

Confronting Race and Collateral Consequences in Public Housing

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INTRODUCTION

Access to affordable housing is one of the most critical issues currently facing low-income families. In many urban areas, rising costs, dwindling economic opportunity, and gentrification have foreclosed access to previously available rental stock and contributed to a crisis in housing.¹ For African Americans lingering economic disparities arising from generations of forced racial segregation² and the disproportional impact of mass incarceration have magnified these problems.³ In this Article I explore legal barriers to publicly subsidized housing, a “collateral consequence” of criminal convictions that increasingly serves as a powerful form of housing discrimination. 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. These widespread barriers to public housing are a detriment to many low-income families, but especially African Americans, owing to their historical experience of both housing discrimination and hypercriminalization.

Part I of this Article tracks the history of racial discrimination in housing, elaborating on private and state-sanctioned barriers, and the resultant contemporary challenges faced by African Americans. This Part surfaces the contemporary federal government’s active involvement in redlining, its support of racially restrictive covenants, and the direct subsidization of all-white suburbs. This Part analyzes how this decades-long government policy produced a massive transfer of wealth to the suburbs in the form of home equity, while at the same time divesting resources from urban areas where most African Americans in northern and mid-western cities lived.

1. See JOSH LEOPOLD ET AL., URBAN INST., THE HOUSING AFFORDABILITY GAP FOR EXTREMELY LOW-INCOME RENTERS IN 2013 (2015), available at <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000260-The-Housing-Affordability-Gap-for-Extremely-Low-Income-Renters-2013.pdf> (“Nationwide, only 28 adequate and affordable units are available for every 100 renter households with incomes at or below 30 percent of the area median income. Not a single county in the United States has enough affordable housing for all its extremely low-income (ELI) renters.”).

2. See *infra* Part I (detailing the history of housing discrimination in the United States).

3. See Bryan Stevenson, *Drug Policy, Criminal Justice and Mass Imprisonment* 5 (Global Comm’n on Drug Policies, Working Paper Prepared for the First Meeting of the Commission, 2011) (“In the United States, considerable evidence demonstrates that enforcement of drug policy has proved to be racially discriminatory and very biased against the poor. America’s criminal justice system is very wealth sensitive which makes it difficult for low-income residents to obtain equally favorable outcomes as more wealthy residents when they are charged with drug crimes.”).

Part II explores modern hypersegregation in public housing programs, the emergence of mass criminalization through government drug policy, and the development and implementation of inflexible “One Strike” public housing exclusion policies. This Part focuses on low-income families facing tremendous housing instability as a result of family members’ criminal justice involvement—the invisible “collateral damage” of these policies.

Part III focuses on remedies, outlining challenges and opportunities for addressing decades-long housing policy that reflected the aggressive policing strategies of the 1980s and 1990s. This Part takes note of an emerging consensus that criminal justice policies are being reassessed in many quarters, including by the federal government itself. It also issues a clarion call to law schools, through the creation of *family defense projects*, to assist communities in challenging punitive aspects of the carceral state, beginning with the task of reinstating access to affordable public housing.

I. RACE-BASED DISCRIMINATION IN HOUSING: AN AMERICAN HISTORY

The history of housing discrimination against African Americans⁴ in the twentieth century is pervasive, far-reaching, and odious.⁵ Over time widespread racist cultural norms, mob violence, and state-sanctioned discrimination have been deployed in equal measure to deny black families access to housing and lending opportunities that give rise to the “American dream” of homeownership—or consistent access to decent and affordable rental properties.⁶ This historical subordination—by private actors and governmental entities alike—has contributed signif-

4. Many minority groups have suffered discrimination in the United States. Because this Article looks at historical housing discrimination, public housing, and the impact of criminal convictions arising from mass incarceration, I focus on the intersection of these areas and their disproportionate impact on the African-American population.

5. For brevity, this Part begins with post-Civil War policy. However, as author Ta-Nehisi Coates has observed in his article *The Case for Reparations*, African Americans have endured “[t]wo hundred fifty years of slavery. Ninety years of Jim Crow Thirty-five years of [state-sanctioned redlining].” See Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

6. Professor Roisman states that, in teaching about inequality, “[m]any cases that appear in all parts of the [p]roperty curriculum illuminate ways in which white supremacist ideology and action have been a substantial cause of racial disparities in control of property. These involve, among other things: conquest; slavery; disposition of public lands to predominantly white, male, Anglo beneficiaries; explicit racial zoning; racially restrictive covenants; ‘manifest destiny’; ‘Negro removal’ by the urban renewal and interstate highway programs; racially discriminatory donative transfers; the implementation of the public housing program; the treatment of farmworkers; and the use of zoning to establish and maintain exclusively white, Anglo settlements.” See Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 675 (2002).

icantly to the modern urban housing crisis, which disadvantages low-income African Americans.

