts with the criminal legal system.<sup>1</sup> As a result, we have seen in recent years a number of proposals to ensure that criminal legal system contacts do not bar inclusion in areas such as employment and political participation.<sup>2</sup> However, the opposite is

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<sup>1</sup> See, e.g., Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 GEO. J. ON POVERTY L. & POL'Y 313, 314 (2006) (“While formerly incarcerated people are expected to rejoin society and lead crime-free lives, they confront numerous obstacles to successful reentry at every turn.”); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 253 (2002) (“[C]ollateral consequences may be the most significant penalties resulting from a criminal conviction.”); Danielle R. Jones, *When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 STAN. J. C.R. & C.L. 237, 237–40 (2015) (discussing the collateral consequences faced by people with criminal records and noting the racial imbalance among individuals prosecuted in criminal court); John G. Malcolm, *The Problem with the Proliferation of Collateral Consequences*, 19 FEDERALIST SOC'Y REV. 36, 42 (2018) (“[I]t is important that we do everything we can to encourage [people with past criminal convictions] to become productive, law-abiding members of society and that we not put too many impediments, in the form of excessive collateral consequences, in their way that will hinder their efforts.”); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 624 (2006) (“The past few years have brought dramatically increased attention to the collateral consequences of criminal convictions . . .”). Even the Koch brothers support reform. See Mark V. Holden, *The Second Chance: A Movement to Ensure the American Dream*, 87 UMKC L. REV. 61, 62 (2018) (noting that Koch Industries has advocated for criminal justice reform).

<sup>2</sup> See, e.g., BETH AVERY & PHIL HERNANDEZ, NAT'L EMP'T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1 (2018), <http://stage.nelp.org/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>, archived at <https://perma.cc/795Y-A8AA> (describing the increasing trend of “ban-the-box” legislation, which requires employers to remove conviction questions from job applications); Sam Levine & Ariel Edwards-Levy, *Most Americans Favor Restoring Felons' Voting Rights, But Disagree On How*, HUFFINGTON POST (Mar. 21, 2018), [https://www.huffingtonpost.com/entry/felons-voting-rights-poll\\_us\\_5ab2c153e4b008c9e5f3c88a](https://www.huffingtonpost.com/entry/felons-voting-rights-poll_us_5ab2c153e4b008c9e5f3c88a), archived at <https://perma.cc/JV28-EP7K> (discussing existing support for and initiatives geared towards restoring voting rights for people with past criminal convictions); Tamara Lush, *Florida Passes Amendment to Restore Felons' Voting Rights*, ASSOCIATED PRESS (Nov. 8, 2018), <https://www.apnews.com/92645d2e14404d459bbc62e64dc4f2d6>, archived at <https://perma.cc/34DH-LZT2> (“Florida added 1.4 million possible voters to the rolls when it passed Amendment 4, a measure restoring voting rights of felons who have served their sentences.”); Vann R. Newkirk II, *How Letting Felons Vote is Changing Virginia*, THE ATLANTIC (Jan. 8, 2018), <https://www.theatlantic.com/politics/archive/2018/01/virginia-clemency-restoration-of-rights-campaigns/549830/>, archived at <https://perma.cc/K2KB-WM3D> (discussing Governor Terry McAuliffe’s pardoning of over 150,000 people in Virginia to restore

true in what is perhaps the most critical marker of civil inclusion: having a stable and affordable place to live. We have seen an expansion of policies designed to exclude people with criminal legal system contacts from access to both public and private housing. Indeed, the housing market and criminal legal system are becoming an interlocking snare, combining to exclude individuals—and their families—who have had even minimal contacts with the criminal legal system.<sup>3</sup> This Article describes the result as exile because people are effectively barred or expelled from their communities and homes for punitive or political reasons.

The federal government began excluding people with criminal legal system involvement from federally subsidized housing in 1975. In that year, the Department of Housing and Urban Development issued regulations instructing local public housing authorities (“PHAs”) to consider the criminal histories of applicants for public housing in leasing decisions.<sup>4</sup> By the late 1980s, this initial regulation evolved into a “hodgepodge of exclusionary policies,”<sup>5</sup> including a “one-strike” eviction policy<sup>6</sup> and mandatory lifetime bans,<sup>7</sup> that have had devastating consequences for individuals and their families.

These exclusionary policies have since spread from public housing to the private rental housing market through the promulgation of crime-free municipal housing ordinances. These ordinances are local regulations that either encourage or require private landlords to evict or exclude tenants who have had varying levels of contact with the criminal legal system—in some cases mere suspicion of criminal activity—or whose presence is otherwise deemed a threat.<sup>8</sup> By one

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their voting rights); *see also* First Step Act of 2018, Pub L. No. 115-391, 132 Stat. 5194 (reauthorizing the Second Chance Act of 2007, including funding for several programs to support successful reentry of formerly incarcerated people).

<sup>3</sup> There are approximately 1.2 million families living in public housing, who are subject to the criminal bars discussed *infra* in Section I.A. *See HUD’s Public Housing Program*, U.S. DEP’T OF HOUS. & URBAN DEV. [https://www.hud.gov/topics/rental\\_assistance/phprog](https://www.hud.gov/topics/rental_assistance/phprog), *archived at* <https://perma.cc/X848-PKE3> (last visited Nov. 19, 2018). Criminal bars are also increasingly prevalent in the private rental housing context, through crime-free municipal ordinances and nuisance ordinances. *See infra* Section 1.A.

<sup>4</sup> 40 Fed. Reg. 33,446 (Aug. 8, 1975) (codified at 24 C.F.R. §§ 960.203(c)(2)–(3) (2015)).

<sup>5</sup> Lahny R. Silva, *Criminal Histories in Public Housing*, 2015 WIS. L. REV. 375, 380 (2015).

<sup>6</sup> 42 U.S.C. §§ 1437d(l)(6)–(9) (2013) (stating that public housing agencies shall provide terms in leases that provide for termination of tenancy when the tenant engages in certain felonies or crimes).

<sup>7</sup> 42 U.S.C. § 1437n(f) (2016) (imposing a lifetime ban from public housing on people found to have produced methamphetamine on the premises); 42 U.S.C. § 13663(a) (1999) (“Notwithstanding any other provision of law, an owner of federally assisted housing shall prohibit admission to such housing for any household that includes any individual who is subject to a lifetime registration requirement under a State sex offender registration program.”).

<sup>8</sup> *See generally* Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, MICH. L. REV. (forthcoming 2019) (discussing how crime-free housing ordinances reinforce and perpetuate racially segregated communities and arguing that these ordinances should be challenged under the Fair Housing Act of 1968); Kathryn V. Ramsey, *One-Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law*, 65

estimate, there are approximately 2,000 such ordinances currently in place around the country.<sup>9</sup>

This Article calls these policies, taken together, policing-based housing policies. The name is apt because these policies are grounded in popular theories of policing, such as “broken windows policing,” which is founded on the belief that addressing disorder in a community will stem more serious crimes,<sup>10</sup> and “hot-spots policing,” where policing resources are focused on small geographic areas where crime is said to be highly concentrated.<sup>11</sup> Also, they adopt many of the enforcement goals, strategies, values, and narratives of the criminal legal system.<sup>12</sup> Moreover, these policing-based housing policies give police officers and “citizen police” vast power to determine who can and cannot live in certain communities. These housing policies can become tools of law enforcement agencies, with landlords being enlisted to police their tenants and neighbors.<sup>13</sup> In turn, residents may use policing-based housing policies and the police as tools of social exclusion.

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UCLA L. REV. 1146, 1152 (2018) (examining crime-free municipal ordinances as an outgrowth of federal “one-strike” policies); Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 825 (2015) (arguing that home rule authority is increasingly used by municipalities as a form of third-party policing, which governs families and intimate spaces); EMILY WERTH, SARGENT SHRIVER NAT’L CTR. ON POVERTY LAW, *THE COST OF BEING “CRIME FREE”: LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES* 15 (2013) (“Some municipalities have also adopted ordinances that require landlords to perform criminal background checks of prospective tenants or authorize the municipality to impose background screening as a condition for a landlord facing enforcement to avoid penalties.”).

<sup>9</sup> Peter Edelman, *More than a Nuisance: How Housing Ordinances are Making Poverty a Crime*, THE NEW REPUBLIC (Apr. 10, 2018), <https://newrepublic.com/article/147359/nuisance-laws-making-poverty-crime>, archived at <https://perma.cc/385M-ANZ2>.

<sup>10</sup> For explanation and critique of “broken windows” policing, see generally K. Babe Howell, *The Costs of “Broken Windows” Policing: Twenty Years and Counting*, 37 CARDOZO L. REV. 1059, 1060–61 (2016).

<sup>11</sup> For explanation and critique of “hot-spots” policing, see generally Tammy Rinehart Kochel, *Constructing Hot Spots Policing: Unexamined Consequences for Disadvantaged Populations and for Police Legitimacy*, 22 CRIM. JUST. POL’Y REV. 350, 351–52 (2011); David Weisburd, *Place-Based Policing*, IDEAS IN AMERICAN POLICING (Police Found., Wash., D.C.) Jan. 2008, at 1; Anthony A. Braga & David Weisburd, *Problem-Oriented Policing: The Disconnect Between Principles and Practice*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 133 (Cambridge University Press, 2006).

<sup>12</sup> See Ramsey, *supra* note 8, at 1158 (“Many of the activities targeted by broken windows and other order-maintenance policing tactics are regulated by state or federal criminal law, but also often by municipal law.”); see generally Archer, *supra* note 8 (discussing the role of principles of policing in crime-free housing ordinances).

<sup>13</sup> See Swan, *supra* note 8, at 825 (“In third-party policing, the state requires private parties—who neither participate in nor benefit from the misconduct they are compelled to address—to enforce laws and prevent misconduct by enacting some method of control over a primary wrongdoer.”).

Several scholars and advocates have written about public housing exclusions.<sup>14</sup> Commentators, however, have not looked at these exclusions in combination with broader policing-based housing policies. Lost in previous reviews is an exploration of how different policies work together to lock people out of communities altogether. When the full array of restrictions on public and private housing is scrutinized, it becomes clear that stable and affordable housing is put out of reach for many. The desire to punish and exclude has overwhelmed the need to provide housing, opportunity, and second chances. The increasing adoption of policing-based housing policies by municipalities and public housing authorities leads to fewer housing options available to those whose choices are already limited. Thus, individuals who have contact with the criminal legal system, and their families, are effectively exiled.

As the number and reach of policing-based housing policies have grown, they have also become entangled with societal assumptions about the criminality of people of color and the criminal legal system's steady march toward mass criminalization. One report found that white Americans associated people of color with crime and overestimated the proportion of crimes committed by people of color.<sup>15</sup> One example noted in the report is that white survey respondents overestimated the percentage of burglaries, illegal drug sales, and juvenile crimes committed by Black people by twenty to thirty percent.<sup>16</sup> In another study, sixty percent of people who viewed a crime story with no picture of the perpetrator falsely recalled seeing one.<sup>17</sup> Of those people, seventy percent believed that the perpetrator they saw was Black.<sup>18</sup> Moreover, white people who

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<sup>14</sup> See, e.g., Ann Cammett, *Confronting Race and Collateral Consequences in Public Housing*, 39 SEATTLE U. L. REV. 1123, 1137–38 (2016); Michelle Y. Ewert, *One Strike and You're Out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violates Due Process and Fair Housing Principles*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 57, 59 (2016); Lahny R. Silva, *Collateral Damage: A Public Housing Consequence of the "War on Drugs"*, 5 U.C. IRVINE L. REV. 783, 785–86 (2015); Jess Kropf, *Keeping "Them" Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Caste*, 4 GEO. J.L. & MOD. CRIT. RACE PERSP. 75, 77–78 (2012); Wendy J. Kaplan & David Rossman, *Called "Out" at Home: The One Strike Eviction Policy and Juvenile Court*, 3 DUKE F. L. & SOC. CHANGE 109, 110 (2011).

<sup>15</sup> Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, SENTENCING PROJECT 1, 3 (2014), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf>, archived at <https://perma.cc/2LVH-SV6J>.

<sup>16</sup> *Id.* See also Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOC., 717, 722 (2001) (finding that "the stereotype of blacks as criminals is widely known and is deeply embedded in the collective consciousness of Americans"); Christina Mancini, Daniel P. Mears, Eric A. Stewart, Kevin M. Bearer & Justin T. Pickett, *Whites' Perceptions About Black Criminality: A Closer Look at the Contact Hypothesis*, 6 CRIME & DELINQ. 996, 997 (2015) (noting that "considerable scholarship has explored the 'racialization of crime'").

<sup>17</sup> Lisa Bloom, *SUSPICION NATION: THE INSIDE STORY OF THE TRAYVON MARTIN INJUSTICE AND WHY WE CONTINUE TO REPEAT IT* 231–32 (2014).

<sup>18</sup> *Id.*

associate crime with Black and Latinx people are more likely to support punitive policies.<sup>19</sup>

Mass criminalization has been defined as “the criminalization of relatively non-serious behavior or activities and the multiple ways in which criminal justice actors, norms, and strategies shape welfare state processes and policies.”<sup>20</sup> Despite a growing consensus about the problem of mass incarceration, and high-profile efforts to reverse America’s race-driven over-reliance on imprisonment,<sup>21</sup> mass criminalization has seeped into virtually every aspect of society. Through expanding definitions of crime, criminal law-based responses to social problems, the increased use of “criminalizing narratives,”<sup>22</sup> and the persistence of “Living While Black” incidents, the criminal legal system continues to expand its reach while entrapping more people in its web. Against this backdrop, policing-based housing policies act as a system of essentially racialized agreements between community members to exclude people of color. This regime takes on added dimensions as policing-based housing policies migrate from public housing to reach relatively privileged people of color who have the desire and means to live in historically white communities. In that context, these policies have the potential to facilitate legally permissible racial segregation—racially restrictive covenants in disguise—to ward off integration by people with means.

Keith Landers’s story provides one example of the ways in which policing-based housing policies and mass criminalization have merged in some communities to disqualify people for housing because of non-violent, often low-level offenses that are frequently the result of poverty, homelessness, racial bias, or mass criminalization. For over a decade, Mr. Landers lived on the streets of Chicago while on the waitlist for public housing.<sup>23</sup> During that period,

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<sup>19</sup> THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 3–4 (2014).

<sup>20</sup> Devon W. Carbado, *Blue-On-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L. J. 1479, 1487 (2016).

<sup>21</sup> See, e.g., The First Step Act of 2018, Pub. L. No. 115-39, 132 Stat. 5194 (including sentencing reform measures and addressing racial disparities in the federal prison system); Jennifer Gonnerman, *Larry Krasner’s Campaign to End Mass Incarceration*, THE NEW YORKER (Oct. 29, 2018) <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration>, archived at <https://perma.cc/9MDD-QK64> (discussing the Philadelphia District Attorney’s efforts to end mass incarceration); *Smart Justice*, ACLU, <https://www.aclu.org/issues/smart-justice>, archived at <https://perma.cc/32G8-J3AH> (last visited Nov. 20, 2018) (describing a large national campaign for reform of mass incarceration).

<sup>22</sup> Criminalizing narratives are the stories we tell about the nature of crime and the people alleged to perpetuate it. ANDREA J. RITCHIE & BETH RITCHIE, BARNARD CTR. FOR RESEARCH ON WOMEN, THE CRISIS OF CRIMINALIZATION: A CALL FOR A COMPREHENSIVE PHILANTHROPIC RESPONSE 9 (2017) (“Criminalization is the social and political process by which society determines which actions or behaviors—and by who—will be punished by the state.”).

<sup>23</sup> *Landers v. Chicago Hous. Auth.*, 936 N.E.2d 735, 736–37 (Ill. App. Ct. 2010).

Mr. Landers was questioned and arrested by the police seventeen times for a range of felony, misdemeanor, and civil ordinance charges.<sup>24</sup> All of the charges had been dismissed, except for a civil ordinance violation for drinking in public.<sup>25</sup> Mr. Landers maintained that the police often questioned and arrested him simply because he was homeless.<sup>26</sup> Thirteen years after Mr. Landers submitted a housing application with the Chicago Housing Authority, he was notified that he had finally reached the top of the waiting list.<sup>27</sup> The Chicago Housing Authority subsequently conducted a criminal background check on Mr. Landers and informed him that his application was rejected because of his history of arrests.<sup>28</sup> He was deemed ineligible for public housing and marked for removal from the waitlist. Even if Mr. Landers could afford to rent private housing, in many communities around the country his history of arrests would similarly disqualify him.<sup>29</sup>

Legal scholars have explored the impact of exclusionary housing policies in federally subsidized<sup>30</sup> and private housing.<sup>31</sup> However, the aggregate impact on individuals, families, and communities of simultaneously excluding people with criminal legal system contacts from *all of* these housing options has received little attention. This article contributes to and extends that conversation. Part I maps the growing web of policing-based housing restrictions and explores their merger with the criminal legal system. Part II explores the connection between the prevalence of housing exclusions based on contacts with the criminal legal system and America's traditional embrace of exclusion. This exclusion comes in response to a threat—real and perceived—or an impulse to exclude people deemed unworthy of citizenship or membership in the community. Part III discusses the collective impact of public and private housing restrictions in

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 737.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 736–37.

<sup>28</sup> *Id.* The fact that the Chicago Housing Authority treated Mr. Landers' arrests as equivalent to guilt is in itself problematic. See Anna Roberts, *Arrests as Guilt*, 60 ALA. L. REV. (forthcoming 2019) (examining how the general, incorrect fusion of arrest and guilt spells out the need for different kinds of criminal justice reform).

<sup>29</sup> See *infra* Section I.B. Mr. Landers was lucky; a court ultimately held that he should not have been denied access to public housing, because his arrest record did not establish that he posed a threat: many arrests were dismissed and based on his homelessness.

<sup>30</sup> See, e.g., Cammett, *supra* note 14, at 1124 (“Evictions, denial of admission, and permanent exclusion of family members from public housing—based on almost *any* type of criminal system exposure—have served to further entrench poverty, contribute to homelessness, and trigger unwarranted family disruption.”); Ewert, *supra* note 14, at 59 (arguing that the demographic makeup of public housing and negative views of people who receive public benefits have led to the creation of the “one strike” eviction policy); Silva, *supra* note 14, at 785 (noting that federal law provides public housing authorities with extraordinary discretion in determining whether members or guests violate lease agreements).