A. Private Discrimination

After the Civil War, the struggle for racial equality played out intensely in the arena of forced residential segregation. In 1896, after Jim Crow “separate but equal” laws were upheld by the U.S. Supreme Court,⁷ some state and local governments attempted to segregate residential space along racial lines. Some municipalities mandated segregated neighborhoods and prohibited blacks and whites from purchasing houses in areas designated for members of the other race.⁸ In deciding the 1917 case of *Buchanan v. Warley*, the U.S. Supreme Court’s discussion of a segregation ordinance provides some insight into the locality’s efforts to discriminate on the basis of race:

This drastic measure is sought to be justified under the authority of the state in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; *that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.*⁹

The Court did not appear to disagree with the rationale articulated by the municipality, which was that there would be conflict and an inevitable deterioration of property values if the neighborhoods were integrated. Nevertheless, it invalidated the ordinance, holding it and similar statutes violated the Fourteenth Amendment of the U.S. Constitution and the Civil Rights Act of 1866 because they were state-sanctioned.¹⁰ Despite the decision of the Court, municipalities continued to pass similar laws throughout the 1920s because few lawsuits were brought to challenge them.¹¹ It is important to note, however, that in order to buttress these

7. See *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Civil Rights Cases*, 109 U.S. 3 (1883).

8. Jonathan Kaplan & Andrew Valls, *Housing Discrimination as a Basis for Black Reparations*, 21 PUB. AFF. Q. 255, 260 (2007).

9. *Buchanan v. Warley*, 245 U.S. 60, 73–74 (1917) (emphasis added).

10. See *id.*; see also Adam Gordon, Note, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186, 209 (2005); Kaplan & Valls, *supra* note 8, at 260.

11. Gordon, *supra* note 10, at 209 n. 112 (citing Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 878 (1988)).

efforts to preserve the color line, racial segregation was also reinforced through terror and mob violence throughout much of the century.¹²

Although *Buchanan* struck down state-sponsored segregation, an important tool for upholding housing segregation rapidly gained favor: the use of private, racially restrictive covenants that served as enforceable contracts to prevent the sale or occupancy of homes to African Americans.¹³ These racially restrictive covenants were mutual agreements used primarily by neighborhood associations to prevent the purchase or rental of real estate in white neighborhoods.¹⁴ Unlike state-sponsored ordinances, private covenants restricting sale of property to blacks were sanctioned by the courts under contract law. In 1926, the case of *Corrigan v. Buckley*¹⁵ upheld the validity of a racially restrictive covenant in the nation's capitol, the District of Columbia.¹⁶ The U.S. Supreme Court opined that “[t]he Thirteenth Amendment denouncing slavery and involuntary servitude [as] a condition of enforced compulsory service of one to another[,] does not in other matters protect the individual rights of persons of the negro race.”¹⁷ Moreover, the Court distinguished the efforts of municipalities from contractually agreed-upon discrimination, confirming that the prohibitions of the Fourteenth Amendment “have reference to State action exclusively, and not to any action of private individuals.”¹⁸ Thus, private discrimination would be enforced widely, enthusiastically, and effectively to exclude blacks from buying or renting property in white neighborhoods for many decades to come.

12. See Coates, *supra* note 5. Discussing the forced segregation of Chicago neighborhoods, Coates notes: “[W]hen government failed, when private banks could no longer hold the line, Chicago turned to an old tool in the American repertoire—racial violence. . . . On July 1 and 2 of 1946, a mob of thousands assembled in Chicago’s Park Manor neighborhood, hoping to eject a black doctor who’d recently moved in. The mob pelted the house with rocks and set the garage on fire. The doctor moved away.” *Id.*

13. Roisman, *supra* note 6, at 677; Kaplan & Valls, *supra* note 8, at 260; Gordon, *supra* note 10, at 216.

14. Kaplan & Valls, *supra* note 8, at 260; Coates, *supra* note 5 (“Chicago whites employed every measure, from ‘restrictive covenants’ to bombings, to keep their neighborhoods segregated.”).

15. 271 U.S. 323 (1926).

16. *Id.* at 327. “In 1921, thirty white persons, including the plaintiff and the defendant Corrigan, owning twenty-five parcels of land, improved by dwelling houses, situated on S Street, between 18th and New Hampshire avenue, in the City of Washington, executed an indenture, duly recorded, in which they recited that for their mutual benefit and the best interests of the neighborhood comprising these properties, they mutually covenanted and agreed that no part of these properties should ever be used or occupied by, or sold, leased or given to, any person of the negro race or blood; and that this covenant should run with the land and bind their respective heirs and assigns for twenty-one years from and after its date.” *Id.*

17. *Id.* at 330.

18. *Id.*

B. State-Sponsored Discrimination

Given the federal government's reputation for upholding civil rights and serving as a check on state oppression, it is difficult for some to believe that for decades the federal government was an active participant in state-sponsored housing discrimination. Not only was it involved in race discrimination, the federal government's role has been described as "by far the most important factor in creating and solidifying racially segregated housing in the U.S."¹⁹ Professor Florence Wagman Roisman, a noted housing scholar, reminds us that the United States did not become a "nation of homeowners" by accident.²⁰ She opines that homeownership was promoted, during and after the New Deal era, through deliberate "government policy that provided homeownership much more for whites than people of color and restricted homeownership to racially segregated communities."²¹ On this issue, the discriminatory housing policies engineered by the federal government are well documented.²²

Until the creation of the Home Owners' Loan Corporation (HOLC)²³ in 1933, and more importantly the Federal Housing Authority (FHA)²⁴ in 1934, home mortgages were difficult to obtain. The lending terms that FHA set made homeownership affordable to middle-income people for the first time.²⁵ According to Kenneth Jackson, the FHA "revolutionized the home finance industry"²⁶ by making three major changes: low down payments, a long repayment period (twenty-five or thirty years), and full amortization of interest and principal.²⁷ However, as a policy prerogative, FHA focused its mortgage insurance on "new residential developments on the edges of metropolitan areas, to the neglect of core cities."²⁸ More importantly, FHA insurance required appraisals of

19. Kaplan & Valls, *supra* note 8, at 260.

20. Roisman, *supra* note 6, at 675.

21. *Id.* at 676.

22. See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 193 (1985). Jackson's study of New Deal housing policy is the work legal scholars and historians most frequently cite on New Deal housing policy, particularly the racial discrimination by the federal government.

23. HOLC was created by the Home Owners' Loan Act of 1933, Pub. L. No. 73-43, § 4(a), 48 Stat. 128, 129.

24. National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934).

25. When the Veterans Administration (VA) was created in 1944, it followed FHA procedures under the G.I. Bill, which was a law that provided a range of benefits for returning World War II veterans. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284. Benefits included low-cost mortgages, low-interest loans to start a business, cash payments of tuition and living expenses to attend university, high school or vocational education, as well as one year of unemployment compensation.

26. JACKSON, *supra* note 22, at 204.

27. *Id.*

28. Roisman, *supra* note 6, at 677.

the property, the borrower, and the neighborhood.²⁹ FHA instructed its underwriters that, “the characteristics of existing city neighborhoods made insuring housing in those neighborhoods unacceptably risky.”³⁰ As such, discriminatory policies were imbedded in the appraisal standards. HOLC rated every urban and suburban neighborhood in America as “A,” “B,” “C,” or “D” quality, reflected in the color-coding maps of every metropolitan area. The letter “D,” or the lowest quality, was colored red and serves as the origin of the term “redlining.” Quality ratings for appraisals were tied to a number of factors, such as age and type of housing stock—but also very much to race. The “A” designated neighborhoods “had to be ‘homogenous’—meaning ‘American business and professional men’—and ‘American’—meaning white and often, native-born.”³¹ Predominantly black neighborhoods automatically received a “D” grade,³² as the FHA’s *Underwriting Manual* “specifically instructed that the presence of ‘inharmonious racial or nationality groups’ made a neighborhood’s housing undesirable for insurance.”³³ According to housing scholar and attorney Adam Gordon:

The FHA . . . used the HOLC system as a basis for developing criteria to select which loans it would insure. It set up a pseudoscientific rating system for neighborhoods, in which 60% of the available points were awarded based on “relative economic stability” and “protection from adverse influences”—both code words for segregation. “If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes”³⁴

The FHA’s *Underwriting Manual* also strongly suggested the use of racially restrictive covenants as a means of “protecting” against neighborhood “transitions.”³⁵ As Gordon has noted, the FHA’s underwriting standards reflected an outmoded and questionable analysis of neighborhood change theory developed by economist Homer Hoyt, in whose model “neighborhoods started out new and white [and] [o]ver time, housing stock deteriorated, and the neighborhood transitioned from white Protestant to Jewish and finally black.”³⁶ Gordon insightfully opines that in this way “the FHA encouraged housing segregation (on a

29. *Id.*

30. *Id.* at 677.

31. Gordon, *supra* note 10, at 207.

32. JACKSON, *supra* note 22, at 198; *see also* Gordon, *supra* note 10, at 207.

33. JACKSON, *supra* note 22, at 208; *see also* Roisman, *supra* note 6, at 677.

34. Gordon, *supra* note 10, at 207 (footnote omitted) (quoting JACKSON, *supra* note 22, at 207–08).

35. *Id.* at 208.

36. *Id.*

national level), much like municipal racial-zoning laws mandated segregation before the Supreme Court invalidated these laws in 1917.”³⁷ This time, however, it was the federal government incentivizing the segregation of neighborhoods, typically suburban, in order for families to qualify for loans in order to purchase homes.

Professor Roisman points out that even after the Supreme Court ruled in *Shelley v. Kraemer*³⁸ that racially restrictive covenants were judicially unenforceable, the FHA and VA continued to require these odious covenants.³⁹ Because of the FHA’s stated preference for insuring loans in suburbs, whites could rarely use FHA favorable loans to secure homes in neighborhoods that were not segregated and suburban.⁴⁰ The assumption that integrated neighborhoods would have resulted in lower home values than segregated neighborhoods became something of a self-fulfilling prophecy, as neighborhoods that failed to be overwhelmingly white could not attract homebuyers.⁴¹ Since segregated black neighborhoods had been redlined, and received a “D” rating under the HOLC rating system, homeownership was historically even more difficult to secure in those areas, which then often fell into decline. President Kennedy finally ended redlining as an official policy of the FHA’s program by signing Executive Order 11,063 on November 20, 1962.⁴² Even so, the Order was more symbolic than effective.⁴³

37. *Id.* at 209. Gordon also posits that “[t]he FHA’s underwriting criteria resulted in much lower rates of lending in urban neighborhoods than in suburban neighborhoods.” *Id.* Citing Jackson he said, “91% of a sample of homes insured by the FHA in metropolitan St. Louis from 1935 to 1939 were located in the suburbs.” *Id.* He goes on to note, “In addition, these criteria resulted in much lower rates of lending to nonwhites than to whites, even when compared with the market as a whole. Only 2.3% of FHA-insured mortgages outstanding in 1950 were for nonwhites, while 5.0% of conventional mortgages were for nonwhites.” *Id.*

38. 334 U.S. 1 (1948).