<sup>31</sup> See generally Ramsey, *supra* note 8, at 1176–77 (discussing the impact of crime-free housing ordinances on private market tenants).



taking stable housing out of reach for many impacted people, pushing them further to the margins. Part IV discusses the problem of mass criminalization and the increasing number and range of people coming into contact with the criminal legal system. This Part also addresses the influence that mass criminalization has on the proliferation of policing-based housing policies that exclude people who have had no contact, or no meaningful contact, with the criminal legal system. Part V concludes by encouraging a decoupling of housing policies from the criminal legal system. Drawing on the admonition in *Southern Burlington County NAACP v. Township of Mount Laurel*<sup>32</sup> that municipalities should act to promote the general welfare of all of its citizens, the Article encourages rejection of policies that promote perpetual punishment and exile. The Article shows that emerging policy and legislation is moving away from mass criminalization, offering hope in ending the exile caused by policing-based housing policies.

## I. THE EVOLUTION AND EXPANSION OF POLICING-BASED HOUSING POLICIES

Across the country, justice-involved people and their families are being excluded from the housing market through the use of policing-based housing policies. These housing policies take various forms, but all encourage or require public housing authorities or private landlords to take steps aimed at keeping people with criminal legal system contacts out of rental housing. This Part discusses the range of exclusionary housing policies in public and private housing and the growing entanglement of policing policy and housing determinations. These restrictions purport to promote safety by excluding people who are alleged to bring crime into the community, but the resulting web entraps people who do not pose a threat to the health or safety of other residents, often excluding those desperately in need of housing. Through the cumulative impact of public and private policing-based housing policies, people who have been convicted of crimes or suspected of criminal activity are exiled from their communities and face the risk of homelessness.

### A. Federally Subsidized Housing

“If you break the law, you no longer have a home in public housing, ‘one strike and you’re out.’ That should be the law everywhere in America.”<sup>33</sup>

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<sup>32</sup> 336 A.2d 713 (N.J. 1975).

<sup>33</sup> President William J. Clinton, Remarks by the President at One Strike Crime Symposium (Mar. 28, 1996).

*Statutory History of Public Housing Exclusions*

In response to what it called a “reign of terror” in public housing,<sup>34</sup> Congress passed the Anti-Drug Abuse Act of 1988.<sup>35</sup> The Act gave PHAs the authority to exclude applicants with criminal records and to evict tenants who engaged in undefined “criminal activity.”<sup>36</sup> The Act also required that all public housing leases contain a provision stating that:

A public housing tenant, any member of the tenant’s household, or a guest or other person under the tenant’s control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.<sup>37</sup>

Almost a decade later, President Clinton sought to deepen these restrictions. During his 1996 State of the Union Address, President Clinton laid the foundation for the “One Strike And You’re Out” policy.<sup>38</sup> His policy coupled increases in funding for public housing authorities with enforcement of the one-strike eviction policy.<sup>39</sup> In response to this action by the Department of Housing and Urban Development (“HUD”), Congress passed the Housing Opportunity and Extension Act in order to amend the Anti-Drug Abuse Act and expand the reach of the policy to cover any drug-related criminal activity, whether or not it

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<sup>34</sup> Anti-Drug Abuse Act of 1988, 42 U.S.C. § 11901(3) (1988) (“The Congress finds that . . . drug dealers are increasingly imposing a reign of terror on public housing tenants.”). It is important to recognize that these screening and eviction policies were in response to calls to protect public housing tenants from widespread criminal activity in their homes. See ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* 75–76 (2008). However, while the goal was laudable, the implementation has disproportionately impacted poor people of color deeply in need of support. Regina Austin, *Step on A Crack, Break Your Mother’s Back: Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 *YALE J.L. & FEMINISM* 273, 275 (2002) (“Chief among those adversely impacted by the [One Strike] campaign have been poor singly minority female heads of household, often senior citizens . . .”); Lisa Weil, *Drug-Related Evictions in Public Housing: Congress’ Addiction to a Quick Fix*, 9 *YALE L. & POL’Y REV.* 161, 175–78 (1991) (noting that the discretion granted to public housing authorities to evict under the one-strike rule means that racial prejudices might control decisions, and that while one offense committed by a public housing resident might result in homelessness, the same offense may only result in drug treatment for someone else in the middle class).

<sup>35</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

<sup>36</sup> 42 U.S.C. § 1437d(l)(6) (2013).

<sup>37</sup> *Id.*

<sup>38</sup> THOMPSON, *supra* note 34, at 77.

<sup>39</sup> U.S. DEP’T OF HOUS. & URBAN DEV., NOTICE PIH 96-16 (HA), “ONE STRIKE AND YOU’RE OUT” SCREENING AND EVICTION GUIDELINES FOR PUBLIC HOUSING AUTHORITIES (HAS) (1996) (“This Notice . . . provides guidance to enhance the ability of public housing agencies to develop and enforce stricter screening and eviction as part of their anti-drug, anti-crime initiatives.”); see also THOMPSON, *supra* note 34, at 77 (outlining the one-strike eviction policy).

occurred on public housing premises.<sup>40</sup> The new mandatory lease provision states:

[A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.<sup>41</sup>

Similar to the provisions adopted in 1988, the new lease provision continues to utilize essentially undefined "criminal activity" as the basis for evictions. The Housing Opportunity and Extension Act also authorizes PHAs to ban applicants *suspected* of using drugs, abusing alcohol, or anyone otherwise engaged in drug or alcohol use that could "interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents."<sup>42</sup>

People who participate in the Housing Choice Voucher Program, commonly referred to as Section 8, are also subject to these restrictions.<sup>43</sup> Under Section 8, PHAs issue vouchers to tenants to subsidize the cost of renting an apartment operated by a private landlord.<sup>44</sup> Section 8 regulations require PHAs to allow for termination of Section 8 rental assistance for a household's drug-related and violent criminal activity on or near the premises.<sup>45</sup> Any criminal

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<sup>40</sup> Housing Opportunity Program Extension Act of 1996, § 9(a)(1)(A), Pub. L. No. 104-120, 110 Stat. 834.

<sup>41</sup> 42 U.S.C. § 1437d(l)(6) (2013). It is important to note that federal regulations only impose lifetime bans on individuals convicted of producing methamphetamine on public housing grounds or individuals who must register as a sex offender. However, these regulations also give local housing authorities the discretion to expand the categories of individuals excluded from public housing. As a result, local PHAs rely on the broad language of "any criminal activity" to exclude individuals convicted of any type of crime, even crimes that do not implicate health or safety concerns.

<sup>42</sup> Housing Opportunity Program Extension Act, *supra* note 40, at § 9(e)(1)(A)(ii).

<sup>43</sup> What is commonly referred to collectively as Section 8 is comprised of two distinct programs: the Housing Choice Voucher program and the Project-based Rental Assistance. See CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: FEDERAL RENTAL ASSISTANCE 1 (2017), <https://www.cbpp.org/research/housing/policy-basics-federal-rental-assistance>, archived at <https://perma.cc/8SYJ-UM54> ("Three major programs—Housing Choice Vouchers, Section 8 Project-based Rental Assistance, and Public Housing—assist about 90 percent of the households receiving federal rental assistance.").

<sup>44</sup> CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: THE HOUSING CHOICE VOUCHER PROGRAM 1 (2017), <https://www.cbpp.org/research/housing/policy-basics-the-housing-choice-voucher-program?fa=view&id=279>, archived at <https://perma.cc/X3P6-UXZ9> ("Low-income families use vouchers to help pay for housing in the private market.").

<sup>45</sup> PHA Denial or Termination of Assistance for Family, 24 C.F.R. § 982.552(c)(1)(i) (2019) (linking termination in the program to an obligation from 24 C.F.R. § 982.551 that members of a participating household not engage in activities that threaten "the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises"); Denial of Admission and Termination of Assistance for Criminal and Alcohol

activity by a tenant, anyone living in a tenant's household, or a guest may also result in termination of the household's rent subsidy.<sup>46</sup> Furthermore, Section 8 landlords must include the following clause in lease agreements:

[D]uring the term of the lease, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any violent or drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.<sup>47</sup>

This rental clause is identical to the one required for public housing lease agreements.<sup>48</sup> Finally, PHAs have interpreted the statutory language to allow them to decline to enter into a Section 8 contract with a landlord who refuses to evict households where members or guests are alleged, based on convictions or arrests, to have engaged in “drug-related or violent criminal activity.”<sup>49</sup>

#### *Implementation and the Exercise of Discretion*

To further implementation of the legislation, HUD published a *One Strike Guide* that included guidelines encouraging PHAs to “take full advantage of their authority to use stringent screening and eviction procedures.”<sup>50</sup> PHAs have heeded that encouragement. As a result, a significant number of public housing authorities adopted policies that reach far beyond the mandates of the legislation<sup>51</sup> and any reasonable definition of “criminal activity” that would

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Abusers, 24 C.F.R. § 982.553(b)(1)(iii) (2019) (“The PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that any family member has violated the family’s obligation under § 982.551 not to engage in any drug-related criminal activity.”); 24 C.F.R. § 982.553(b)(2) (2019) (“The PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that any household member has violated the family’s obligation under § 982.551 not to engage in violent criminal activity.”).

<sup>46</sup> 42 U.S.C. § 1437f(o)(7)(D) (2018) (stating that leases shall provide that “any criminal activity . . . engaged in by a tenant of any unit, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy”).

<sup>47</sup> *Id.*

<sup>48</sup> 42 U.S.C. § 1437d(l)(6) (2013).

<sup>49</sup> 42 U.S.C. § 1437f(o)(6)(C) (2018) (“[A] public housing agency may elect not to enter into a housing assistance payments contract . . . with an owner who refuses . . . to take action to terminate tenancy for . . . drug related or violent criminal activity.”).

<sup>50</sup> U.S. DEP’T OF HOUS. & URBAN DEV., “ONE STRIKE AND YOU’RE OUT” POLICY IN PUBLIC HOUSING 3 (Mar. 1996).

<sup>51</sup> See generally MARIE CLAIRE TRAN-LEUNG, SARGENT SHRIVER NAT’L CTR. ON POVERTY LAW, WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS

impact the health, safety, and enjoyment of other tenants. For example, PHAs have excluded applicants with records for crimes such as jaywalking and public transit violations.<sup>52</sup> Many PHAs reject applicants based solely on their record of arrests and the arrests of their families, whether or not those arrests have resulted in conviction.<sup>53</sup> These exclusions include cases where the arrests are for minor misdemeanors and infractions.<sup>54</sup>

The guidelines allow PHAs to consider criminal activity that occurred within a “reasonable time” before the screening takes place. A considerable number of PHAs have used this to justify the adoption of unreasonably long “lookback” periods, some as long as twenty years, when considering an applicant’s criminal records, whether or not those past infractions should reasonably be considered

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BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 22–27 (2015). But note that under the Obama Administration, HUD modified its position in favor of creating “second chances” for people with criminal records. In 2011, HUD issued a letter urging PHAs to exercise their “broad discretion,” in order to allow for “second chances” for people with criminal legal involvement. Letter from Shaun Donovan, Sec’y, U.S. Dep’t of Hous. & Urban Dev., to Pub. Hous. Auth. Exec. Dirs. (June 17, 2011),

[https://www.usich.gov/resources/uploads/asset\\_library/Rentry\\_letter\\_from\\_Donovan\\_to\\_PHAs\\_6-17-11.pdf](https://www.usich.gov/resources/uploads/asset_library/Rentry_letter_from_Donovan_to_PHAs_6-17-11.pdf), *archived at* <https://perma.cc/5VDH-KNDM>. In 2015, HUD issued a notice to “inform PHAs and owners of other federally-assisted housing that arrest records may not be the basis for denying admission, terminating assistance or evicting tenants, to remind PHAs and owners that HUD does not require their adoption of ‘One Strike’ policies, and to remind them of their obligation to safeguard the due process rights of applicants and tenants.” U.S. DEP’T OF HOUS. & URBAN DEV., NOTICE PIH 2015-19, GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS (2015),

<https://www.hud.gov/sites/documents/PIH2015-19.PDF>, *archived at*

<https://perma.cc/2MHK-4SL2>. The Trump administration has not yet specifically addressed this topic, but has generally been attempting to roll back the Obama Administration’s steps towards fair housing. *See* Glenn Thrush, *Under Ben Carson, HUD Scales Back Fair Housing Enforcement*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html>, *archived at* <https://perma.cc/7RFA-5H5A> (noting changes made by HUD under the Trump Administration that had the effect of scaling back fair housing efforts implemented under the Obama Administration).

<sup>52</sup> *See* HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 46 (2004),

<https://www.hrw.org/sites/default/files/reports/usa1104.pdf>, *archived at*

<https://perma.cc/594G-KU5A> (“Just about any offense will do, even if it bears scant relation to the likelihood the applicant will be a good tenant.”); *see also* John F. Ammann, *Criminal Records of the Poor and Their Effects on Eligibility for Affordable Housing*, 9 J. AFFORDABLE HOUSING 222, 222–24 (2000) (noting that many homeless people have trouble being approved for housing because of “minor criminal problems” dealing with transit offenses).

<sup>53</sup> *Id.* at 44 (“HUD guidelines allow PHAs to reject applicants based solely on arrest records even if the charges were ultimately dropped, and many do just that.”).

<sup>54</sup> *Id.* at 46.

relevant to future behavior.<sup>55</sup> Some jurisdictions use lookback periods as long as ten to twenty years.<sup>56</sup> One jurisdiction in Texas expressed it simply: “We do not allow people convicted of felonies to live here.”<sup>57</sup> Some PHAs, like Albany, Georgia; Bangor, Maine; Milwaukee, Wisconsin; and Yakima, Washington, use open-ended language in the information provided to potential renters stating that PHAs are “not required or obligated to assist applicants who . . . [h]ave a history of criminal activity by any household member.”<sup>58</sup>

Section 8 programs have adopted similar policies. For example, in Dubuque, Iowa, an applicant with a felony conviction must wait seven years before being eligible for a Housing Choice Voucher.<sup>59</sup> AIMCO, a real estate company and one of the largest owners of apartment buildings in the country, excludes tenants from project-based Section 8 for any felony record, in addition to explicitly excluding potential tenants with convictions for crimes such as “public intoxication, cable theft, . . . littering, shoplifting, . . . fishing/hunting without a license, loitering, [and having] . . . overgrown grass.”<sup>60</sup>

In *Department of Housing and Urban Development v. Rucker*<sup>61</sup> the Supreme Court sanctioned this harsh regime and held that local housing authorities have 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.*”<sup>62</sup> The policies and practices upheld by the Court led to the eviction of public housing tenants like Pearlie Rucker, a sixty-three-year-old great-grandmother who lived in public housing with her mentally disabled adult daughter, her two grandchildren, and one great-granddaughter.<sup>63</sup> Ms. Rucker was evicted when her daughter was found with cocaine three blocks from their public housing apartment.<sup>64</sup> These laws and policies also led to the eviction of Willie Lee, a public housing tenant for over twenty-five years, and Barbara Hill, a public housing tenant for over thirty years, whose grandsons were found

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<sup>55</sup> See TRAN-LEUNG, *supra* note 51, at 12 (“Despite HUD’s suggestion that five years is a reasonable lookback period of serious crimes, a number of housing providers look further back, some as long ago as twenty years.”).

<sup>56</sup> *Id.* at 12.

<sup>57</sup> *Id.* at 1.

<sup>58</sup> *Id.* at 11 (alteration in the original).

<sup>59</sup> *Id.* at 25.

<sup>60</sup> *Id.*

<sup>61</sup> 535 U.S. 125 (2002).

<sup>62</sup> *Id.* at 130 (emphasis added). Courts have extended the holding in *Rucker* to Section 8 rental agreements. Robert Van Someren Greve, *Protecting Tenants Without Preemption: How State and Local Governments Can Lessen the Impact of HUD’s One-Strike Rule*, 25 GEO. J. ON POVERTY L. & POL’Y 135, 140–41 (2017) (citing *Camco, Inc. v. Lowery*, 839 N.E.2d 655, 668–70 (Ill. App. Ct. 2005), and *Scarborough v. Winn Residential L.L.P.*, 890 A.2d 249, 251–52, 255–59 (D.C. 2006)).

<sup>63</sup> *Rucker v. Davis*, 237 F.3d 1113, 1117 (9th Cir. 2001), *rev’d sub nom.* Dep’t of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002).

<sup>64</sup> *Rucker*, 535 U.S. at 128.

smoking marijuana in the parking lot of their apartment building.<sup>65</sup> Herman Walker, a seventy-five-year-old disabled man, was also evicted from his public housing unit when his live-in caretaker was found with cocaine in the unit.<sup>66</sup> None of these tenants, their families, or household members was accused of dealing drugs or engaging in violent criminal activity, and none were accused of behavior that created a demonstrable risk to resident safety.<sup>67</sup>

It is important to note that some of the overly broad interpretations of these regulations are motivated by the need to make difficult distinctions in distributing a scarce resource. The United States has a shortage of approximately 7.4 million affordable housing units for low-income families.<sup>68</sup> As a result, across the country, the demand for public housing far exceeds its availability.<sup>69</sup> PHAs must use some selection method to narrow the list of individuals in need of housing assistance to determine who will ultimately receive housing. However, in narrowing down the list of public housing applicants, PHAs are engaging in a value judgment and using unfair and discriminatory criteria to determine who is most deserving. By relying on arrests, by penalizing individuals for the conduct of friends or family members, and by relying on an unconstrained range of previous convictions as a proxy for worthiness, these exclusionary public housing policies disproportionately impact people of color.<sup>70</sup> Moreover, through this process, applicants and residents are criminalized — regularly branded as potentially violent or dangerous criminals based on allegations of relatively minor infractions and living under constant surveillance for evidence of violations that could justify their eviction.<sup>71</sup>

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<sup>65</sup> *Rucker*, 237 F.3d at 1117.

<sup>66</sup> *Id.*

<sup>67</sup> See also Austin, *supra* note 34, at 275–76 (“Chief among those adversely impacted by the [one-strike] campaign have been poor single minority female heads of household, often senior citizens, who are living with their actual or adopted offspring, one or more of whom, usually an adolescent or young adult male child or grandchild, sells or possesses drugs. The mothers and grandmothers (though sometimes it is a sister, aunt, cousin, wife, or girlfriend) are in general innocent, often even ignorant, of any criminal activity, but are nonetheless held responsible for the conduct of the other occupants of their units.”).

<sup>68</sup> NAT’L LOW INCOME HOUS. COAL., *THE GAP: A SHORTAGE OF AFFORDABLE HOMES 2* (2017).