39. Roisman, *supra* note 6, at 678 (revealing that FHA Commissioner Franklin D. Richards asserted that the Court’s action in *Shelley* would “in no way affect the programs of this agency”). Richards later clarified that it was not “the policy of the Government to require private individuals to give up their right to dispose of their property as they [saw] fit, as a condition of receiving the benefits of the National Housing Act.” *Id.*

40. Kaplan & Valls, *supra* note 8, at 263.

41. *Id.*

42. Exec. Order No. 11,063, 3 C.F.R. § 652 (1959–1963). The Executive Order recognized that “discriminatory policies and practices based upon race, color, creed, or national origin now operate to deny many Americans the benefits of housing financed through Federal assistance,” and directed “all departments and agencies in the executive branch of the Federal Government, insofar as their functions relate to the provision, rehabilitation, or operation of housing and related facilities, to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin” in a series of areas including “loans hereafter insured, guaranteed, or otherwise secured by the credit of the Federal Government.” *Id.*

43. Kaplan & Valls, *supra* note 8, at 263 (“Throughout much of the 1960s advocates of federal anti-discrimination housing policies were rebuffed. While Congress passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965, it refused to deal with housing. Indeed, it explicitly excluded housing . . .”).

C. The Fair Housing Acts

In 1968, the legal landscape changed in order to finally outlaw private discrimination and state-sponsored discrimination in housing. The landmark U.S. Supreme Court case of *Jones v. Alfred H. Mayer Co.*⁴⁴ held that Congress, pursuant to the Civil Rights Act of 1866, could regulate the sale of private property in order to prevent racial discrimination and bars all racial discrimination, private as well as public, in the sale or rental of property.⁴⁵ In the same year Congress also passed the Fair Housing Act,⁴⁶ which expanded on the previous civil rights acts to prohibit discrimination concerning the sale, rental, and financing of housing based on race, religion, or national origin. Enacted just a few days after the assassination of Dr. Martin Luther King, Jr., the Act begins with a bold pronouncement: “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁴⁷ As sweeping as those changes to the legal landscape were, there were, as always, implementation problems.⁴⁸

These expanded protections and opportunities for black homeowners gave rise to more covert actions in order to maintain residential segregation. As black families moved into white suburbs previously foreclosed to them, unscrupulous speculators took advantage of the perception that “changing” neighborhoods triggered declining property values.⁴⁹ Fear arising from integration and its potentially negative economic

44. 392 U.S. 409 (1968).

45. *Id.* at 413. The Civil Rights Act of 1866, *see* 14 Stat. 27, provided the basis for this decision as currently embodied by 42 U.S.C. § 1982. The original long title of the 1866 Act is “An Act to protect all Persons in the United States in their Civil Rights and liberties, and furnish the Means of their Vindication.” Reversing many precedents, the Supreme Court in *Jones* held that the Civil Rights Act of 1866 prohibited both private and state-backed discrimination and that the Thirteenth Amendment authorized Congress to prohibit private acts of discrimination as among “the badges and incidents of slavery.” Congress possessed the power to determine “what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.” *Jones*, 392 U.S. at 440.

46. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3619, 3631. Since 1974, the Act added gender discrimination; and since 1988, the Act protects people with disabilities and families with children.

47. *See* 42 U.S.C. § 3601 (2012); *see also* Michael G. Allen et al., *Assessing HUD’s Disparate Impact Rule: A Practitioner’s Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 156 (2014).

48. *See* Kaplan & Valls, *supra* note 8, at 263 (“Title VIII of the Civil Rights Act . . . was diluted by several key compromises, especially with respect to the requirements necessary to show discrimination, and the available mechanism of enforcement . . . [HUD] could not itself pursue cases, and the possible awards arising out of private lawsuits pursued under Title VIII were severely limited; while the Department of Justice (DOJ) could prosecute ‘pattern or practice’ cases, there was little incentive for it to do so and few such cases were ever pursued.”).

49. *See* Gordon, *supra* note 10, at 219 (“In addition to the financial and human capital effects of the thirty-year head start that whites had on blacks in accumulating capital through homeownership, the FHA’s policies reshaped how Americans conceived of residential segregation. The FHA’s

impact made white homeowners vulnerable to “blockbusting.”⁵⁰ Blockbusting, while not new, is a technique employed by investors to entice white homeowners to sell properties below market value by inspiring panic over the changing racial composition of neighborhoods. The investors would then resell those properties to blacks at an inflated cost. Not coincidentally, the practice accelerated white flight and served to re-segregate neighborhoods, this time as all black.⁵¹ Author Ta-Nehisi Coates wrote about unscrupulous investors’ practices in North Lawndale, a suburb of Chicago: “They would hire a black woman to walk up and down the street with a stroller. Or they’d hire someone to call a number in the neighborhood looking for ‘Johnny Mae.’ Then they’d cajole whites into selling at low prices, informing them that the more blacks who moved in, the more the value of their homes would decline, so better to sell now.”⁵²

In response to the weak enforcement provisions and dishonest lender practices, Congress passed a trio of equal lending acts in the 1970s.⁵³ They also enacted the Fair Housing Act Amendments of 1988⁵⁴ in order to put teeth in fair housing enforcement provisions. The Act increased the federal government’s commitment to enforcing nondiscrimination in housing and lending and “shifted much of the [enforcement] burden from the individual plaintiffs to the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ).”⁵⁵ Nevertheless, the results of the Fair Housing and Equal Lending Acts over time have been mixed; these remedies might have come too late after the federal government’s decades-long policy of segregation to foster racial equality in housing.

D. The High Cost of Race Discrimination in Housing

“Anti-discrimination laws and policies with regard to housing and lending could do little to undo the accumulated damage to racial equality that had been done over the course of the twentieth century.”⁵⁶ Kaplan and Valls have aptly observed that by the time that the Fair Housing

acceptance of the Hoyt model of neighborhood change made Americans think of residential segregation as the norm, even though in the early twentieth century that had not been the case.”)

50. *Id.*; see, e.g., W. EDWARD ORSER, BLOCKBUSTING IN BALTIMORE: THE EDMONSON VILLAGE STORY 102–17 (1994).

51. Gordon, *supra* note 10, at 219.

52. See Coates, *supra* note 5.

53. See Kaplan & Valls, *supra* note 8, at 264 (citing “the 1972 ‘Equal Credit Opportunity Act,’ the 1975 ‘Community Reinvestment Act’ and the 1977 ‘Home Mortgage Disclosure Act’”).

54. Pub. L. 100-430, 102 Stat. 1619 (1988).

55. Kaplan & Valls, *supra* note 8, at 264.

56. *Id.*

Laws were enacted, “racial residential segregation, and its accompanying conditions of black poverty, unemployment, and poor educational opportunities were so entrenched” that these remedies were of little help.⁵⁷ Moreover, although discriminatory practices formally ended in the 1970s, they were “replaced by subtler techniques that encouraged ghettoization, like channeling black families away from white areas and banks’ and mortgage brokers’ systematically pushing middle-income black families into high-cost, high-risk loans when they could have qualified for more affordable loans.”⁵⁸

The cumulative effects of persistent discrimination in housing have had an impact on blacks that is both existential and material. For example, FHA social engineering policies ensured that the so-called “good” neighborhoods became synonymous with suburbs, which can still be interpreted as inhospitable to African Americans. Owing to the prevalence of longstanding racially restrictive covenants and the concomitant exclusion of blacks, the idealized notion of suburban as affluent, resourced, crime-free, and “American” is constructed as “white.” Conversely, that which is urban is synonymous with ghetto, poor, crime-ridden, and is constructed as “black.” Scholar Jeannine Bell opines that continued resistance to integration can manifest as suspicion, harassment, and racial profiling in suburban areas.⁵⁹ Because suburban is constructed as white, African Americans can be “presumed to be outsiders in their own neighborhoods.”⁶⁰

State-sponsored segregation imposed economic costs on African Americans as well. The federal government subsidized a massive transfer of wealth and opportunity in the form of home equity⁶¹ to whites in the suburbs while at the same time divesting resources from urban areas, where most blacks lived.⁶² This history of discrimination has taken an

57. *Id.*

58. Editorial, *How Segregation Destroys Black Wealth*, N.Y. TIMES (Sept. 15, 2015), http://www.nytimes.com/2015/09/15/opinion/how-segregation-destroys-black-wealth.html?emc=edit_th_20150915&nl=todaysheadlines&nid=65092703&r=0.

59. See Jeannine Bell, *Can't We Be Your Neighbor? Trayvon Martin, George Zimmerman, and the Resistance to Blacks as Neighbors*, 95 B.U. L. REV. 851, 870 (2015) (“The idealization of White neighborhoods in some cases leads to hate crimes committed against minorities who cross the color line, and in others, discrimination leveled at people of color . . . who are presumed to be outsiders in their own neighborhoods.”). The murder of Trayvon Martin illustrates this dilemma perfectly.

60. *Id.*

61. Roisman, *supra* note 6, at 681 (“By the start of the 1970s, eleven million Americans had purchased dwellings thanks to FHA-VA financing. . . . Almost all of those . . . federally-insured and federally-guaranteed home mortgage loans went to whites. ‘Less than 2 percent of the housing financed with federal mortgage assistance from 1946 to 1959 was available to Negroes.’”).