<sup>69</sup> See, e.g., U.S. DEP’T OF HOUS. & URBAN DEV., *Housing Choice Vouchers Fact Sheet*, [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8), archived at <https://perma.cc/NE5K-SKZY> (last visited Oct. 2, 2019) (noting that there are often long waiting periods for Section 8 housing because demand exceeds availability); Katie Lannan, *Demand for Public Housing Far Exceeds Availability*, METRO WEST DAILY NEWS (Mar. 7, 2019), <https://www.metrowestdailynews.com/news/20190307/demand-for-public-housing-far-exceeds-availability>, archived at <https://perma.cc/A9P8-AXRS> (reporting that there are 160,000 people on a waiting list for public housing in Massachusetts).

<sup>70</sup> See Archer, *supra* note 8, at 48 (arguing that “[d]ecision-making based on whether a person has involvement with the criminal legal system effectively functions as a racialized criterion”).

<sup>71</sup> A similar dynamic is at play in the public welfare system. As one scholar has explained:

Since the initial adoption of these laws and regulations, divisive rhetoric has fueled increasingly punitive and exclusionary federal public housing policies.<sup>72</sup> Policymakers have fed off of a narrative that residents of public housing are morally deficient and unworthy of public support.<sup>73</sup> Buying into these narratives makes it easier for policymakers to justify the exclusion of people in need of housing. In the context of federally subsidized housing, there are few first or second chances for individuals who have been convicted of crimes, suspected of criminal activity, or simply related to those convicted or suspected of criminal activity. Many of them are relegated to homelessness because of the lack of other affordable housing options and the realities of housing discrimination against people with criminal legal system contacts.<sup>74</sup> Those fortunate enough to have some financial resources will look for housing on the private rental market, where they are likely to encounter a new range of restrictions and exclusions in municipalities that have also adopted policing-based rental housing policies.

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[t]oday's welfare system treats those who use public benefits, or who even apply for benefits, as latent criminals. Nationwide, welfare recipients are treated as presumptive liars, cheaters, and thieves. Their lives are heavily surveilled and regulated, not only by the welfare system, but also by the criminal justice system.

KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* 1 (2012).

<sup>72</sup> See generally, Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1499–1502 (1991); Peter M. Cicchino, *The Problem Child: An Empirical Survey and Rhetorical Analysis of Child Poverty in the United States*, 5 J.L. POL'Y 5, 33–35 (1996); Lisa A. Crooms, *Don't Believe the Hype: Black Women, Patriarchy and the New Welfarism*, 38 HOW. L.J. 611, 620–24 (1995).

<sup>73</sup> See Ewert, *supra* note 14, at 59 (“[T]he demographic composition of public housing communities, and an attitude that these residents are ‘undeserving poor,’ has resulted in the persistence of the ‘one strike’ eviction policy that looms over public housing residents.”); Jaime Alison Lee, *Poverty, Dignity, and Public Housing*, 47.2 COLUM. HUM. RTS. L. REV. 97, 118 (Winter 2015) (“Despite the severe challenges they face, public housing residents remain subject to culturalism’s disdain.”). But see Austin, *supra* note 34, at 275 (“[O]ne-strike,’ . . . is premised on the notion that public housing residents, no less than private housing residents, deserve a safe and secure place to live.”).

<sup>74</sup> LEGAL ACTION CTR., *HELPING MOMS, DADS & KIDS TO COME HOME: ELIMINATING BARRIERS TO HOUSING FOR PEOPLE WITH CRIMINAL RECORDS* 2 (2016), <https://lac.org/resources/criminal-justice-resources/housing-resources/eliminating-barriers-housing-criminal-records/>, archived at <https://perma.cc/B4AN-ZKHG> (“[C]riminal record restrictions for public and private housing have been an accepted and enforced practice across the country for decades, leaving many young people and parents who have been caught in the web of the criminal justice system either homeless or living apart from each other.”); Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 269 (2009) (discussing the stigma associated with having been incarcerated); TRAN-LEUNG, *supra* note 51, at 2 (“Of the people who enter prison, roughly one out of ten will have experienced homelessness in the recent past. Of those who leave prison, one out of ten will experience homelessness in the future.”).



### *B. Crime Free Housing Ordinances: Policing-Based Housing Policies Migrate to Private Housing*

Crime-free housing ordinances are local laws that either encourage or require private landlords, through mandatory action or seemingly voluntary guidance, to exclude or evict tenants who have had some degree of contact with the criminal legal system.<sup>75</sup> The ordinances take various forms, but all encourage or require landlords in the municipality to take steps aimed at keeping “undesirable” people out of rental housing and, ultimately, out of the municipality altogether. Through purportedly voluntary programs, a municipality may offer a certification program for rental properties that allows landlords to advertise their properties as “crime-free” if the landlords or property managers attend a training session and take measures the municipalities claim will improve the safety of their property, such as conducting criminal background checks.<sup>76</sup> At the mandatory end of the spectrum, crime-free housing ordinances make alleged criminal activity a violation of the rental agreement, allowing police officers to decide whether a potential tenant’s criminal history disqualifies him from rental housing in the community or whether a tenant must be evicted because of alleged criminal activity. If the police determine that a landlord has failed to act on their determination, they may revoke her authorization to rent her property.<sup>77</sup>

Like restrictions on access to public housing passed in response to an alleged “reign of terror,” crime-free ordinances and programs have the purported goal of stemming crime in rental housing.<sup>78</sup> Crime-free ordinances have roots in the law enforcement community, are historically police-sponsored

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<sup>75</sup> See Archer, *supra* note 8, at 4 (“These local ordinances have the purported goal of stemming crime in rental housing by forcing landlords, either through mandatory action or seemingly voluntary guidance, to exclude or evict tenants who have had some degree of contact with the criminal legal system.”); WERTH, *supra* note 8, at 2–4 (discussing the types of requirements imposed on landlords in different types of crime-free housing ordinances). Crime free housing ordinances are often adopted alongside nuisance ordinances that require the eviction of tenants alleged to create nuisance on the property, often measured by calls for police assistance to the property. *Id.* at 4–5 (“Often municipalities will incorporate both the crime free rental housing and nuisance property elements into one ordinance or adopt both types of ordinances simultaneously.”).

<sup>76</sup> See, e.g., WILLIAM D. GORE, SAN DIEGO CTY. SHERIFF’S DEP’T, SAN DIEGO COUNTY CRIME FREE MULTI-HOUSING PROGRAM: KEEPING ILLEGAL ACTIVITY OUT OF RENTAL PROPERTY, 14–15 (2007), [http://www.sdsheriff.net/documents/cfmh\\_manual.pdf](http://www.sdsheriff.net/documents/cfmh_manual.pdf), archived at <https://perma.cc/9XSZ-ZCN8> [hereinafter SAN DIEGO COUNTY CRIME FREE MULTI-HOUSING PROGRAM]; see generally Archer, *supra* note 8, at 18–19 (discussing the range of voluntary crime-free housing programs).

<sup>77</sup> See, e.g., FARIBAULT, MINN. CODE OF ORDINANCES § 7-42(3) (2019).

<sup>78</sup> *Crime Free Rental Housing*, INT’L CRIME FREE ASS’N, [http://www.crime-free-association.org/rental\\_housing.htm](http://www.crime-free-association.org/rental_housing.htm), archived at <https://perma.cc/2PQT-B2D9> (last visited Oct. 2, 2019) (“The Crime Free Rental Housing Program is a, state-of-the-art, crime prevention program designed to reduce crime, drugs, and gangs on small rental properties.”).

programs, and seek to create closer collaboration between police departments and landlords.<sup>79</sup> The first ordinances were created by the International Crime Free Association (“ICFA”), an organization founded in 1992 by a member of the Mesa Police Department in Mesa, Arizona.<sup>80</sup> The stated goal of the ICFA is to use “law enforcement based crime prevention” to keep illegal activity, and the tenants believed to bring it, off of rental property.<sup>81</sup>

The principles and goals of the ICFA’s Crime Free Multi-Housing Program have been adopted wholesale by municipalities around the country. There are four common provisions found in many of these ordinances: (1) licensing programs and mandatory landlord training programs; (2) a crime-free database or background screenings; (3) a crime-free lease addendum; and (4) an enforcement scheme that encourages eviction and exclusion.<sup>82</sup> As adopted, these ordinances compel private landlords to reject tenants deemed unsuitable by the municipality and stretch the definition of “criminal activity” beyond any reasonable definition of crime. These ordinances bar people who cannot reasonably be said to pose a threat to the health or safety of other residents.

The efforts of the ICFA have led to the adoption of crime-free ordinances across the United States.<sup>83</sup> According to one estimate, approximately 2,000 municipalities across forty-eight states have adopted a crime-free housing ordinance.<sup>84</sup> Under the authority of these crime-free housing ordinances, landlords are instructed or encouraged to refuse to rent to prospective tenants with a criminal history, including a history of arrests without conviction, regardless of whether that record suggests a present risk to the rental property or the safety of other tenants.<sup>85</sup> In some municipalities, landlords are also encouraged to deny rental applications from individuals who were previously evicted because of suspicions that they engaged in criminal activity.<sup>86</sup> The core

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (“The Crime Free Multi-Housing Program started in 1992 in Mesa AZ, when Tim Zehring of the Mesa Police Department was tasked to design a safety program that would work in rental housing.”).

<sup>81</sup> *Id.*

<sup>82</sup> Archer, *supra* note 8, at 22.

<sup>83</sup> *Id.* at 22–23 (discussing the goals of and the programs offered by the ICFA).

<sup>84</sup> *Crime Free Multi-Housing*, INT’L CRIME FREE ASS’N, <http://www.crime-free-association.org/multi-housing.htm>, archived at <https://perma.cc/8A6H-PL9J> (last visited Oct. 2, 2019).

<sup>85</sup> See Archer, *supra* note 8, at 27–29 (discussing certain crime-free ordinances that require or encourage landlords to conduct extensive background checks that sometimes go beyond criminal convictions); Ramsey, *supra* note 8, at 1182–84 (explaining that police can decide when to evict tenants but that no standards “govern the discretion of the police to require eviction”).

<sup>86</sup> See Archer, *supra* note 8, at 34–36 (outlining Orlando’s database for crime-free certified landlords); *Crime Free Multi-Housing*, CITY OF ORLANDO, <http://www.cityoforlando.net/police/crimefreemultihousing/>, archived at <https://perma.cc/Y9YQ-UUP2> (last visited Oct. 2, 2019) (referring to the Crime Free Multi-housing Program as “an important community policing tool” and noting that the police department provides a database accessible to eligible landlords that shows all persons arrested

components of crime-free housing ordinances are lease addendums that allow or require landlords to evict tenants who they believe have engaged in or facilitated criminal behavior.<sup>87</sup> Under the ICFA model addendum, a tenant risks eviction if she has engaged in or facilitated *any* criminal activity. The model lease addendum does not define what constitutes criminal activity for purposes of the agreement.<sup>88</sup> It does provide that “a *single* violation of any of the provisions of this added addendum shall be deemed a *serious* violation, and a material and irreparable non-compliance. It is understood that a single violation shall be good cause for immediate termination of the lease.”<sup>89</sup> Many municipalities around the country have adopted a version of this model lease addendum.<sup>90</sup>

As discussed, a resident does not have to be convicted in order to be evicted. A common crime-free lease addendum provision states that “[u]nless otherwise provided by law, proof of violation shall not require a criminal conviction, but shall be by a preponderance of the evidence.”<sup>91</sup> This language creates the possibility that a mere arrest—or even a stop that results in neither arrest nor conviction—might be sufficient to evict someone from their home.<sup>92</sup> When a tenant violates the crime-free lease addendum, many of these ordinances either give the landlord the authority to evict for these activities,

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on “Crime Free Certified Properties”); Bianca Prieto, *Crime-Free Apartment Program Starting in Orlando*, ORLANDO SENTINEL (Jan. 30, 2011), [http://articles.orlandosentinel.com/2011-01-30/news/os-orlando-crime-free-multihousing-20110130\\_1\\_crime-free-multi-housing-complexes-crime-free](http://articles.orlandosentinel.com/2011-01-30/news/os-orlando-crime-free-multihousing-20110130_1_crime-free-multi-housing-complexes-crime-free), archived at <https://perma.cc/Q5SP-UJZD> (“‘This program is [aimed at] squeezing out all the people who just don’t want to do right, so good people can have a nice, quiet place to live,’ said Officer Derwin Bradley, who was tasked with starting program [sic] in Orlando. ‘Some families move from property to property just wreaking havoc.’”).

<sup>87</sup> *Crime Free Multi-Housing*, *supra* note 84.

<sup>88</sup> *Crime Free Lease Addendum*, INT’L CRIME FREE ASS’N, [http://www.crime-free-association.org/lease\\_addendums\\_az\\_english.htm](http://www.crime-free-association.org/lease_addendums_az_english.htm), archived at <https://perma.cc/S2V5-DV3Q> (last visited Oct. 2, 2019).

<sup>89</sup> *Id.*

<sup>90</sup> Swan, *supra* note 8, at 845 (noting that “approximately two thousand cities and towns in forty-four states” have implemented the ICFA’s program).

<sup>91</sup> *Crime Free Lease Addendum*, *supra* note 89; see, e.g., *Landlords Sue City Over ‘Crime-Free’ Ordinance*, AM. APARTMENT OWNERS ASS’N, <https://www.american-apartment-owners-association.org/property-management/latest-news/landlords-sue-city-over-crime-free-ordinance/>, archived at <https://perma.cc/P2GS-CEYK> (explaining that the city’s crime-free lease addendum says that landlords do not need a criminal conviction in order to find “proof of violation”) (last visited Mar. 23, 2018).

<sup>92</sup> Archer, *supra* note 8, at 29–32 (discussing addendums from different municipalities which suggest that tenants may be evicted for mere arrests or stops, sometimes even when these interactions with law enforcement take place outside of the landlord’s property). In some municipalities, the police department periodically provides owners and property managers of crime-free properties with a listing of individuals who have been arrested. See, e.g., Prieto, *supra* note 87; *Crime Free Multi-Housing*, *supra* note 84 (explaining the type of information available in the database managed by the police department).

including those committed by guests or other members of the household, or in fact mandate the tenant's eviction.<sup>93</sup>

Crime-free housing ordinances are generally promoted as a means to reduce crime and improve the quality of life for everyone living in the community.<sup>94</sup> However, by relying solely on arrests and an overly broad range of previous convictions as indicators of future dangerousness and by penalizing individuals for the conduct of friends or family members, these ordinances will have a marginal impact on reducing crime, at best, but will certainly exclude individuals and families who pose no safety risk to their neighbors or their property.

Beyond their ineffectiveness at stemming crime, policies that use tenant-screening and eviction practices based on contacts with the criminal legal system raise several civil rights concerns. First, crime-free housing ordinances will disproportionately exclude people of color.<sup>95</sup> “Decision-making based on whether a person has involvement with the criminal legal system effectively functions as a racialized criterion.”<sup>96</sup> By using contact with the criminal legal system as a tool for exclusion, documented racial biases in policing and the criminal legal system are imported into the private housing market, reinforcing racial segregation in the adopting and surrounding communities.<sup>97</sup>

In addition, the circumstances surrounding the adoption of crime-free housing programs around the country include evidence that targeting and

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<sup>93</sup> Marie Claire Tran-Leung, *Beyond Fear and Myth: Using the Disparate Impact Theory Under the Fair Housing Act to Challenge Housing Barriers Against People with Criminal Records*, 45 CLEARINGHOUSE REV. 4, 5 (2011); see also SCHAUMBURG, ILL., CODE OF ORDINANCES § 99.10.05(F)(1) (2019) (mandating a crime-lease provision in every residential lease and providing that violations of the provision provide grounds for eviction).

<sup>94</sup> See, e.g., *Crime Free Multi-Housing*, *supra* note 84 (warning that “drug criminals and other destructive tenants” operating out of rental units cause property damage, a decline in property value, and fires, in addition to presenting threats to other tenants’ safety); *Crime Free Multi-Housing Program*, DUBLIN, CAL., <http://www.ci.dublin.ca.us/118/Crime-Free-Multi-Housing-Program>, archived at <https://perma.cc/96KG-WFL9> (“[P]roperty managers will reap the benefits of reduced crime, better community awareness, increased property values, more attractive neighborhoods, advertisement of participation, and improved quality of life.”) (last visited Dec. 31, 2018).

<sup>95</sup> See generally Archer, *supra* note 8, at 47–57 (showing that crime-free housing ordinances import the racial biases and disparities of the criminal legal system into the private housing market).

<sup>96</sup> *Id.* at 48.

<sup>97</sup> See generally Archer, *supra* note 8, at 47–57; Ramsey, *supra* note 8, at 1183 (“[Crime-free housing ordinances] also raise troubling questions about racial justice, especially when eviction decisions by the police department can be based only on an arrest. It is well-documented that the police are more likely to arrest people of color than white people.”); see also Cammett, *supra* note 14, at 1141–42 (noting that recreational drug use exists among “all racial and economic groups, and is not more prevalent among African Americans” but that people living in public housing, especially Black tenants, “are especially vulnerable to surveillance and state intervention in the form of police presence, selective prosecutions, and disparate outcomes in criminal courts”); HUMAN RIGHTS WATCH, *supra* note 52, at 84–85 (noting racial disparities in the enforcement of criminal offenses in the United States).

excluding people of color motivated the decision to adopt of many of these programs.<sup>98</sup> Numerous crime-free housing programs were adopted following increased racial diversity in the community.<sup>99</sup> Evidence of intentional discrimination is also evident in the structure of some ordinances. For example, by carving out exceptions for single-family homes or apartments occupied by relatives of the owner, the impact on white tenants with criminal legal system contacts is softened, allowing them to continue to live in the community.<sup>100</sup>

Moreover, crime-free housing programs promote destructive and harmful narratives around people with criminal legal system contacts. These messages, which are often embedded in the structure of crime-free ordinances and promoted through training and descriptive material, can deepen the social stigma and resulting isolation and exclusion experienced by formerly incarcerated people.<sup>101</sup> The messaging encourages people to act through fear and treat people with criminal legal system contacts as a cancer that will spread if not swiftly removed.

Finally, crime-free housing ordinances troublingly expand the reach and impact of the criminal legal system, importing racially discriminatory and discredited policing practices into the private housing market. As discussed earlier, the ICFA describes their program as law enforcement-driven and based on principles of policing.<sup>102</sup> In engaging policing principles in both design and implementation, crime-free ordinances import racially discriminatory policing practices into the private housing market, adding a new aspect to the ways race can impact ones' access to housing. Further, crime-free housing ordinances may increase the likelihood of police-citizen interactions because of aggressive, zero-tolerance police responses to these ordinances.

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<sup>98</sup> Archer, *supra* note 8, at 36–38.

<sup>99</sup> In Faribault, Minnesota, the city council adopted a crime-free housing ordinance after “[t]he 2010 census showed an increase of 214% in Faribault’s Black population since 2000 and a 263% increase in the Black population living in the downtown area of Faribault during the same period.” *Id.* at 36; *see also* CMTY. PARTNERS RESEARCH, INC., RICE COUNTY HOUSING STUDY: AN ANALYSIS OF THE HOUSING NEEDS OF THE CITIES IN RICE COUNTY F-21, DF-6 (2012).

<sup>100</sup> *See, e.g.*, CAROL STREAM, ILL. CODE OF ORDINANCES § 10-12-4(B)(1) (2019) (exempting landlords of single family dwellings occupied “by a member of the owner’s immediate family”); ST. LOUIS PARK, MINN. CITY CODE § 8-328 (2019) (exempting owners if their “only rental housing is either unoccupied or a dwelling unit homestead by a relative”); FARIBAULT, MINN. CODE OF ORDINANCES § 7-38(1)(a)(1) (2019) (exempting single-family dwellings occupied by a relative of the owner).

<sup>101</sup> For example, in San Diego County, landlords are told: “When you think of criminals, think of predators.” SAN DIEGO COUNTY CRIME FREE MULTI-HOUSING PROGRAM, *supra* note 76, at 2.

<sup>102</sup> *See Crime Free Programs*, INT’L CRIME FREE PROGRAMS, <http://www.crime-free-association.org/index.html>, archived at <https://perma.cc/76ZA-MWL5> (last visited Sept. 29, 2019) (“The Crime Free Programs are innovative, law enforcement-based crime prevention solutions designed to help keep illegal activity off rental property.”).

### C. *The Merging of Policing and Housing Policy*

By embracing and expanding exclusionary housing practices, policymakers are weaving housing policy and the criminal legal system together, both ideologically and functionally. Ideologically, the normative values of the criminal legal system are infiltrating housing determinations. While housing policy has embraced a culture of exclusion and punishment, these values are predated and have been imported from policing. Specifically, housing policy is adopting the policing-based values of exclusion and punishment, and treating applicants and tenants as suspects, blurring the line between housing determinations and policing.<sup>103</sup> Functionally, police officers are engaging landlords and residents in policing the community and using these housing policies as a way to keep “problematic” people out of their jurisdictions.<sup>104</sup> Policing-based housing policies give police officers outsized power to determine who can and cannot live in certain communities. These policies essentially allow police officers to pick and choose who may live in their community simply by making the practically unreviewable assertion that an applicant or tenant engaged in illegal activity.<sup>105</sup> In turn, landlords are increasingly being used to police crimes and serve as a tool of law enforcement through increased investigation, surveillance, and regulation.<sup>106</sup> Ultimately, the denial of housing is used to punish “criminalized people”—both those with meaningful criminal legal system contacts and, increasingly, those without—with devastating consequences.

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<sup>103</sup> See Cammett, *supra* note 14, at 1125 (describing housing policy as “reflect[ing] the aggressive policing strategies of the 1980s and 1990s”); Ramsey, *supra* note 8, at 1158 (connecting crime-free ordinances with “broken windows” policing). Similar infiltrations happened in the welfare system. See GUSTAFSON, *supra* note 72, at 1–2 (“Policing the poor and protecting taxpayer dollars from fraud and abuse have taken priority over providing security to economically vulnerable parents and children.”).

<sup>104</sup> See TRAN-LEUNG, *supra* note 51, at 22 (noting that federal law, in the name of public safety, allows creation of policies that deny admission to people who have engaged in certain criminal activities but that some PHAs exclude far more people than necessary to preserve public safety).

<sup>105</sup> The determinations often elude review because most housing applicants do not challenge the rejection of their housing application and most tenants do not challenge their eviction. See generally Vicki Been & Leila Bozorg, *Spiraling: Evictions and Other Causes and Consequences of Housing Instability*, 130 HARV. L. REV. 1408, 1432 (2017) (noting that tenants “face considerable challenges in housing court” and have a high rate of default judgments against them); Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 137 (2013); HUMAN RIGHTS WATCH, *supra* note 52, at 1 (describing that people “merely arrested but never convicted of any offense . . . can be and often are excluded from public housing on the basis of their criminal records.”); TRAN-LEUNG, *supra* note 51, at 16 (“[I]nstead of determining whether criminal activity took place, many housing providers treat a criminal arrest the same as criminal activity, even if the applicant was never convicted of the underlying offense.”).

<sup>106</sup> See Swan, *supra* note 8, at 846 (describing how through exclusionary housing policies landlords are “conscripted into the project of crime control”).

In another manifestation of the criminalization of tenants in federally subsidized housing, public housing authorities often invite the police onto the property, resulting in increased policing in public housing and the criminalization of tenants and their guests. The heavy police presence has been described as “occupying the community.”<sup>107</sup> Thus, the most commonplace activities—which would go unnoticed and un-criminalized in other communities—expose residents to police encounters, arrests, and criminal prosecutions.<sup>108</sup> To be clear, police officers must be able to effectively respond to crime and work to create safe communities. Therefore, if public housing residents are experiencing higher crime, then more focused policing may be appropriate. The essential problem is the nature and practice of policing in poorer communities.<sup>109</sup>

In Frederick, Maryland, public housing residents alleged that the local police department, which had entered into an agreement with the public housing authority, was illegally arresting tenants and their guests for trespassing.<sup>110</sup> Residents were advised to “carry their photo identification with them at all times to display to police” and the housing authority maintained a trespass log that listed individuals who were “believed to be at one of the [a]partments with ‘no apparent legitimate reason,’” including the friends and fiancés of tenants.<sup>111</sup> If a person on the log was encountered again on the grounds of the public housing complex, they were arrested solely because their name appeared on the trespass log.<sup>112</sup>

Similarly, the United States Department of Justice Civil Rights Division (“DOJ”) found that the Baltimore, Maryland and Newark, New Jersey police departments singled out public housing residents for arrest and citation.<sup>113</sup> The

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<sup>107</sup> DEBORAH LAMM WEISEL, POLICE EXECUTIVE RESEARCH FORUM, TACKLING DRUG PROBLEMS IN PUBLIC HOUSING: A GUIDE FOR POLICE 101 (1990).

<sup>108</sup> Alexis Karteron, *When Stop and Frisk Comes Home: Policing Public and Patrolled Housing*, 69 CASE W. RES. L. REV. 669, 669 (2019).

<sup>109</sup> See generally Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 57 (2014) (arguing that “stops and frisks are violent assertions of police dominance of the streets”); Bennett Capers, *Policing, Place, and Race*, 44 HARV. C.R.-C.L. L. REV. 43, 61–64 (2009) (discussing criminal law and criminal procedure’s role in facilitating segregated spaces); Kami Chavis, *The Legacy of Stop and Frisk: Addressing the Vestiges of A Violent Police Culture*, 49 WAKE FOREST L. REV. 849, 850–852 (2014) (discussing how stop-and-frisk evolved into a tactic to intimidate vulnerable classes and how its legacy will endure); Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 36 (2017) (showing “a racial skew in the financial burdens” of sanctions imposed through different stages of policing); JAMES FORMAN, LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 10–14 (2017) (exploring how majority-Black communities endorsed criminal justice policies that disproportionately impact Black men).

<sup>110</sup> Karteron, *supra* note 109, at 684.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 684–85.

<sup>113</sup> U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 37 (2016) (“We found evidence that BPD supervisors have explicitly

DOJ found that the Baltimore Police Department “perpetuate[s] and fuel[s] a multitude of issues rooted in poverty and race, focusing law enforcement actions on low-income, minority communities,” prompting police officers to engage in “unnecessary, adversarial interactions with community members.”<sup>114</sup> In one example cited in the report, from January 2010 to May 2015, Baltimore police officers reported making over 300,000 pedestrian stops.<sup>115</sup> Forty-four percent of those stops were made in two small, predominantly African-American districts that contain only eleven percent of Baltimore’s population.<sup>116</sup> During that same period, seven Black men were stopped more than thirty times each.<sup>117</sup>

Private rental housing has also been a focus of concentrated policing efforts in some targeted communities. For example, in New York City, the New York Police Department (“NYPD”) ran Operation Clean Halls,<sup>118</sup> in which private landlords authorized the NYPD to patrol the common areas of apartment buildings.<sup>119</sup> Although it originally began with a focus on drug sales in common areas, the reach of the program expanded to include quality of life offenses throughout the building.<sup>120</sup> In some of the buildings enrolled in Operation Clean Halls, police officers conducted floor-by-floor sweeps, stopping and questioning almost everyone they encountered.<sup>121</sup> In some neighborhoods in the City, nearly every private apartment building was enrolled in the program.<sup>122</sup>

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condoned trespassing arrests that do not meet constitutional standards, and evidence suggesting that trespassing enforcement is focused on public housing developments.”); U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 21 (2014) (“[C]omplaints from NPD officers and—particularly in public housing projects—the community allege that the NPD’s practice of requiring officers to issue high numbers of citations resulted in officers’ focusing on convenient targets, rather than on the individuals involved in serious criminal activity.”).

<sup>114</sup> INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, *supra* note 113, at 20.

<sup>115</sup> *Id.* at 5.

<sup>116</sup> *Id.* at 6.

<sup>117</sup> *Id.*

<sup>118</sup> Complaint at 1–2, *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2012) (No. 12 Civ. 2274) [hereinafter *Ligon Complaint*]; *see also* Karteron, *supra* note 109, at 683–84 (discussing Operation Clean Halls).

<sup>119</sup> *Ligon Complaint*, *supra* note 118, at 31.

<sup>120</sup> *Id.* at 7 (“The NYPD has a widespread practice of stopping, questioning, and searching those they encounter in Clean Halls Buildings without any suspicion of unlawful behavior, and arresting them or issuing summonses without probable cause.”).

<sup>121</sup> *Id.* at 3. In a settlement, New York City agreed to a prohibition on officers “approaching, questioning, or detaining” people for simply being inside or around patrolled buildings. *See* Benjamin Mueller, *New York Police Department Agrees to Curb Stop and Frisk Practices*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/nyregion/new-york-police-dept-stop-and-frisk.html>, *archived at* <https://perma.cc/4PUB-DD5F> (“The agreement prohibits officers from approaching, questioning or detaining people merely because they are inside or around those buildings, and forces officers to apply the same constitutional protections there that they are supposed to apply anywhere in the city.”).

<sup>122</sup> *Ligon Complaint*, *supra* note 118, at 2–3.



## II. THE AMERICAN TRADITION OF EXILE

The prevalence of housing exclusions based on any level of contact with the criminal legal system is consistent with America's broader embrace of exile in response to perceived threats. This Part situates the web of policing-based housing policies within America's history of responding to threats—real or imagined—through temporary or permanent removal from the community.<sup>123</sup>

Americans have embraced the tradition of exile for centuries — from the forced migration and genocide of Native Americans to facilitate America's westward expansion to the American Colonization Society's campaign to exile freed slaves to Africa to remove a threat to the institution of slavery. Today, this country continues to use exile as a means to define the boundaries of citizenship and belonging, and to protect “innocent” individuals from future harm.<sup>124</sup> This continuation of the tradition is not only reflected in policing-based housing policies, but also in a range of other public policies.

The United States has a deep-rooted history of exiling or banishing “undesirable” or marginalized people from the community.<sup>125</sup> Indeed, many colonies were initially populated in large part by people who were banished as punishment for their crimes.<sup>126</sup> Originally, prisoners were only sent from

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<sup>123</sup> JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 172 (2007) (discussing “technologies of exile,” which are used to “address[] threatening persons and behaviors by removing them from the community more or less permanently”).

<sup>124</sup> *Id.* at 173.

<sup>125</sup> See *Korematsu v. United States*, 323 U.S. 214, 235 (1944); Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 6 (2016) (“American history shows a persistent commitment to exiling ‘undesirable’ people from public space: Jim Crow, Anti-Okie, and Sundown Town laws are among many notorious examples.”); Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 106–07 (2007) (“[B]anishment in the United States is most often found as a condition for probation or parole. Convicts infrequently challenge probation and parole conditions for fear that they will be denied release.”); Melissa Fares, *75 Years Later, Japanese Americans Recall Pain of Internment Camps*, REUTERS (Feb. 17, 2017), <https://www.reuters.com/article/us-usa-japanese-anniversary/75-years-later-japanese-americans-recall-pain-of-internment-camps-idUSKBN15W2E2>, archived at <https://perma.cc/NL9T-HTS8> (noting that about 120,000 Japanese-Americans were incarcerated in internment camps in remote desert locations during World War II because of fear that many were spies for Japan); Briana L. McGinnis, *Exile in America: Political Expulsion and the Limits of Liberal Government* at iii (Apr. 22, 2015) (unpublished Ph.D. dissertation, Georgetown University), [https://repository.library.georgetown.edu/bitstream/handle/10822/760863/McGinnis\\_georgetown\\_0076D\\_12992.pdf?sequence=1](https://repository.library.georgetown.edu/bitstream/handle/10822/760863/McGinnis_georgetown_0076D_12992.pdf?sequence=1), archived at <https://perma.cc/3ZJH-XMC9> (“[A] survey of American history indicates that although communities may not openly ostracize, outlaw, or exile, they have not suppressed the desire to purge their membership rolls. Rather, they have become more adept at disguising it, draping illiberal exile practices in the language of law, consent, and contract.”).

<sup>126</sup> Yung, *supra* note 125, at 109.

England to America on a sporadic basis.<sup>127</sup> The practice was codified with the Transportation Act of 1718.<sup>128</sup> As a result of the adoption of the Transportation Act and American independence, between 30,000 and 50,000 convicted people were banished to the Americas before or after completion of their sentence, primarily to Virginia and Maryland.<sup>129</sup>

Exile was also once embraced in the United States as a potential compromise to end slavery and address the racial discrimination and violence that plagued the country as increasing numbers of enslaved people were being emancipated. Proposals to expatriate Black people—both enslaved and free—first came about in the colonial era.<sup>130</sup> But the increasing numbers of free Black people in the North during the 1700s raised concerns in the South and elevated the urgency of the conversation, with more and more commentators calling for the forced exile of Black people to various parts of Africa.<sup>131</sup> In *Notes on the State of Virginia*, Thomas Jefferson wrote that slavery was morally and politically wrong,<sup>132</sup> but he also believed it would be ill-advised to free enslaved people unconditionally.<sup>133</sup> Jefferson believed unconditional emancipation “would surely and tragically culminate in either blood-letting or blood mixing,” with neither being tolerable.<sup>134</sup> He viewed forced expatriation and colonization as a solution. Other prominent Southerners shared his view that exile of all Black people would be the best solution.<sup>135</sup>

Driven by concerns over the rapidly expanding free Black and enslaved population, Charles Fenton Mercer, a Federalist legislator in Virginia, founded the American Colonization Society (“ACS”) in 1816 with the goal of persuading the federal government to rid the United States of slavery by removing Black Americans from the country.<sup>136</sup> Although originally founded by abolitionists, the ACS ended up comprising an incongruous coalition of Northerners and

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<sup>127</sup> *Id.* (“For many decades, criminals were sent from England to the Americas on an ad hoc basis.”); Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 123–24 (1999) (discussing the lack of uniformity and compliance within the British system of banishment).

<sup>128</sup> See Bleichmar, *supra* note 127, at 116–17 (“Under the Transportation Act of 1718, Great Britain relied on the systematic sentencing of certain criminals to banishment to the Colonies.”).

<sup>129</sup> *Id.*

<sup>130</sup> ERIC BURIN, SLAVERY AND THE PECULIAR SOLUTION: A HISTORY OF THE AMERICAN COLONIZATION SOCIETY 6 (2005).

<sup>131</sup> See *id.* at 7–10 (noting several colonists who proposed sending enslaved people to Africa).

<sup>132</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 94 (Penguin Classics ed. 1998) (1787) (referring to slavery as a “great political and moral evil”).

<sup>133</sup> *Id.* at 151.

<sup>134</sup> BURIN, *supra* note 130, at 9–10.

<sup>135</sup> See *id.* (noting that people like James Madison agreed with proposals to send enslaved people to distant lands).

<sup>136</sup> *Id.* at 1.

Southerners who supported a formal program of exile and forced African colonization for different reasons. Abolitionist ACS supporters, like Mercer, believed that once Black people in this country were freed from slavery, they would continue to be forced into poverty and become malcontent, growing to be a destabilizing force in U.S. society.<sup>137</sup> They believed that even after the abolition of slavery, racism would permanently consign free Black people to a life of humiliation and degradation, which was antithetical to their own beliefs and ideology.<sup>138</sup> In the face of this dilemma “white reformers chose to remove the object of white racism rather than combat racism itself.”<sup>139</sup> Some of the abolitionist reformers had even less generous motivations, viewing free Black people as a “nuisance and burden.”<sup>140</sup> To this group, the growing number of free Black people was “a degraded, idle, and vicious population” who threatened the welfare of White Americans.<sup>141</sup> Exile, they believed, would both give Black people a fresh start and increase American safety.<sup>142</sup>

Many slaveholder ACS supporters saw forced colonization as a means to protect the institution of slavery from the threat of freed slaves.<sup>143</sup> They believed the mere presence of free Black people increased the likelihood of slave rebellions.<sup>144</sup> While they waited for the federal government to support the mission of forced colonization, some pro-slavery proponents of forced colonization took steps to advance exile on a smaller scale. For example, some Virginia slaveholders helped to secure a statewide ban on so-called “domestic emancipations,” in which freed slaves were allowed to remain within the state of

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<sup>137</sup> *Id.* at 13.

<sup>138</sup> GARY B. NASH, *FORGING FREEDOM: THE FORMATION OF PHILADELPHIA'S BLACK COMMUNITY, 1720 TO 1840* 233–34 (1988) (“Believing that hostility to free blacks would always block their efforts to rise in society, Mercer foresaw a growing class of frustrated, angry, and pauperized blacks who would threaten the harmony and stability of the republic.”).

<sup>139</sup> *Id.* at 234.

<sup>140</sup> *Id.* at 235 (quoting a Maryland political leader who was in favor of colonization).

<sup>141</sup> *Id.* at 235; *see also* RICHARD S. NEWMAN, *FREEDOM'S PROPHET: BISHOP RICHARD ALLEN, THE AME CHURCH, AND THE BLACK FOUNDING FATHERS* 203 (2008) (“Massachusetts politician Edward Everett spoke for many Northern colonizationists when he supported colonizing free blacks, whom he described as vagabonds, criminals, and a drain on Northern society.”).