62. See generally David M. P. Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America*, in THE NEW SUBURBAN HISTORY 11 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006); Douglas S. Massey, *Origins of Economic Disparities: The*

enormous toll on contemporary black wealth.⁶³ The generational effect of discrimination has only widened the wealth gap between whites and blacks.⁶⁴ A 2011 report attributes much of the disparity to the lower rate of homeownership and the equity that it provides among African Americans.⁶⁵ The economic effects play out in myriad ways. Today, “even middle-class minority neighborhoods have lower house price appreciation, fewer neighborhood amenities, lower-performing schools, and higher crime than white neighborhoods with comparable income levels.”⁶⁶

As previously noted, African Americans, owing to their exclusion from suburban developments, were increasingly concentrated in urban centers and, over time, disproportionately housed in public housing projects in northern and midwestern cities. In these cities, site selection for public housing projects was initially completely under local control. According to J.A. Stoloff, a policy analyst from HUD, it was common for “discriminatory site selection practices [to be] carried on at the local level.”⁶⁷ “Racial segregation in public housing, perpetuated by site selection strategies, was the norm and reflected the larger patterns of residential segregation in the U.S. Projects were often designed to be race-specific”⁶⁸ Thus, there are currently a disproportionate percentage of

Historical Role of Housing Segregation, in SEGREGATION: THE RISING COSTS FOR AMERICA 39 (James H. Carr & Nandinee K. Kutty eds., 2008).

63. Editorial, *supra* note 58. A recent report indicated that “[i]n 1970, two years after the passage of the Fair Housing Act, for example, the average *well-off* black American lived in a neighborhood where potential home wealth, as measured by property values, stood at about only \$50,000—as opposed to \$105,000 for affluent whites and \$56,000 for *poor* whites.” *Id.*

64. The “median white household had \$111,146 in wealth holdings, compared to just \$7,113 for the median Black household.” See LAURA SULLIVAN ET AL., DEMOS & INST. FOR ASSETS & SOC. POLICY, BRANDEIS UNIV., THE RACIAL WEALTH GAP: WHY POLICY MATTERS 1 (2015), available at http://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf. “In addition to these longstanding homeownership and home equity disparities, the foreclosure crisis during the Great Recession of 2007-2008 dipped even further into families of color’s housing wealth. While the median white family lost 16 percent of their wealth in the housing crash and Great Recession, Black families lost 53 percent and Latino families lost 66 percent.” *Id.* at 1–2.

65. *Id.* at 10 (noting specifically that “[l]ower homeownership rates among Blacks and Latinos have many roots, ranging from lasting legacies of past policies to disparate access to real estate ownership”).

66. MARGERY AUSTIN TURNER ET AL., U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, at xxii (2013), available at https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf.

67. See J.A. STOLOFF, U.S. DEP’T OF HOUS. & URBAN DEV., A BRIEF HISTORY OF PUBLIC HOUSING 7, available at http://reengageinc.org/research/brief_history_public_housing.pdf (last visited May 22, 2016).

68. *Id.* at 7. For instance “[t]he racial segregation of housing projects was often a deliberate decision on the part of the local housing authorities. For example, in New York, the Williamsburg Houses project in Brooklyn was built in 1935 for whites, and the Harlem River Houses project in Manhattan was built to house blacks. Harlem River Houses was seen as a way to prevent demand by African-Americans for access to the housing being provided in all-white communities.” *Id.* at 7–8.

African Americans participating in public housing programs. Approximately 4.8 million households in the United States receive housing assistance through HUD programs.⁶⁹ Across all public housing programs, about forty-five percent of residents are black (despite being thirteen percent of the population),⁷⁰ another thirty-two percent are white (representing seventy-two percent of the population), and a little over twenty percent are Hispanic.⁷¹ Public housing sites tend to be clustered in census tracts with high poverty rates, and black and Hispanic residents of public housing are the most likely to live in census tracts with poverty rates over forty percent.⁷²

In the latter part of the twentieth century, these patterns of low-income housing segregation were emerging alongside another critical government policy that affected African Americans in disproportionate ways. The federal and state governments were beginning to incarcerate U.S. residents at an accelerated pace, and much of the increase was due to the government's "war on drugs."⁷³ Mass criminalization—especially arising from drug convictions—would have the greatest deleterious effect on low-income African Americans. People who were living in public housing would soon see their tenancy in subsidized housing jeopardized as a result of family members with any kind of criminal justice involvement.

II. COLLATERAL DAMAGE:

THE RACIAL IMPACT OF MASS CRIMINALIZATION IN PUBLIC HOUSING

Sociologists have analyzed the history of federally subsidized housing in the United States—and described its problems as a contemporary urban crisis.⁷⁴ In doing so, they note the neoliberal policies and other so-

69. *Who Lives in Federally Assisted Housing?*, HOUSING SPOTLIGHT, Nov. 2012, at 1, available at <http://nlhc.org/sites/default/files/HousingSpotlight2-2.pdf>.