<sup>142</sup> *See* NASH, *supra* note 138, at 233–235 (discussing the views of colonizers who thought that the formerly enslaved, once free, would never be able to succeed in the United States and that they would develop hostility toward other Americans); BURIN, *supra* note 130, at 11–13 (discussing the views of colonizers who advocated for colonization as a way to get rid of the former enslaved people who would incite riots among enslaved people).

<sup>143</sup> BURIN, *supra* note 130, at 11 (noting that those who were in favor of colonization as a means of protecting the institution of slavery “aimed to remove individuals who were thought to endanger bondage”).

<sup>144</sup> *Id.*

Virginia.<sup>145</sup> Virginia legislators also further limited the rights of free Black people, hoping the oppression would cause Black people to leave the state “voluntarily.”<sup>146</sup>

Although some members of the Black community originally supported the idea of repatriation, most quickly realized that slaveholder members of the ACS “want[ed] to get rid of them . . . so as to make their property more secure.”<sup>147</sup> The resolution adopted by Philadelphia’s Black leaders on January 15, 1817 powerfully summarized the community’s feeling about exile and forced colonization:

[W]hereas our ancestors (not of choice) were the first successful cultivators of the wilds of America, we their descendants feel ourselves entitled to participate in the blessings of her luxuriant soil, which their blood and sweat manured; and that any measure . . . having a tendency to banish us from her bosom, would not only be cruel, but in direct violation of those principles which have been the boast of the republic.<sup>148</sup>

Despite Black opposition, by 1822, ACS helped to found Liberia in West Africa for the colonization of free-born Black Americans and emancipated slaves. In the following decade, thousands of free Black Americans—facing crippling discrimination and violence at home—moved to Liberia.<sup>149</sup> Indeed, ACS helped to free many enslaved people on the explicit condition that they agree to move to Liberia after their manumission.<sup>150</sup> The United States government eventually funded some of the ACS’s work.<sup>151</sup> And, by the 1830s,

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<sup>145</sup> *Id.* at 12 (“Hoping to stem the growth of the free black population, in 1806 Tidewater and Piedmont planters secured a state-wide ban on domestic emancipations—that is, liberations wherein freedpersons were allowed to remain in the state.”).

<sup>146</sup> *Id.*

<sup>147</sup> NASH, *supra* note 138, at 238 (quoting a statement made by James Forten, a black abolitionist and leader in Philadelphia); *see also* BURIN *supra* note 130, at 16 (“Like their counterparts in the North, most southern free blacks opposed the ACS.”).

<sup>148</sup> NASH, *supra* note 138, at 238.

<sup>149</sup> BURIN, *supra* note 130, at 17–20 (“Emigration to Liberia surged in the aftermath of Nat Turner’s Rebellion. The upswing came partly because southern free blacks were fleeing vengeful whites.”). Long after the end of slavery in the United States, Black people continued to feel forced into “exile” by the crushing weight of racial discrimination and refusal to allow them to enjoy the full benefits of citizenship. NASH, *supra* note 138, at 243–44 (discussing the meeting and creation of the Haitian Emigration Society, a group of Philadelphia Blacks that endorsed a plan to help Black Americans “leave a country where it is but too certain the coloured man can never enjoy his rights”) (quoting a resolution placed before the assemblage). Decades later, self-exile would become a key element of some Black nationalist thought during the 20th century. *See* MANNING MARABLE, *MALCOLM X: A LIFE OF REINVENTION* (2011).

<sup>150</sup> BURIN, *supra* note 130, at 2.

<sup>151</sup> *See id.* at 15 (“In the meantime, Monroe began allocating funds to the ACS, ostensibly so that the organization would make Liberia a congenial place for recaptured Africans. Thus began a tenuous but vital relationship between the national government and the ACS.”).

exile and forced “colonization became the fastest growing racial-reform movement and the first one that brought Northerners and Southerners together on a plan of removing blacks from American shores.”<sup>152</sup>

America has never fully abandoned the idea of removing undesirable people through exile. Although the hope of ridding the United States of Black people through exile has lost its mainstream appeal,<sup>153</sup> the ACS model of removing the object of white racism, rather than confronting and challenging the underlying racism itself, is reflective of America’s approach to public policy challenges both big and small. The United States hopes to erase the problem by exiling the victim without ever really wrestling with the underlying sources of the problems or recognizing the humanity or rights of belonging of the people being exiled. This is particularly true of challenges grounded in the subjugation of marginalized communities or in areas of concern that have been racialized. Native Americans have long endured attempts at exile, banishment, and extermination, from the Trail of Tears to the growth of reservations.<sup>154</sup> During World War II, Japanese Americans were forced into internment camps to isolate the threat that they allegedly posed to the country.<sup>155</sup> The embrace of exile was evident in Jim Crow policies around the country, where white people created white-only spaces—e.g., schools, neighborhoods, parks, restaurants—by

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<sup>152</sup> NEWMAN, *supra* note 141, at 203.

<sup>153</sup> Although it has lost mainstream appeal, the hope of banishing Black people has certainly not died altogether. For examples of Black Americans being told to “go back” to Africa, see Rachel Dicker, *Man at Trump Rally Yells ‘Go Back to Africa’ at Black Woman*, U.S. NEWS & WORLD REP. (Mar. 14, 2016),

<https://www.usnews.com/news/articles/2016-03-14/man-at-trump-rally-yells-go-back-to-africa-at-black-woman>, archived at <https://perma.cc/YL7T-USGE>; Cleve R. Wootson Jr., ‘Go Back to Africa’? This Man Will—if Racists Pay His Way, WASH. POST (July 19, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/07/19/go-back-to-africa-this-man-will-if-racists-pays-his-way/>, archived at <https://perma.cc/BY5K-SBCC>. Today, such efforts to banish Black people are also seen in less explicit terms in the gentrification of Black communities. See, e.g., Sam Levin, ‘We’re Being Pushed Out’: The Displacement of Black Oakland, THE GUARDIAN (June 1, 2018), <https://www.theguardian.com/us-news/2018/jun/01/from-black-panthers-to-bbq-becky-the-displacement-of-black-oakland>, archived at <https://perma.cc/9Z3P-3UNE> (discussing how White newcomers to a community call the police on Black residents as a way to suppress expressions of Black culture that the white residents dislike); *infra* notes 244, 245 and accompanying text (discussing instances in which the police were called on people of color).

<sup>154</sup> See VICKI ROZEMA, VOICES FROM THE TRAIL OF TEARS (2003) (compiling first-hand accounts of the removal of Native Americans from their homelands and their experiences along the Trail of Tears); James J. Davis et al., *American Indian Poverty in the Contemporary United States*, 31 SOC. F. 5, 6–7 (2016) (attributing high poverty rates among Native Americans in part to their being relocated by the federal government to poor quality lands and their being isolated from metropolitan areas with more economic opportunities).

<sup>155</sup> See Fares, *supra* note 125.

excluding Black people.<sup>156</sup> More recently we have used residency exclusion zones for convicted sex offenders;<sup>157</sup> forcibly removed, criminalized, or bribed homeless people and the poor to force them to leave urban centers or gentrifying communities;<sup>158</sup> banned, segregated, and institutionalized people with disabilities;<sup>159</sup> used expulsions and out-of-school school suspensions to

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<sup>156</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 30–35 (2010) (discussing the rise of Jim Crow laws as a response to the abolition of slavery and as an attempt to put American Black people into subordinate positions).

<sup>157</sup> Yung, *supra* note 125, at 104–106, 121. “The exclusion zone usually requires that a sex offender live at least 500 to 2,500 feet from any location listed as protected.” *Id.* at 104. As of 2007, “as many as ten states” provided for some sort of banishment as part of criminal punishment. *Id.* at 113.

<sup>158</sup> See Rankin, *supra* note 125, at 6 (“Another increasingly popular and deleterious manifestation of the urge to exile persists today: the proliferation of laws and policies that effectively banish visibly poor people from urban centers.”); Don Mitchell, *The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States*, 29 *ANTIPODE* 303, 306 (arguing that “anti-homeless laws both reflect and reinforce a highly exclusionary sense of modern citizenship, one that explicitly understands that excluding some people from their rights not only as citizens, but as thinking, acting persons, is both good and just.”). Regulations and policies have also been passed to facilitate the physical removal of homeless people from cities and states, and sometimes from the country. See Alastair Gee et al., *Bussed Out: How America Moves its Homeless*, *THE GUARDIAN* (Dec. 20, 2017), <https://www.theguardian.com/us-news/ng-interactive/2017/dec/20/bussed-out-america-moves-homeless-people-country-study>, archived at <https://perma.cc/R44Y-E9WR> (noting that “[c]ities have been offering homeless people free bus tickets to relocate elsewhere for at least three decades” and that they often also pay for airplane tickets to places as far away as New Zealand in order to cut their homeless populations). These tickets are sometimes given on the condition that the recipient will never return to the shelter from which they received the ticket. *Id.* (noting that some shelters give tickets and require recipients to sign a contract confirming that their relocation will be “permanent”). Locals are encouraged to donate to bussing programs because the removal is advertised as lowering the homeless population. See *id.* (noting that one executive director of a homeless shelter said fundraising was easiest when he told locals, “[g]ive us money and we’ll ship our homeless problem to somebody else”). Cities have openly admitted that they view the physical removal of homeless people as a financial benefit. Former mayor Michael Bloomberg has praised New York City’s bussing scheme for “sav[ing] the taxpayers of New York City an enormous amount of money” and San Francisco does not deny the financial incentive behind bussing people out of the city. *Id.*

<sup>159</sup> There is a long history of the disabled being removed from society in the United States. In the 1880s, several cities, including San Francisco, New Orleans, and Chicago, passed “ugly laws,” which made it illegal for people with disabilities to ask for money in public. See SUSAN SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 24–39 (NYU Press 2009) (discussing the histories of “ugly laws” in San Francisco, New Orleans, and Chicago). However, as the nickname suggests, these laws targeted people whose physical presence in public spaces would “scare” people. See, e.g., Adrienne Phelps Coco, *Diseased, Maimed, Mutilated: Categorizations of Disability and an Ugly Law in Late Nineteenth-Century Chicago*, 44 *J. SOC. HIST.* 23, 33 (arguing that the discussions and concerns of Chicago’s tabloids in the 19th century suggest that the city’s “ugly law” was only intended to affect “crippled beggars,” not all people with disabilities); see also Robert L. Burgdorf Jr., *Why I Wrote the Americans with Disabilities Act*, *WASH. POST* (July 24, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?noredirect=on&utm\\_term=.c96461b02919](https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?noredirect=on&utm_term=.c96461b02919), archived

remove certain children;<sup>160</sup> and threatened deportation of immigrants who in some cases have spent virtually their entire lives in this country.<sup>161</sup> This same embrace of exile is a motivation behind the expansion of policing-based housing policies.

Exile has been closely linked to notions of citizenship. America has a history of excluding people who were never accepted as citizens of a community or removing those who were deemed to have forfeited aspects of their citizenship. For example, Native Americans were historically not seen as citizens of the United States. Their land was routinely taken, and they were banished. In *Dred Scott v. Sandford*, the Supreme Court held that Black people “had no rights

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at <https://perma.cc/N85A-FD9V> (“These laws were actually enforced as recently as 1974, when a police officer arrested a man for violating Omaha’s ordinance.”). People with visible disabilities, however, have not been the only targets of removal practices. As the author of the Americans with Disabilities Act notes, residential treatment centers for people with disabilities were “typically located in rural areas with high walls and locked wards that isolated the residents from the rest of society . . . .” *Id.*

<sup>160</sup> Schools suspend children for many reasons, ranging from “‘violent’ behavior, such as biting or fighting with another child, to ‘disruptive’ behavior, such as not following directions or talking out of turn.” April Laissle, *WYSO Investigation Reveals Thousands of Ohio K-3 Students Suspended Each Year*, WYSO (July 5, 2018), <https://www.wyso.org/post/wyso-investigation-reveals-thousands-ohio-k-3-students-suspended-each-year>, archived at <https://perma.cc/335Z-76CP>. One expert has noted that school officials decide when to remove students based on factors such as “their own stress level, their perception of the child, [and] the resources that the teacher may or may not have to support the number of children in the classroom.” *Id.* Indeed, the subjective nature of these decisions is reflected in the data, which shows that certain populations of students—mainly, students with disabilities and students of color—are significantly at risk of being removed from their classrooms. See *School Climate and Discipline: Know the Data*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/gen/guid/school-discipline/data.html>, archived at <https://perma.cc/ES93-AENE> (last visited Mar. 26, 2019) (“Various data sources show clearly that students with disabilities and students of color are disproportionately impacted by such practices.”); see also John Hildebrand, *Report: NY’s Black Students Suspended Far More Than Whites, Others*, NEWSDAY (Dec. 9, 2018), <https://www.newsday.com/long-island/education/schools-suspensions-students-racial-disparity-1.24329928>, archived at <https://perma.cc/9QJ2-W5JC> (reporting that “Black male students in high school generally had the highest suspension rates of any group” in New York State and that Black students outside New York City were four times more likely to be suspended from school than White students).

<sup>161</sup> See Letter from Ken Paxton, Attorney Gen. of Tex., to Jeff Sessions, Attorney Gen. of the U.S. (June 29, 2017), [https://www.texasattorneygeneral.gov/sites/default/files/files/epress/DACA\\_letter\\_6\\_29\\_2017.pdf](https://www.texasattorneygeneral.gov/sites/default/files/files/epress/DACA_letter_6_29_2017.pdf), archived at <https://perma.cc/636D-HR2N> (showing letter signed by ten state attorneys general and the governor of Idaho requesting that the Secretary of Homeland Security rescind the Deferred Action for Childhood Arrivals program); *Full Text: Jeff Sessions on Trump Ending DACA Program*, POLITICO (Sept. 5, 2017), <https://www.politico.com/story/2017/09/05/trump-ending-daca-dreamers-program-sessions-transcript-242326>, archived at <https://perma.cc/LZ8P-EY9X> (arguing that DACA should be rescinded because “[e]nforcing the [immigration] law saves lives, protects communities and taxpayers, and prevents human suffering. Failure to enforce the laws in the past has put our nation at risk of crime, violence and even terrorism.”).

which the white man was bound to respect” and were “not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and [could] therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”<sup>162</sup> This holding made discussions and acts of exile acceptable. In 1868, with the ratification of the Fourteenth Amendment to the United States Constitution, Black people were finally recognized as citizens.<sup>163</sup> Immediately afterwards, laws began to criminalize Blackness, chipping away at Black citizenship and belonging, and exiling Black people from various communities and forums of civic engagement. Today, felon disenfranchisement, collateral consequences, and policing-based housing policies are all motivated, in part, by a belief that people with criminal legal system contacts have voluntarily sacrificed elements of their citizenship.

### III. THE COLLECTIVE IMPACT OF EXCLUSION BY POLICING-BASED HOUSING POLICIES

The United States Supreme Court has held that housing is a life necessity.<sup>164</sup> Yet, the current system of policing-based housing policies in public and private housing creates an all-encompassing web that threatens to bar people from their homes and their communities. Under the weight of this regime, individuals with criminal records and others targeted by law enforcement are often unable to provide a stable home for themselves and their families. The effects of this exclusion can have profound consequences, including splintered families, loss of employment, loss of child custody, and recidivism.<sup>165</sup> This Part will explore the

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<sup>162</sup> 60 U.S. 393, 407, 404 (1857).

<sup>163</sup> U.S. CONST. amend. XIV.

<sup>164</sup> *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (holding that “[h]ousing is a necessary [sic] of life”).

<sup>165</sup> See Cammett, *supra* note 14, at 1143–44 (“When parents are rejected from public housing through the One Strike policy they are at greater risk of homelessness and family disintegration. Moreover, the inability to establish safe and consistent housing can leave some families vulnerable to intervention by child welfare agencies.”); Weil, *supra* note 34, at 178 (“In reality, it is the rare case where an eviction affects only individuals directly involved in drug-related activity. The more prevalent and difficult case arises where a family member or guest has engaged in criminal activity, and innocent family members must pay the price of eviction for that transgression”); see also THOMPSON, *supra* note 34, at 69 (“[A]s basic as the need for housing may be, it is often one of the most confounding of obstacles that the ex-offender will encounter when he or she leaves prison.”); TRAN-LEUNG, *supra* note 51, at 2 (describing studies finding that previously incarcerated individuals are less likely to be convicted of another crime if they secure rental housing); LEGAL ACTION CTR., *supra* note 74, at 2 (“When justice-involved people can’t find stable housing, they have a much harder time finding and keeping jobs, maintaining their health and pursuing educational opportunities—the very things that make recidivism less likely, communities safer, and families healthier.”).



cumulative impact of policing-based housing policies, including creating conditions of exile.<sup>166</sup>

It is impossible to calculate the number of individuals and families that have been impacted by exclusionary housing policies. There is little quantitative research on the general impact of crime-free housing ordinances and exclusionary policies in public housing, and there is no quantitative research on the disproportionate impact on people of color. But, a study by Human Rights Watch provides some sense of the scope. According to HUD data analyzed by Human Rights Watch, HUD reported that 46,657 applicants for conventional, project-based public housing were denied in 2002 because of exclusionary housing policies.<sup>167</sup> However, this number only represents a fraction of those excluded from housing because of their criminal records. First, the reported number of people denied housing does not include individuals or families evicted from public housing.<sup>168</sup> Second, the reported number does not include people who were denied Section 8 housing assistance because PHAs are not required to report Section 8 denials to HUD.<sup>169</sup> Third, although HUD requires PHAs to report the number of housing applicants rejected under one strike policies, there is no uniform definition of which exclusions officially fall under one strike.<sup>170</sup> Therefore, it is unclear whether the reported data includes all criminal record-based exclusions pursuant to PHA policy, or only those exclusions mandated by Congress.<sup>171</sup> Finally, the number does not include people who chose not to submit an application because they believed they would be rejected because of actual or suspected involvement with the criminal legal system, based on their own assessment, misinformation, or because they were counseled by PHA staff not to submit an application.<sup>172</sup> Indeed, Human Rights Watch found that it was common for eligible people not to apply because they had a criminal record and that many eligible applicants were even turned away at PHA application offices.<sup>173</sup>

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<sup>166</sup> Other scholars have also likened certain aspects of criminal legal system policies to exile or banishment. *See, e.g.*, Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 153 (1999) (describing the impact of collateral sentencing consequences on formerly incarcerated individuals as having the potential to create a sense of exile by excluding them from "important aspects of life"); Rankin, *supra* note 125, at 5 ("The exclusive side of this pervasive phenomenon, which this Article calls 'the influence of exile,' often drives the regulation and restriction of the rights of the most vulnerable members of society."); Yung, *supra* note 125, at 106–07 (2007) ("[B]anishment in the United States is most often found as a condition for probation or parole.").

<sup>167</sup> HUMAN RIGHTS WATCH, *supra* note 52, at 31–32.

<sup>168</sup> *See id.* at 32.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 32–33.

<sup>173</sup> *Id.* at 33.

Adjusting for all of these shortcomings in the data, and considering general criminal legal system data, Human Rights Watch concluded that a better estimate of the number of people made ineligible for public housing because of a felony conviction was 3.5 million.<sup>174</sup> Again, even this estimate is not comprehensive because it does not include people who become ineligible for public housing because of lesser contacts with the criminal legal system, such as misdemeanor convictions, convictions for violations, and arrests without conviction.<sup>175</sup> Nor does it include those who have been excluded from private housing because of crime-free municipal ordinances, or simple discrimination by private landlords who refuse to rent to individuals with criminal records with or without the color of law.

The difficulty of calculating the number of people impacted by policing-based housing policies is compounded by the difficulty of assessing racial disparities in who may be discouraged, excluded, or evicted as a result of these policies. However, it is important to note that these exclusionary policies will not impact all communities equally. Indeed, the United States has a widespread problem of racialized policing.<sup>176</sup> Black people experience mass criminalization more acutely and are more vulnerable to exclusions.<sup>177</sup>

Although more research is needed to understand the cumulative impact of these policies, it is clear that they create a snare that excludes people from public housing who will face additional hurdles on the private housing market. Others have been denied admission to or evicted from private housing, only to find similar barriers to public housing. The criminalization and stigma follow them from place to place and community to community.

Consider the case of Thelma Jones. Ms. Jones is a Black woman who lives in Faribault, Minnesota, a community subject to exclusionary, policing-based

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<sup>174</sup> *Id.* at 33–34.

<sup>175</sup> A 2002 study in Chicago found that up to twenty-five percent of evictions through the One Strike program “stemmed from a juvenile arrest.” Kaplan & Rossman, *supra* note 14, at 116.

<sup>176</sup> See Bennett L. Gershman, *Use of Race in “Stop-and-Frisk”: Stereotypical Beliefs Linger, But How Far Can the Police Go?*, 72 N.Y. ST. B.J. 42, 42 (explaining that a study done by the New York State Attorney General’s Office found that Black people were over six times more likely to be stopped than Whites, and Hispanics more than four times as likely); John J. Donohue III & Steven D. Levitt, *The Impact of Race on Policing and Arrests*, 44 J.L. & ECON. 367 (2001) (finding that the number of nonwhites arrested remains unchanged by changes in the number of white and nonwhite police officers).

<sup>177</sup> Archer, *supra* note 8, at 47–54 (noting that crime-free housing ordinances will disproportionately impact Black people because Black people are disproportionately forced into contact with the criminal legal system, and discussing statistics which show that Black communities are targeted by police and criminalized); Cammett, *supra* note 14, at 1141–42 (noting that Black people “are especially vulnerable to surveillance and state intervention”); Ramsey, *supra* note 8, at 1183–84 (noting that people of color are both more likely to be arrested and more likely to rent than white people, leading people of color to be at greater risk of eviction).

housing policies in both public and private rental housing.<sup>178</sup> After living in Faribault for almost a decade and in her then-current home for five years, Ms. Jones was informed by her landlord that she and her children had two weeks to move out.<sup>179</sup> At the time of her eviction notice, Ms. Jones's landlord had been charged with misdemeanors under Faribault's crime free housing ordinance for failing to meet requirements of the ordinance.<sup>180</sup> The landlord informed Ms. Jones that the police advised the landlord to remove Ms. Jones from the house, stating that the police had "responded to complaints at this home 82 times" and characterized Ms. Jones' home as a location of "ongoing criminal activity."<sup>181</sup>

Ms. Jones and her children did not have any criminal convictions to support this conclusion.<sup>182</sup> However, there is evidence that police had come to Ms. Jones's home repeatedly because of harassing calls to the police by her White neighbors.<sup>183</sup> On one occasion, police responded to calls because Ms. Jones was hosting a family barbecue.<sup>184</sup> On another occasion, police were called when Ms. Jones hosted a child's birthday party.<sup>185</sup> Police even responded to calls because her children were outside playing on a trampoline.<sup>186</sup> Ms. Jones and her family were evicted because they were unwelcome by her White neighbors.

After her eviction, Ms. Jones and her family moved from their five-bedroom house to a much smaller two-bedroom apartment, the only housing she could find. However, because of the municipality's rental occupancy restrictions,<sup>187</sup> her two older children were no longer able live with her.<sup>188</sup> One of those children, Priyia Lacey, was pregnant when the family was evicted —

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<sup>178</sup> Complaint at 1, ¶ 3, *Jones v. City of Faribault*, No. 18-CV-01643-JRT (D. Minn. June 13, 2018), [https://www.aclu.org/sites/default/files/field\\_document/1\\_-\\_complaint\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/1_-_complaint_1.pdf), archived at <https://perma.cc/Q44Z-9ZEL> [hereinafter *Jones Complaint*].

<sup>179</sup> *Id.* at 45, ¶ 197.

<sup>180</sup> *Id.* at 45, ¶ 199. The Faribault Police Department charged Jones' landlord with two criminal misdemeanors: "Rental Dwelling Registration/Fail to Register" and "C[ri]me[F]ree[M]ulti-H[ousing]-Fail to Attend Training." *Id.* Crime-free ordinances are frequently adopted as part of a larger rental housing licensing program for all landlords in the municipality and require compliance with the crime-free ordinance provisions in order for landlords to obtain or maintain their residential operator's license. *See, e.g.*, SCHAUMBURG, ILL., MUNICIPAL CODE § 99.10.05(A); FARIBAULT, MINN., MUNICIPAL CODE § 7-42; LAS VEGAS, NEV., MUNICIPAL CODE § 6.09.020(A). In some municipalities, violating these provisions is a misdemeanor.

<sup>181</sup> *Jones Complaint*, *supra* note 178 at 46, ¶ 203.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 45, ¶ 205.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> The Ordinance states that a rented home cannot house a family numbering more than two times the number of legal bedrooms plus one. FARIBAULT, MINN., MUNICIPAL CODE § 7-40(h)(2)(b).

<sup>188</sup> *Jones Complaint*, *supra* note 178, at 47, ¶ 208.

she had relied on her mother for emotional and financial support.<sup>189</sup> Ms. Lacey sought private rental housing in Faribault on her own, but had no success.<sup>190</sup> Eventually, Ms. Lacey applied for public housing.<sup>191</sup> When she made it to the top of the waiting list, the Faribault Housing and Redevelopment Authority sent her a letter informing her that she was “ineligible” for housing because the criminal background check revealed an assault warrant and judgment years before.<sup>192</sup> In fact, Ms. Lacey was never convicted of this misdemeanor charge.<sup>193</sup> Moreover, the incident in question did not take place at her previous residence.<sup>194</sup> She appealed the decision, but was denied.<sup>195</sup> She reasonably fears that the misdemeanor assault charge will work with the town’s public and private policing-based housing policies to exclude her from all housing in Faribault.<sup>196</sup>

#### IV. THE ROLE OF MASS CRIMINALIZATION

Part of the danger of policing-based housing policies is the broad and over-inclusive definition of criminal activity utilized by most crime-free ordinances and exclusionary housing policies.<sup>197</sup> The overly expansive reach of the system ensnares people who have not engaged in activities that meet traditional notions of “crime” and who have not had any meaningful contact with the criminal legal system. This problem is exacerbated because it occurs against a backdrop of mass criminalization in the United States. The entanglement of policing-based housing policies and mass criminalization is pushing already marginalized people further to the edges of society. The problem gets worse the more we criminalize relatively innocuous behavior and allow the label of criminality to form the basis for a range of housing decisions. This Part discusses the phenomena of mass criminalization and its effect of increasing the number and range of people that come into contact with the criminal legal system, thus swelling the numbers of people subject to the web of policing-based housing restrictions. Indeed, the problem of mass criminalization is particularly

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<sup>189</sup> *Id.* at 49, ¶ 223.

<sup>190</sup> *Id.* at 49, ¶ 225.

<sup>191</sup> *Id.* at 49, ¶ 226.

<sup>192</sup> *Id.* at 50, ¶ 227.

<sup>193</sup> *Id.*

<sup>194</sup> Jones Complaint, *supra* note 178, at 50, ¶ 227.

<sup>195</sup> *Id.* at 49, ¶ 226.

<sup>196</sup> *Id.* at 50, ¶ 230.

<sup>197</sup> See *infra* Part I; see also Archer, *supra* note 8, at 29–32 (discussing a range of crime-free housing ordinances, some of which appear to provide for eviction when a tenant has merely been arrested but not convicted, and perhaps even when the tenant has merely been stopped by police).

impactful in the housing context where “criminality” often takes on the broadest possible definition.

Scholars and advocates are drawing much needed attention to the individual and community-based harms of mass incarceration.<sup>198</sup> However, mass incarceration represents just one part of a much larger social justice crisis: mass criminalization.<sup>199</sup> The criminal legal system continues to expand its reach beyond criminalization by redefining crime and criminals. Today, the United States arrests over ten million individuals per year.<sup>200</sup> Four million people in the United States are currently “on probation, parole or otherwise under the control of the criminal legal system without being incarcerated.”<sup>201</sup> These statistics reflect mass criminalization.<sup>202</sup>

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<sup>198</sup> See, e.g., ALEXANDER, *supra* note 156, at 4 (“[I] came to see that mass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.”); Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1532–33 (2016) (indicating that the United States imprisons a larger percentage of the population than most other countries and discussing the effects imprisonment has on the individual and the person’s family); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004) (assessing the effects of mass incarceration on Black communities and concluding that incarceration does not benefit them); Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/>, archived at <https://perma.cc/2UC2-PNQ3> (discussing the effects mass incarceration has had on Black families); *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration/mass-incarceration-animated-series>, archived at <https://perma.cc/23SV-U5A5> (last visited Nov. 26, 2018) (detailing the stories of three people affected by mass incarceration); NAZGOL GHANDNOOSH, SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 18 (2015), <https://sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf>, archived at <https://perma.cc/EG4F-FJNQ> (“[M]ass incarceration’s hold on vast public resources and the obstacles erected for people with criminal records further erode the economic and social buffers that prevent crime.”).

<sup>199</sup> See Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S. CAL. INTERDISC. L.J. 363, 364 (2016) (“[I]t is insufficient to understand the incursion of mass criminalization into the lives of poor black women without analyzing the interplay of the criminal justice system and other state systems. These systems include welfare offices, public schools, child welfare agencies, public housing, and the family courts, to name just a few.”); Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 551 (2017) (“Mass criminalization enables the police to arrest African-Americans not only through the criminalization of non-serious conduct, but also through the diffusion of criminal justice officials, norms, and strategies into the structure and organization of the welfare state.”); Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 325 (2015) (“Although mass incarceration is perhaps the most serious and pressing problem with the criminal justice system in the United States, most criminal cases are misdemeanors and often do not result in jail or prison time. The problem is thus better characterized as one of mass criminalization.”).

<sup>200</sup> RITCHIE, *supra* note 22, at 1.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

In the United States, the federal government, states, and municipalities have increased the number of criminal laws and the penalties for violating them. On the federal level alone, there are as many as 4,500 federal crimes listed in the United States Code.<sup>203</sup> At the same time, government agencies and law enforcement authorities are expanding the number of places where they choose to enforce those laws, widening the range of people brought into contact with the criminal legal system. Mass criminalization has attached criminal sanctions to spitting in public places, violating subway rules, sleeping in public places, jaywalking, riding a bike on the sidewalk, and removing trash from a bin.<sup>204</sup> The result is that the criminal legal system intersects with our lives frequently and harshly. Today, arrests and punishments are often rooted in race and poverty and have become the default response to a range of social challenges, with the police serving as first responders, mental health professionals, and disciplinarians.<sup>205</sup>

### A. Mass Criminalization and Criminalizing Narratives

Exile of marginalized people is facilitated through mass criminalization. Mass criminalization reflects a social and political process through which society determines who will be subjected to punishment by the government — creating new categories of criminals and attaching moral judgments to these individuals.<sup>206</sup> Accordingly, mass criminalization is achieved not only through the proliferation of laws and harsh punishments, but also through the proliferation of tough on crime rhetoric and criminalizing narratives.<sup>207</sup> We are

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<sup>203</sup> Michael Cottone, *Rethinking Presumed Knowledge of the Law in the Regulatory Age*, 82 TENN. L. REV. 137, 141 (2014) (noting that estimates range from 3,600 to approximately 4,500 laws); see also Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 707–09 (2005) (discussing the proliferation of federal crimes).

<sup>204</sup> See Carbado, *supra* note 20, at 1487–88 (listing the types of non-serious behaviors that localities have criminalized); Luna, *supra* note 203, at 707 (listing “non-criminal behavior” that has been criminalized, such as loitering and violating subway rules).

<sup>205</sup> See generally PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 11 (2017) (“Low income people are arrested for minor violations that are only annoyances for people with means but are disastrous for the poor and near poor . . .”); Carbado, *supra* note 20, at 1487 (noting that certain non-serious activities are policed by “criminal justice actors”); RITCHIE, *supra* note 22, at 1.

<sup>206</sup> See Luna, *supra* note 203, at 712–13 (noting that there is no normative theory underlying and unifying American criminal law); RITCHIE & RITCHIE, *supra* note 22, at 9 (“Criminalization is the social and political process by which society determines which actions or behaviors—and by who—will be punished by the state.”).

<sup>207</sup> Luna, *supra* note 203, at 720 (noting that “[p]oliticians have . . . become nimble in deploying the rhetoric of accepted justifications” to fuel overcriminalization); RITCHIE, *supra* note 22, at 9 (“[H]ighly racialized and gendered narratives—whether they are about ‘thugs,’ ‘crack mothers,’ ‘welfare queens,’ or ‘bad hombres’—are used to fuel a generalized state of anxiety and fear, and to brand people labeled ‘criminal’ as threatening, dangerous, and inhuman.”); see also Bernard Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. &

structuring political and civil order around the fear of violent crime. And we have created narratives about who perpetuates those crimes and how crime begins and then takes hold of communities.<sup>208</sup> These narratives have “crept into popular and political language,”<sup>209</sup> and in the process, the values of freedom and equality take a back seat to the desire to repress this perceived crime.<sup>210</sup> This regime fuels a culture of fear of crime and of those believed to perpetuate it, leading to control and exclusion.<sup>211</sup>

Through criminalizing narratives, we have criminalized children and childhood misbehavior. Juveniles are arrested and confined for status offenses such as staying out late or failing to attend class.<sup>212</sup> We have expanded the school-to-prison pipeline in which school discipline policies and practices facilitate the ultimate incarceration of predominantly Black and Latinx students,<sup>213</sup> by creating a system in which students may be arrested in school for minor misconduct and adolescent behavior. For example, in South Carolina, students as young as seven years old have been arrested and charged for

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CRIMINOLOGY 109, 113 (1999) (asserting that “[c]laims of harm have become so pervasive that the harm principle has become meaningless”).

<sup>208</sup> See SIMON, *supra* note 124, at 3–7 (discussing how fear of violent crime has spread through American society and the outsized impact it has had on the poor and on certain racial groups).

<sup>209</sup> THOMPSON, *supra* note 34, at 15.

<sup>210</sup> See SIMON, *supra* note 124, at 3.

<sup>211</sup> *Id.* at 6.

<sup>212</sup> Luna, *supra* note 203, at 706.

<sup>213</sup> See CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 2 (2010) (“As in the case with school suspensions, children of color are disproportionately impacted by School-to-Prison Pipeline policies that lead to court involvement.”); Sarah E. Redfield & Jason P. Nance, *School-to-Prison Pipeline*, 2016 A.B.A. PRELIMINARY REP. 24–46, [https://www.americanbar.org/content/dam/aba/publications/criminaljustice/school\\_to\\_prison\\_pipeline\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminaljustice/school_to_prison_pipeline_report.authcheckdam.pdf), archived at <https://perma.cc/8DHQ-2JGB> (detailing the way in which the school-to-prison pipeline affects different categories of students); Matt Cregor & Damon Hewitt, *Dismantling the School-to-Prison Pipeline: A Survey from the Field*, 20 POVERTY & RACE 5 (2011) (“As suspension, expulsion and school-based arrest rates grow, racial disparities in discipline continue to widen.”); see generally Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867 (2010) (summarizing the different ways in which the school-to-prison pipeline is fueled by the public school system); Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 919 (2016) (finding, through data from the U.S. Department of Education, that “a police officer’s regular presence at a school is predictive of greater odds that school officials refer students to law enforcement for committing various offenses, including . . . lower level offenses”); Julianne Hing, *Race, Disability and the School-to-Prison Pipeline*, COLORLINES (May 13, 2014), <https://www.colorlines.com/articles/race-disability-and-school-prison-pipeline>, archived at <https://perma.cc/2XPY-6UK6> (discussing the disproportionate rate at which Black students are suspended or expelled and demonstrating an example of a Black student who was at risk of being unnecessarily removed from class for alleged discipline issues).

loitering, cursing, or acting in “an obnoxious manner” on school grounds.<sup>214</sup> In Greenville County, South Carolina, a student with emotional and behavioral disabilities was charged with a crime after failing to comply with instructions to leave the library and cursing at another student who was making fun of her.<sup>215</sup> In another situation, a child was arrested for violating the student dress code.<sup>216</sup>

This criminalization has been particularly stark for Black children. Black boys “have been gerrymandered out of the very notion of boyhood. If childhood is a time of innocence that warrants protection, then that stage of life ends much earlier and more abruptly for black boys.”<sup>217</sup> Black girls are similarly robbed of their childhood, and disproportionately disciplined and excluded from school for things such as a bad attitude.<sup>218</sup>

Through criminalizing narratives, we have criminalized resistance to discrimination and injustice. There are efforts to criminalize and brand activists as “black identity extremists,” subjecting them to governmental surveillance and prosecution. In 2017, officials with the FBI’s Domestic Terrorism Analysis Unit alleged that there was a “resurgence in ideologically motivated, violent criminal

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<sup>214</sup> *Kenny v. Wilson*, 885 F.3d 280, 284 (4th Cir. 2018) (quoting S.C. CODE ANN. § 16-17-420(A)(1)). “[S]tudents, including some as young as seven, have been charged under the statutes for cursing, refusing to follow directions, or getting in a physical altercation that doesn’t result in any injuries.” *Id.* at 286.