70. *Id.* at 3; see also KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 5 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

71. HUMES ET AL., *supra* note 70, at 5. According to the census, "[p]eople of Hispanic origin may be any race. For the 2010 Census, a new instruction was added immediately preceding the questions on Hispanic origin and race, which was not used in Census 2000. The instruction stated that 'For this census, Hispanic origins are not races' because in the federal statistical system, Hispanic origin is considered to be a separate concept from race." *Id.*

72. HOUSING SPOTLIGHT, *supra* note 69.

73. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

74. As history has shown, persistent housing discrimination, wealth disparities, white flight, and urban deindustrialization have all had an outsized impact on the lives of African Americans. See generally WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996) (arguing that the disappearance of work and the consequences of that disappearance for social and cultural life are the central problems in the inner cities); THOMAS J. SUGRUE, *THE*

cial forces that have created conditions of racial hypersegregation, deindustrialization, concentrated poverty, and crime. It is beyond the scope of this article to engage with these larger issues in depth, although they are relevant. This Article serves to confront our history of racial segregation and highlight the problems of low-income public housing residents in the context of mass incarceration. For tenants with criminal convictions who are displaced from their housing through eviction, inadmissibility, or permanent exclusion, the high cost of living in many cities puts basic shelter out of reach. For these tenants, access to subsidized housing is critical to stave off homelessness and preserve their families.

A. Collateral Damage: The “War on Drugs”

For three decades the story of mass criminalization has centered on the government’s punitive drug policy and all of the collateral damage that flows from it. Scholar David Hilfiker posits, “There can be no doubt . . . that the war on drugs has been the major cause of the increase in incarceration of black inner-city residents.”⁷⁵ He asserts that “in the early 1980s, the emphasis of this war nationwide has been on law enforcement and the incarceration of drug offenders, not on prevention and treatment. It has also concentrated drug law enforcement on inner-city areas and instituted harsher sentencing policies, particularly for crack cocaine.”⁷⁶ However, as Michelle Alexander explains in her path-breaking work, *The New Jim Crow*,

President Ronald Reagan officially announced the current drug war in 1982, before crack became an issue in the media or a crisis in poor black neighborhoods. A few years after the drug war was declared, crack began to spread rapidly in the poor black neighborhoods of Los Angeles and later emerged in cities across the country.⁷⁷

According to Alexander, “The Reagan administration hired staff to publicize the emergence of crack cocaine in 1985 as part of a strategic effort to build public and legislative support for the war.”⁷⁸ She insists

ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (1996) (attributing urban decline to changes in the labor market, urban economy, and race and class segregation).

75. DAVID HILFIKER, URBAN INJUSTICE: HOW GHETTOS HAPPEN 38 (2002).

76. *Id.* (“Thanks to this war (which has in truth been largely a war on the poor), between 1985 and 1995 the number of black state prison inmates sentenced for drug offenses rose by more than 700 percent. In recent years there has also been a dramatic increase in the number of drug cases heard in federal court, as prosecuting attorneys have exercised their authority to bring more offenders under the scope of the more severe federal mandatory minimum penalties.”).

77. ALEXANDER, *supra* note 73, at 5.

78. *Id.* “The impact of the drug war has been astounding. In less than thirty years, the U.S. penal population exploded from around 300,000 to more than 2 million, with drug convictions ac-

that “[t]he racial dimension of mass incarceration is its most striking feature. No other country in the world imprisons so many of its racial or ethnic minorities. The United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid.”⁷⁹

Thus, the prevalence of criminal convictions—especially drug convictions—has had an unmistakable impact on the stability of African-American communities, triggering life-altering collateral consequences arising from criminal convictions.⁸⁰ Some scholars have noted that “[v]irtually every felony conviction carries with it a life sentence”⁸¹ through the effects of ongoing restrictions, such as voting and jury service, which continue to punish long after the criminal sentence is served. Jeremy Travis refers to this and other civil sanctions collectively as “invisible punishment”⁸² because they operate hidden from public view, outside of the process of criminal sentencing. In addition to disenfranchisement, collateral consequences include limitations on employment, access to legal immigration, being subject to “carceral debt”⁸³ owed as a result of criminal system involvement, and many others. Any of these can become obstacles to successful reintegration. However, one of the most consequential obstacles to successful reentry remains restrictions on access to subsidized housing or terminations of tenancy based on crimi-

counting for the majority of the increase. The United States now has the highest rate of incarceration in the world, dwarfing the rates of nearly every developed country, even surpassing those in highly repressive regimes like Russia, China, and Iran. In Germany, 93 people are in prison for every 100,000 adults and children. In the United States, the rate is roughly eight times that, or 750 per 100,000.” *Id.* at 6.

79. *Id.* She also notes, “In Washington, D.C., our nation’s capitol, it is estimated that three out of four young black men (and nearly all those in the poorest neighborhoods) can expect to serve time in prison. Similar rates of incarceration can be found in black communities across America.” *Id.* at 6–7.

80. See, e.g., Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 371–72 (2012); see also Sarah B. Berson, *Beyond the Sentence—Understanding Collateral Consequences*, NAT’L INST. OF JUST. J., Dec. 2013, at 25, 25 available at <https://www.ncjrs.gov/pdffiles1/nij/241927.pdf> (“Many collateral consequences affect a convicted person’s employment and business opportunities; others deny access to government benefits and program participation, including student loans, housing, contracting and other forms of participation in civic life.”).

81. Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”*: *Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 527 (2006).