<sup>215</sup> *Id.* at 285.

<sup>216</sup> Luna, *supra* note 203, at 706; Sara Rimer, *Unruly Students Facing Arrest, Not Detention*, N.Y. TIMES (Jan. 4, 2004), <https://www.nytimes.com/2004/01/04/us/unruly-students-facing-arrest-not-detention.html>, archived at <https://perma.cc/6ES6-SHYR> (noting student arrests for dress code violations, tantrums, and turning out the lights in the bathroom).

<sup>217</sup> Gene Demby, *When Boys Can’t Be Boys*, NPR (Nov. 2, 2018), <https://www.npr.org/sections/codeswitch/2018/11/02/417513631/when-boys-cant-be-boys>, archived at <https://perma.cc/MZ9F-HRLL>. See also Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE 143, 163–64 (2014) (arguing that youth of color are disproportionately criminalized by the “blurred” distinction between adolescents and adults because “the acts of children of color, for some, seem more . . . threatening.”).

<sup>218</sup> See REBECCA EPSTEIN ET AL., *GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD* 8 (2017) (finding that participants in a study “viewed Black girls collectively as more adult than white girls” and suggesting that this “adulthood” may lead to harsher treatment of Black girls); MONIQUE MORRIS, *PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS* 20–22 (2015) (discussing circumstances that disproportionately affect Black girls and how those circumstances have long-term effects); NAACP LEGAL DEF. & EDUC. FUND, INC., *OUR GIRLS, OUR FUTURE: INVESTING IN OPPORTUNITY AND REDUCING RELIANCE ON THE CRIMINAL JUSTICE SYSTEM IN BALTIMORE* 1 (2018) (“National data on school-based arrests and referrals to law enforcement reveals that Black and Latinx students are disproportionately targeted for harsh punishment. Moreover, national data shows that Black girls are the fastest growing demographic affected by school discipline, arrests, and referrals to the juvenile justice system.”).



activity” stemming from Black people’s “perceptions of police brutality.”<sup>219</sup> Under this narrative, the federal government attempted to prosecute Rakem Balogun as a “black identity extremist” for statements he made on Facebook protesting police brutality.<sup>220</sup> Mr. Balogun spent five months in jail—during which time he lost his job, car, and home—before being cleared of any wrongdoing.<sup>221</sup>

Through criminalizing narratives, individuals are placed into gang databases without notice or process based on broad and vague criteria such as the color of their clothing or having tattoos.<sup>222</sup> The result is often the criminalization of youth and friendship. In New York City, gangs are defined as “a group of persons with a formal or informal structure that includes designated leaders and members, that engage in or are suspected to engage in unlawful conduct.”<sup>223</sup> In addition to criteria such as the color of clothing, individuals are labeled as gang members based on criteria such as “staying out late,” playing video games, and using Snapchat and Instagram — criteria that could apply to almost any teenager.<sup>224</sup> Once placed into the database, people face consequences such as enhanced surveillance, enhanced punishment, and deportation.<sup>225</sup> Inclusion in

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<sup>219</sup> Sam Levin, *FBI Terrorism Unit Says ‘Black Identity Extremists’ Pose a Violent Threat*, THE GUARDIAN (Oct. 7, 2017), <https://www.theguardian.com/us-news/2017/oct/06/fbi-black-identity-extremists-racial-profiling>, archived at <https://perma.cc/76KH-NNTR>.

<sup>220</sup> Sam Levin, *Black Activist Jailed for his Facebook Posts Speaks Out About Secret FBI Surveillance*, THE GUARDIAN (May 11, 2018), <https://www.theguardian.com/world/2018/may/11/rakem-balogun-interview-black-identity-extremists-fbi-surveillance>, archived at <https://perma.cc/68AY-CKDD>.

<sup>221</sup> *Id.*

<sup>222</sup> Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 DENV. CRIM. L. REV. 1, 16–17 (2015) (noting the lack of due process or appeal for people added to the NYPD’s gang database). The article also notes that 99% of people added to the NYPD gang database between 2001 and 2013 were Black, Latinx, or unidentified and 30% were under the age of eighteen when they were added. *Id.*; Mick Dumke, *Like Chicago Police, Cook County and Illinois Officials Track Thousands of People in Gang Databases*, PROPUBLICA: ILL. (July 19, 2018), <https://www.propublica.org/article/politic-il-insider-additional-gang-databases-illinois-cook-county>, archived at <https://perma.cc/4S2W-A2QX> (discussing the broad range of factors that may count as “evidence” of gang membership); Alice Speri, *New York Gang Database Expanded by Seventy Percent under Mayor Bill de Blasio*, THE INTERCEPT (June 11, 2018), <https://theintercept.com/2018/06/11/new-york-gang-database-expanded-by-70-percent-under-mayor-bill-de-blasio/>, archived at <https://perma.cc/V52T-KKPX> (reporting on the NYPD’s sweeping definition of what constitutes a gang and what makes a young person a potential suspect that needs to be surveilled).

<sup>223</sup> Speri, *supra* note 222.

<sup>224</sup> *Id.*

<sup>225</sup> See Annie Sweeney & Paige Fry, *Nearly 33,000 Juveniles Arrested Over Last Two Decades Labeled As Gang Members By Chicago Police*, CHICAGO TRIBUNE (Aug. 9, 2018), <https://www.chicagotribune.com/news/local/breaking/ct-met-chicago-police-gang-database-juveniles-20180725-story.html>, archived at <https://perma.cc/9GLV-2SS2> (discussing critics’ concerns with gang databases: that they are racially skewed, can cause greater harm when shared with other law enforcement agencies, and that they impose a harmful label on individuals during

the database could be used as alleged evidence of criminal activity, serving as a basis for exclusion from housing.

Through criminalizing narratives, we criminalize poor people struggling to go about everyday life through a confluence of poverty capitalism—the growing practice of profiting from the limited choices available to poor people—and predatory policing.<sup>226</sup> Poverty capitalism fits squarely into the mass criminalization framework, making it acceptable to profit off of poor citizens and further criminalizing those who are unable to pay fines through probation or jail.<sup>227</sup> In Tulsa, Oklahoma, women caught stealing baby formula and diapers have been ordered to attend a court-mandated “anti-theft school” for sixty-five dollars a class.<sup>228</sup> In traffic courts around the country, people often face a range of:

[F]ines, fees, surcharges, and costs. They owe money for the police officers’ retirement fund, the clerks’ retirement fund, the crime victims’ emergency fund, and the jail law library fund. There are probation supervision fees, fees for drug tests, administrative fees, probation “start-up” fees, photo fees, convenience fees, and electronic monitoring fees.<sup>229</sup>

The overwhelming number of small courts around the country, including traffic courts, state courts, city courts, magistrate courts, and probate courts

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criminal investigations or at sentencings); Christie Thompson, *How ICE Uses Secret Police Databases to Arrest Immigrants*, MARSHALL PROJECT (Aug. 28, 2017), <https://www.themarshallproject.org/2017/08/28/how-ice-uses-secret-police-databases-to-arrest-immigrants?ref=collections>, archived at <https://perma.cc/JU9X-7TQ9> (telling the story of a man who was targeted by ICE after being wrongly listed in a gang database).

<sup>226</sup> Predatory policing has been defined as “the direct targeting of vulnerable groups by way of arrests or the issuance of citations as sources of revenue for the city or the police department or to effectuate promotions and pay increases for particular officers.” Carbado, *supra* note 20, at 1502.

<sup>227</sup> Reliance on courts for municipal revenue generation is a deeply entrenched practice in many communities. One such community is Ferguson, Missouri, where the Department of Justice investigation found that city and police leadership relied on “citation productivity” to fund the city budget. See U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 10 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf), archived at <https://perma.cc/L4FJ-7GND> (“City and police leadership pressure officers to write citations, independent of any public safety need, and rely on citation productivity to fund the City budget.”).

<sup>228</sup> Sarah Stillman, *America’s Other Family-Separation Crisis*, THE NEW YORKER (Nov. 5, 2018), <https://www.newyorker.com/magazine/2018/11/05/americas-other-family-separation-crisis>, archived at <https://perma.cc/9HDY-XVDN>.

<sup>229</sup> Sarah Geraghty, *How the Criminalization of Poverty Has Become Normalized in American Culture and Why You Should Care*, 21 MICH. J. RACE & L. 195, 196 (2016) (referencing traffic courts in Georgia specifically).

exacerbates the problem.<sup>230</sup> Many of these courts require immediate payment under threat of jail.<sup>231</sup>

Each of these regimes helps to create a country where poor people, people of color, and other marginalized people are disproportionately likely to be labeled as criminals for behavior having no meaningful connection to their fitness as neighbors. By criminalizing their status and behaviors, and using that criminality as a basis of housing exclusion, we make it impossible for an ever-increasing swath of Americans to live with dignity and security.

### *B. The Myth of Criminality, Weaponizing Fear, and Living While Black*

Although many policymakers point to crime as a primary motivation behind the proliferation of policing-based housing policies and the desire to exclude,<sup>232</sup> the problem is not actual crime, but the myth of criminality.<sup>233</sup> Racial bias permeates mass criminalization.<sup>234</sup> Indeed, the narrative linking race and crime has endured for centuries, continuing to act as a measure of Black people's "fitness for modern life."<sup>235</sup> The influence of this criminalizing narrative can be

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<sup>230</sup> *See id.* at 198 ("One of the challenges we face as advocates is the sheer number of little courts.").

<sup>231</sup> *See id.* at 196 ("It has become culturally permissible to farm out municipal fine collection to private companies that make huge profits providing 'supervision' to many people who do not need to be on probation at all."). The case of Adel Edwards is a powerful example. Mr. Edwards is an older Black man with an intellectual disability. He has no income and lives in Georgia "in a house without running water or utilities." *Id.* Mr. Edwards received a summons for burning leaves in his yard without a permit. *Id.* During his initial court appearance, he was put on probation, fined a total of \$1,028, handcuffed, and taken to jail because he could not afford to make a \$250 payment on his fine. *Id.*

<sup>232</sup> *See, e.g., Crime Free Programs, supra* note 102 ("The Crime Free Programs are innovative, law enforcement-based crime prevention solutions designed to help keep illegal activity off rental property.").

<sup>233</sup> For example, when policies are in place prohibiting potential employers from asking for information about previous criminal convictions, the employers will often use race as a signal for whether the applicant has a conviction. Phil Hernandez, *Ban-the-Box Statistical Discrimination Studies Draw the Wrong Conclusions*, NAT'L EMP. L. PROJECT (Aug. 29, 2017), <https://www.nelp.org/blog/ban-the-box-statistical-discrimination-studies-draw-the-wrong-conclusions/>, archived at <https://perma.cc/5PZS-T7H4>; *see also* Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, 133 Q.J. OF ECON. 191, 229 (2016) (concluding that "employers substantially increase discrimination on the basis of race" after ban the box policies are put in place).

<sup>234</sup> Carbado, *supra* note 20, at 1489 (noting how "poverty and race intersect to create a pathway to criminalization"); *see generally* KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010) (chronicling the history of the myth of Black criminality in the United States).

<sup>235</sup> MUHAMMAD, *supra* note 234, at 1–2. This is a centuries-old phenomenon, used to justify Black repression from the time of slavery, to Jim Crow, to today. *See id.* at 20–25, 35–44 (describing the "science," statistics, writings, and views that were relied on to justify the treatment of enslaved Black people and Black people during the dawn of the Jim Crow era). In

seen in one groundbreaking study that confirmed that a Black man without a criminal record was less likely to get a job than a white man with a criminal conviction.<sup>236</sup> In some ways “being black in America today is just about the same as having a felony conviction.”<sup>237</sup> Through racialized narratives, negative labeling, and media coverage, Americans’ fear of crime has morphed with America’s fear of Black people.<sup>238</sup> For many, crime statistics “define Black humanity,”<sup>239</sup> with narratives asserting that poor Black people embrace and encourage a culture of crime.<sup>240</sup> In conversations ranging from criminal justice reform, to education, to housing, these racialized narratives fuel a general state of anxiety and fear, and brand Black people, and people of color more broadly, as dangerous and inhuman.<sup>241</sup> In this context, banishment and exile become a natural response.<sup>242</sup>

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turn, the myth of Black criminality has been used to justify deploying the police power of the state to control and segregate Black people. *See id.* at 1 (“Nearly half of the more than two million Americans behind bars are African Americans, and an unprecedented number of black men will likely go to prison during the course of their lives.”); Coates, *supra* note 198, (noting that the governor of Mississippi in 1904 said that southern states did not want to invest in educating Black Americans because of “[t]he strength of [crime] statistics”).

<sup>236</sup> DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 98 (2007) (“Blacks are less than half as likely to receive consideration by employers than equally qualified whites, and black nonoffenders fare no better than even those whites with prior felony convictions.”).

<sup>237</sup> *Id.* at 91.

<sup>238</sup> *See* MUHAMMAD, *supra* note 234, at 1–2; *see also* THOMPSON, *supra* note 34, at 10–14 (discussing negative narratives around involvement in the criminal legal system, particularly when it comes to narratives of people of color involved in crime).

<sup>239</sup> MUHAMMAD, *supra* note 234, at 1.

<sup>240</sup> THOMPSON, *supra* note 34, at 20.

<sup>241</sup> For example, criminalizing and dehumanizing narratives about immigrants of color have been a hallmark of President Trump’s campaign and presidency, including his infamous statement about Mexican migrants: “They’re bringing drugs. They’re bringing crime. They’re rapists.” Katie Rogers, *Trump Highlights Immigrant Crime to Defend His Border Policy*, *Statistics Don’t Back Him Up*, N.Y. TIMES (June 22, 2018), <https://www.nytimes.com/2018/06/22/us/politics/trump-immigration-borders-family-separation.html>, *archived at* <https://perma.cc/Z847-DGBR>; *see also* Gregory Korte & Alan Gomez, *Trump Ramps Up Rhetoric on Undocumented Immigrants: ‘These aren’t people. These are animals.’*, USA TODAY (May 16, 2018), <https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002/>, *archived at* <https://perma.cc/72WL-AJGK> (“We have people coming into the country or trying to come in . . . . You wouldn’t believe how bad these people are . . . . These aren’t people. These are animals.”) (quoting Donald Trump).

<sup>242</sup> *See* Carbado, *supra* note 20, at 1489 (arguing that the negative effects of mass criminalization are compounded by the “enormous discretion” given to police officers with regard to who they can arrest, which can allow for racial prejudices to take effect); RITCHIE & RITCHIE, *supra* note 22, at 9 (“[V]iolence, banishment and exile, denial of protection, and restrictions on freedom, expression, movement, and ultimately existence of people deemed ‘criminal’ within our communities becomes a ‘natural’ response.”).

There is widespread fear in American communities that allowing certain people to live within their borders will threaten their safety, well-being, and prosperity.<sup>243</sup> The mark of criminality exists for people of color even in the absence of actual criminality.<sup>244</sup> Mass criminalization feeds the myth of criminality and validates unwarranted fear. In turn, policing-based housing policies weaponize that fear. Indeed, mass criminalization is particularly harmful in the housing context because public housing authorities, private landlords, and municipalities define criminality so broadly, even stretching to include cases where there has not been an arrest. Given the close connections between law enforcement, the criminal legal system, and race and poverty, for many poor people of color, exile is almost fate.

Moreover, policing-based housing policies can lead to exclusions or evictions because of police contacts resulting from the weaponization of police by community members suspicious or resentful of people of color, solely because of their race. A well-known example that received media attention illustrates this point. On April 12, 2018, Rashon Nelson and Donte Robinson went into a Starbucks in Philadelphia to meet with their business partner.<sup>245</sup> After waiting ten minutes for him, the two men were surrounded by police and handcuffed, facing charges of trespassing and creating a disturbance.<sup>246</sup> Their alleged crime was sitting in the Starbucks and asking to use the restroom before ordering their coffee.<sup>247</sup> This incident was just one in what became a stream of similar stories of people calling the police on people of color for innocuous, everyday behavior.<sup>248</sup> Under many policing-based housing policies, their arrest could have triggered exclusion from private or public housing.

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<sup>243</sup> See, e.g., *Crime Free Multi-Housing: Keep Illegal Activity off Rental Property*, *supra* note 84.

<sup>244</sup> See generally PAGER, *supra* note 236 (discussing a study that confirmed the impact of racial and criminal stigma in the employment market).

<sup>245</sup> Rachel Siegel, “*They Can’t be Here for Us*”: *Black Men Arrested at Starbucks Tell Their Story for the First Time*, WASH. POST (Apr. 19, 2018), [https://www.washingtonpost.com/news/business/wp/2018/04/19/they-cant-be-here-for-us-black-men-arrested-at-starbucks-tell-their-story-for-the-first-time/?noredirect=on&utm\\_term=.dc966a51d152](https://www.washingtonpost.com/news/business/wp/2018/04/19/they-cant-be-here-for-us-black-men-arrested-at-starbucks-tell-their-story-for-the-first-time/?noredirect=on&utm_term=.dc966a51d152), archived at <https://perma.cc/DBP5-LEN5>.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> See, e.g., Christina Caron, *5 Black Women Were Told to Golf Faster. Then the Club Called the Police*, N.Y. TIMES (Apr. 25, 2018), <https://www.nytimes.com/2018/04/25/us/black-women-golfers-york.html>, archived at <https://perma.cc/5V2E-FWNB>; Christina Caron, *A Black Yale Student Was Napping and a White Student Called the Police*, N.Y. TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/nyregion/yale-black-student-nap.html>, archived at <https://perma.cc/L44Z-TJGY> (describing how a white student called the police on a Black graduate student who fell asleep in her dorm’s common area); Bill Chappell, *College Apologizes After Native American Students’ Visit is Sidelined by Police*, NPR (May 4, 2018), <https://www.npr.org/sections/thetwo-way/2018/05/04/608533284/college-apologizes-after-native-american-students-visit-is-sidelined-by-police>, archived at <https://perma.cc/J6DM-FZER> (telling the story of two Native American teenagers who, while on a college campus trip, were pulled aside by campus police who had been called by a parent on the tour because of the boys’

The arrest of Mr. Nelson and Mr. Robinson represents an experience well-known to Black people. The phrase “Living While Black” has been used to encompass the innumerable ways in which people of color, and Black people in particular, are viewed with suspicion and required to justify their presence in spaces where they are seen as not being the norm.<sup>249</sup> As sociologist Elijah Anderson explains, there are “white spaces” where Black people are often not present or exist in a limited number.<sup>250</sup> When in white spaces, Black people are often required to provide justification and proof—to police or other citizens—that they belong.<sup>251</sup> When those suspicious of Black people in White spaces call the police to enforce those exclusions, these criminal legal system contacts can pose numerous risks to the health and safety of those being policed, and can result in criminal records justifying housing exclusion.

The combination of expanding policing-based housing policies and the spike in police officers responding to complaints about Black people living their lives in white spaces increases the likelihood that Black people will experience exile and that White residential spaces will be preserved. Together, they risk

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appearance); Marwa Eltagouri, *A Woman Called 911 About Burglars at her Neighbor's House. They Were Black Airbnb Guests*, WASH. POST (May 8, 2018), <https://www.washingtonpost.com/news/business/wp/2018/05/08/a-woman-called-911-about-burglars-at-her-neighbors-house-they-were-black-airbnb-guests/>, archived at <https://perma.cc/4AVR-H327>.

<sup>249</sup> See, e.g., P.R. Lockhart, *Living While Black and the Criminalization of Blackness*, VOX (Aug. 1, 2018), <https://www.vox.com/explainers/2018/8/1/17616528/racial-profiling-police-911-living-while-black>, archived at <https://perma.cc/X3SS-8KEN> (“These stories and others have been published so frequently that they’ve formed a new news genre: ‘Living While Black,’ a phrase that encompasses the myriad ways black people are viewed with suspicion, profiled, and threatened with responses from police for minor infractions, or less.”); *Living While Black*, HUFFPOST (last visited Nov. 21, 2018), <https://www.huffingtonpost.com/topic/living-while-black>, archived at <https://perma.cc/F4GP-XHNG> (listing different racist encounters); Cleve R. Wootson Jr., *#LivingWhileBlack Victims Want a Congressional Hearing on Racial Profiling*, WASH. POST (June 4, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/06/04/they-were-harassed-for-livingwhileblack-now-they-want-congressional-hearings-on-profiling/>, archived at <https://perma.cc/XLC5-X9V7> (“Trying to turn their bad moments into a national call for action, Martin and several other black people who’ve had police sicked on them while they’ve been doing innocuous things—a meme-able phenomenon hashtagged #LivingWhileBlack—are asking for a congressional hearing on the issue.”).

<sup>250</sup> Elijah Anderson, *The White Space*, 1 SOC. RACE & ETHNICITY 10, 10 (2015) (describing “white space[s]” as “settings in which black people are typically absent, not expected, or marginalized when present”); see also Elijah Anderson, *This is What it Feels Like to Be Black in White Space*, THE GUARDIAN (June 8, 2018), <https://www.theguardian.com/commentisfree/2018/jun/09/everyday-racism-america-black-white-spaces>, archived at <https://perma.cc/4C46-7GTV> (“For black people, experience holds a dear school, and the knowledge they acquire is based largely on the experience of living while black in a society that is dominated by white people.”).

<sup>251</sup> See Anderson, *supra* note 250, at 11–15 (describing specific instances of profiling experienced by Black people in America).

working in the same way as racially restrictive covenants—community-based contractual agreements that prohibit the sale, rental, or occupancy of a residence to certain groups of people.

## V. MOVING BEYOND THE TRADITION OF EXILE

In 1975, the New Jersey Supreme Court declared that exclusionary zoning violates the New Jersey Constitution.<sup>252</sup> In *Southern Burlington County NAACP v. Township of Mount Laurel*, the plaintiffs challenged economic and racial discrimination in zoning decisions and the provision of affordable housing in suburban communities.<sup>253</sup> The court recognized that the police powers of the state, and those related powers delegated to local municipalities, must be exercised to “promote public health, safety, morals [and] the general welfare.”<sup>254</sup> To fulfill their obligations to act in the best interest of the general welfare, municipalities must consider not just the welfare of their own citizens, but also the welfare of the state’s citizens as a whole.<sup>255</sup> Otherwise, the state would see:

[P]oor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted; poor people forced to live in urban slums forever not because suburbia, developing rural areas, fully developed residential sections, seashore resorts, and other attractive locations could not accommodate them, but simply because they are not wanted. It is a vision not only at variance with the requirement that the zoning power be used for the general welfare but with all concepts of fundamental fairness and decency that underpin many constitutional obligations.<sup>256</sup>

The New Jersey court’s recognition of exclusionary localism as antithetical to economic and social equality and its particular understanding of collective responsibility under the police powers were groundbreaking at the time of the *Mount Laurel* decision.<sup>257</sup> Equally important was the court’s statement that each

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<sup>252</sup> *S. Burlington City NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 724–33 (N.J. 1975).

<sup>253</sup> *Id.* at 717.

<sup>254</sup> *Id.* at 725.

<sup>255</sup> *Id.* at 725–26.

<sup>256</sup> *S. Burlington City NAACP v. Twp. of Mount Laurel*, 456 A.2d 390, 415 (N.J. 1983).

<sup>257</sup> *See Twp. of Mount Laurel*, 336 A.2d at 749 (Pashman, J., concurring) (“The problems we begin to face today are of awesome magnitude and importance, both for New Jersey and for the nation as a whole. It will not do to approach them gingerly; they call out for forceful and decisive judicial action.”); CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* 148–50 (1996); David D. Troutt, *Mount Laurel and Urban Possibility: What Social Science Research Might Tell the Narratives of Futility*, 27 SETON HALL L. REV. 1471, 1477 (1997).

community must be concerned with the impact that their housing decisions will have on the state as a whole and on people seeking to join that community.<sup>258</sup>

Most American communities have never grappled with the broader message of *Mount Laurel*. Although there are many narratives that can be told about the *Mount Laurel* opinion,<sup>259</sup> at its core *Mount Laurel* stands for the proposition that no community has the right to permanently exile marginalized people because of perceived threats to its identity or way of life. We have a collective responsibility to create space in our communities for everyone by eliminating sources of perpetual social exclusion. Policing-based housing policies indulge many of the dark prejudices at the heart of American history, including a desire to exclude anyone perceived as a threat. These laws are deeply American, even as they violate the central values of the United States. We will need to confront those fears and prejudices in order to replace practices of exclusion with inclusion.

As a first step, we must decouple the criminal legal system from housing policy. Delaware provides a model for how to move in the right direction. The Delaware State Housing Authority (“DSHA”) has recognized the need to “consider both the desire of all residents to live in a safe and secure environment and the community’s need to provide housing for all individuals, including individuals with conviction records.”<sup>260</sup> Although the DHSAs reviews the criminal history of applicants, their screening process consciously integrates ideas of rehabilitation and redemption. For example, the DSHA screening criteria considers whether the applicant’s criminal history raises actual safety and security concerns for other residents, whether the offense included the use of violence, and the length of time that has passed since the conviction.<sup>261</sup> In addition, for housing applicants who are in recovery for alcohol or substance abuse, the DHSAs will consider whether the crime was committed while the applicant was under the influence of alcohol or illegal drugs in addition to all rehabilitation efforts the applicant has taken since their conviction.<sup>262</sup> Notably, the DHSAs will also consider whether the housing applicant has the support of

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<sup>258</sup> *Twp. of Mount Laurel*, 336 A.2d at 726 (“[W]hen regulation does have a substantial external impact, the welfare of the state’s citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.”).

<sup>259</sup> See Troutt, *supra* note 257, at 1472 (discussing some of the narratives through which the story of *Mount Laurel* can be told).

<sup>260</sup> DEL. STATE HOUS. AUTH., ADMINISTRATIVE PLAN FOR THE SECTION 8 MOVING TO WORK VOUCHER PROGRAM 116 (2012), [http://www.destatehousing.com/FormsAndInformation/Publications/s8\\_admin\\_plan.pdf](http://www.destatehousing.com/FormsAndInformation/Publications/s8_admin_plan.pdf), archived at <https://perma.cc/FGK9-B4KU>.

<sup>261</sup> DEL. STATE HOUS. AUTH., STATEMENT OF POLICIES GOVERNING ADMISSION AND OCCUPANCY IN LOW-RENT PUBLIC HOUSING AND PUBLIC HOUSING HOME OWNERSHIP (2012), [http://www.destatehousing.com/FormsAndInformation/Publications/a\\_o\\_policy\\_2007.pdf](http://www.destatehousing.com/FormsAndInformation/Publications/a_o_policy_2007.pdf), archived at <https://perma.cc/XNY3-RYT4>.

<sup>262</sup> *Id.*



family, friends, community groups, or current residents as a support network, as well as recommendations from an individual's probation officer, caseworker, counselor, family member, clergy, employer, or community leader.<sup>263</sup>

Rockford, Illinois provides another model. The Rockford Housing Authority ("RHA") has changed its orientation around housing and policing. Previously, the RHA used private security guards who did not feel compelled to respect tenants in their homes or those tenants' due process rights.<sup>264</sup> In one instance, the private security guards searched a fifteen-year-old boy without probable cause because he did not have his identification.<sup>265</sup> After finding a joint in his pocket during the search, the RHA turned him over to the police and evicted his entire family.<sup>266</sup> Then, in 2015, HUD issued a notice to "inform PHAs and owners of other federally-assisted housing that arrest records may not be the basis for denying admission, terminating assistance or evicting tenants, to remind PHAs and owners that HUD does not require their adoption of 'One Strike' policies, and to remind them of their obligation to safeguard the due process rights of applicants and tenants."<sup>267</sup> Under the political cover of the HUD notice, the RHA fired the private security firm it had previously used, adopted policies to move the RHA away from harsh rules enforcement, and increased its focus on identifying and meeting the basic needs of all of its residents.<sup>268</sup> The RHA also moved away from targeting and arresting visitors to RHA residences. Previously, the RHA banned certain visitors and arrested those people for trespassing if they were found on RHA property.<sup>269</sup> Indeed, one-third of all of the arrests on RHA property were for trespassing.<sup>270</sup> The RHA eventually realized that they "were doing no good banning people, because the people [they] were banning were young black males who were either the father of someone living on [the] property or the child of one of the mothers who

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<sup>263</sup> *Id.*

<sup>264</sup> J. Brian Charles, et al., *Black, White, and Blue*, GOVERNING (Jan. 23, 2019), <https://www.governing.com/topics/public-justice-safety/gov-segregation-police.html>, *archived at* <https://perma.cc/2EMP-CFBP>.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE PIH 2015-19, GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS (2015), <https://www.hud.gov/sites/documents/PIH2015-19.PDF>, *archived at* <https://perma.cc/3L8F-RESP>. The HUD guidance was a significant move towards rejecting a culture of exclusion. However, this approach has been rejected by the Trump administration, which has not yet specifically addressed this topic but has generally been attempting to roll back the Obama Administration's steps towards fair housing. *See* Thrush, *supra* note 51.

<sup>268</sup> *See* Charles, et al., *supra* note 264.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

lived there.”<sup>271</sup> Moreover, the no-tolerance policy itself was a primary driver of arrests of non-residents.<sup>272</sup>

However, it is not enough to proclaim the importance of inclusion, or even to rollback explicit policies of exclusion. We must also grapple with the underlying forces that feed the initial desire to exclude. As noted by a concurring justice in *Mount Laurel*, exclusionary housing practices are “often motivated by fear of and prejudices against other social, economic, and racial groups.”<sup>273</sup> One driver of that fear and prejudice is the criminalization of people of color. In this regard, the current movement against mass criminalization offers some hope for reform. We are at an important crossroads with substantial public opinion on both the left and the right recognizing the folly of mass criminalization. The bipartisan passage of the First Step Act, which shortens mandatory minimum sentences for nonviolent offenders, addresses some racial disparities in the criminal legal system, and provides reentry support, is one example on the national level.<sup>274</sup> On the statewide and local level, we have seen jurisdictions adopt laws either decriminalizing or legalizing recreational marijuana use,<sup>275</sup> taking meaningful steps to remove police officers from schools and slow the school-to-prison pipeline,<sup>276</sup> prohibiting or limiting the consideration of criminal records during the employment application process,<sup>277</sup> and requiring a racial equity study prior to adopting criminal legal system

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<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Twp of Mount Laurel*, 336 A.2d at 736 (Pashman, J., concurring).

<sup>274</sup> First Step Act of 2018, Pub. L. No. 115-391.

<sup>275</sup> As of 2019, recreational use of marijuana is legal in Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington. See John O’Connor, *Recreational Marijuana is Now Legal in 11 States*, FORTUNE (June 25, 2019), <https://fortune.com/2019/06/25/recreational-marijuana-illinois/>, archived at <https://perma.cc/Z5K3-UWU2>.

<sup>276</sup> See Proposed Final Judgment at 2, *Cal. v. Stockton Unified Sch. Dist.*, Case No. 34-2019-00248766 (Cal. Super. Ct., Sacramento Cty., Jan. 18, 2019), <https://oag.ca.gov/system/files/attachments/press-docs/filed-proposed-final-judgment.pdf>, archived at <https://perma.cc/JQ4M-GH6K> (proposing limiting the role of law enforcement officers in student discipline and limiting arrests to behavior that poses “a major threat to school safety”); Lauren Camera, *New York City Limits Use of Police in Schools*, U.S. NEWS & WORLD REPORT (June 20, 2019), <https://www.usnews.com/news/education-news/articles/2019-06-20/new-york-city-limits-use-of-police-in-schools>, archived at <https://perma.cc/R3FA-MH4T> (discussing a memorandum of understanding limiting the role of police officers in schools).

<sup>277</sup> One example is New York City’s Fair Chance Act, which restricts most employers’ use of criminal history in the hiring process. See NYC HUMAN RIGHTS, FAIR CHANCE ACT: LEGAL ENFORCEMENT GUIDANCE (June 24, 2016), <https://www1.nyc.gov/site/cchr/law/fair-chance-act.page>, archived at <https://perma.cc/MD7S-U94L> (outlining the requirements of the Act). The law imposes affirmative obligations on covered employers who want to conduct criminal background checks on job applicants and a process that must be followed before making an adverse decision on the basis of the applicant’s criminal history. *Id.* Among the restrictions is the prohibition of any statement or inquiry relating to a pending arrest or criminal conviction during an interview or at any point prior to a conditional offer being made. *Id.*

policies.<sup>278</sup> If jurisdictions do not take continued steps to reverse mass criminalization, over-criminalized and marginalized communities will continue to be victims.

## CONCLUSION

One's home—not only the physical residence, but also the community in which it is located—impacts one's life in numerous and interdependent ways. One's access to education and jobs, one's safety and access to quality health care, one's social networks, and the quality of the air one breathes are all deeply impacted by where one lives.<sup>279</sup> But even more than that, your home and community deeply impact your identity and sense of self. According to anthropologist William S. Sax, “people and the places where they reside are engaged in a continuing set of exchanges; they have determinate, mutual effects upon each other because they are part of a single, interactive system.”<sup>280</sup>

In so many ways, the history of Black people in America is the history of control and exclusion. Central to that history are the legal and social limitations on how and where Black and other marginalized people can live; exclusions which have outlived both chattel slavery and legally countenanced Jim Crow. Policing-based housing policies are only the newest tool that American communities have developed to define the boundaries of who is allowed to live

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<sup>278</sup> Iowa was the first state to require a “minority impact statement,” assessing the impact proposed criminal legal system and sentencing legislation will have on minority communities. IOWA CODE § 2.56 (2008). Other states and municipalities have adopted similar mandates. *See, e.g.*, CONN. GEN. STAT. § 51-10c (2019) (creating the Commission on Racial and Ethnic Disparity in the Criminal Justice System to address the overrepresentation of Black and Latinx people in the criminal legal system); KINGS CTY., WA., KINGS CTY. CODE Title 2, Ch. 10 § 220 (2010) (requiring the “development of analytical tools to support all branches’ departments and agencies in identifying the equity impacts of policies and decisions and ways in which to amplify positive impacts and mitigate negative impacts.”).

<sup>279</sup> *See, e.g.*, Xavier de Souza Briggs, *More Pluribus, Less Unum? The Changing Geography of Race and Opportunity*, in *THE GEOGRAPHY OF OPPORTUNITY* 17, 35 (Xavier de Souza Briggs ed., 2005); James R. Elliot, *Social Isolation and Labor Market Insulation: Network and Neighborhood Effects on Less-Educated Urban Workers*, 40 *SOC. Q.* 199, 199–216 (1999) (discussing the ways poverty and social networks within a neighborhood impact labor prospects); Daniel Kiel, *The Enduring Power of Milliken’s Fences*, 45 *URB. LAW.* 137, 144 (2013); Katherine S. Newman, *Dead-End Jobs: A Way Out*, 13 *BROOKINGS REV.* 24 (1995) (describing the stagnation of jobs in inner city communities); John A. Powell, *Living and Learning: Linking Housing and Education*, 80 *MINN. L. REV.* 749 (1995); Aaron J. Saiger, *The School District Boundary Problem*, 42 *URB. LAW.* 495, 499–501 (2010) (discussing disparities between schools in neighboring school districts).

<sup>280</sup> Julie Beck, *The Psychology of Home: Why Where You Live Means So Much*, *THE ATLANTIC* (Dec. 30, 2011), <https://www.theatlantic.com/health/archive/2011/12/the-psychology-of-home-why-where-you-live-means-so-much/249800/>, archived at <https://perma.cc/FTL5-YEHZ> (quoting WILLIAM S. SAX, *MOUNTAIN GODDESS: GENDER AND POLITICS IN A HIMALAYAN PILGRIMAGE* (1991)).

and thrive within their borders, and thus who can shape and be shaped by living in these communities. By combining the brutal efficiency of mass criminalization and the racism of the criminal legal system, the expansion of policing-based housing policies risks profound damage to the physical, economic, and psychological well-being of its victims.

Continued success in the fight against mass criminalization and perpetual punishment may be the most effective strategy to stem the exile that flows from policing-based housing policy. Today, far too many decisionmakers choose to exclude families because their children engaged in behavior that would be of little consequence in other communities;<sup>281</sup> people struggling with drug-addiction and searching for stable housing to support their recovery;<sup>282</sup> and people targeted by the over-policing of poor communities.<sup>283</sup> Eventually, the punishment and exile must end.

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<sup>281</sup> See Cammett, *supra* note 14, at 1141 (discussing evictions for minor marijuana use among youth).

<sup>282</sup> See TRAN-LEUNG, *supra* note 51, at 1 (discussing the rejection of Marissa Morris, a mother of three who overcame a history of substance abuse and who fears that her rejection from public housing, and the resulting stress of homelessness, would threaten her recovery).

<sup>283</sup> See Cammett, *supra* note 14, at 1142 (“[P]arents and children living in public housing, especially African Americans, are especially vulnerable to surveillance and state intervention in the form of police presence, selective prosecutions, and disparate outcomes in criminal courts.”).