82. See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 16 (Marc Mauer & Meda Chesney-Lind eds., 2002).

83. Cammett, *supra* note 80, at 378. “Carceral debt” is a term this Article uses to identify criminal justice related debt, which weighs heavily on parents seeking reentry: monetary penalties levied, “user fees” assessed to recoup the operating costs of the justice system, and debt incurred during incarceration, including mounting child support obligations.

nal activity.⁸⁴ The cumulative effects of concentrated poverty, including collateral consequences, have created a crisis of residential affordability and instability in housing across the country.⁸⁵

B. "One Strike, and You're Out"

"Since 1975, federal regulations have instructed Public Housing Authorities (PHAs) to consider the criminal history of applicants for public housing as it relates to physical violence to persons or property or other criminal acts that would affect the health, safety, or welfare of other tenants."⁸⁶ As a result, most PHAs adopted broad screening policies that call for the rejection of applicants with unfavorable criminal histories. However, the government's war on drugs during the 1980s and 1990s led to the enactment of several federal laws that contributed to a new zero-tolerance policy for any criminal behavior in public housing.⁸⁷ Colloquially known as "One Strike," the policy arose from concerns about the increase of crime within public housing authorities⁸⁸ that, according to its proponents, made robust intervention and eviction remedies necessary to address criminal behavior by public housing tenants, their children, and their guests.

The first of these enactments, the Anti-Drug Abuse Act of 1988, required PHAs to include in their leases a clause prohibiting tenants, any member of a household, guest, or other person under tenant's control from engaging in "criminal activity, including drug-related criminal activity, on or near public housing premises."⁸⁹ When the criminal activity occurred while the tenant was living in public housing they could be evicted.⁹⁰ The 1988 legislation was followed in 1996 with a pronouncement by then-President Clinton, delivered at his State of the Union address to Congress. He proclaimed: "I challenge local housing authorities

84. These restrictions also apply to other forms of federally funded housing such as Section 8 housing vouchers, but the defunding of these programs (and subsequent unavailability) have made them impractical targets for analysis for the purposes of this Article.

85. The nation's public housing program was established in 1937 to provide "decent and safe dwellings for low-income families." 42 U.S.C. § 1437(a)(1)(A) (2012).

86. NAT'L HOUS. LAW PROJECT, AN AFFORDABLE HOME ON RE-ENTRY FEDERALLY ASSISTED HOUSING AND PREVIOUSLY INCARCERATED INDIVIDUALS 1 (2008), available at <http://nhlp.org/resourcecenter?tid=86>; see also 24 C.F.R. § 960.203(c)(2)–(3) (2015).

87. See ALEXANDER, *supra* note 73, at 57.

88. 42 U.S.C. § 11901 (2012) ("[P]ublic and other federally assisted low-income housing . . . suffers from rampant drug-related or violent crime; . . . the increase in drug-related and violent crime . . . leads to murders, muggings, and other forms of violence against tenants [and] local law enforcement authorities often lack the resources to deal with the [problem].").

89. Pub. L. No. 100-690, § 5101(5), 102 Stat. 4181 (1988).

90. *Id.*; see also LEGAL ACTION CTR., SAFE AT HOME: A REFERENCE GUIDE FOR PUBLIC HOUSING OFFICIALS ON THE FEDERAL HOUSING LAWS REGARDING ADMISSION AND EVICTION STANDARDS FOR PEOPLE WITH CRIMINAL RECORDS 5 (2004).

and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule for residents who commit crime and peddle drugs should be, one strike and you're out."⁹¹

Two months later Clinton signed the Housing Opportunity Program Extension Act of 1996 (HOPE),⁹² enshrining One Strike into law. HOPE required PHA leases to include a provision that subjected a tenant to eviction for a variety of criminal activities.⁹³ Drug-related activities made a tenant ineligible for public housing for at least three years.⁹⁴ HOPE also subjected the tenant's family to eviction, without regard for their knowledge of or responsibility for the past drug crime.⁹⁵ HUD Secretary Andrew Cuomo enthusiastically embraced the policy shortly after implementation, especially as it targeted drug offenses:

Make no mistake about it; in public housing, drugs are public enemy number one. We must have zero tolerance for people who deal drugs. They are the most vicious, who prey on the most vulnerable. They are the jailers, who imprison the elderly. They are the seducers, who tempt the impressionable young. They must be stopped. 'One Strike and You're Out' is doing just that.⁹⁶

91. See President William J. Clinton, 1996 State of the Union Address (Jan. 23, 1996), *available in* 142 CONG. REC. H768, H770 (1996)). President Clinton gave the formal name "One Strike and You're Out" to the policy in a memorandum he sent to the HUD Secretary two months later. See Memorandum on the "One Strike and You're Out" Guidelines, 1 PUB. PAPERS 521 (Mar. 28, 1996) (directing HUD to adopt "a clear and straightforward rule for those who endanger public housing communities by dealing drugs or engaging in other criminal activity: One Strike and You're Out of public housing").

92. Pub. L. No. 104-120, 110 Stat. 834 (codified as amended at 12 U.S.C. § 1701 (2012)).

93. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 504, 104 Stat. 4079 (codified as amended at 42 U.S.C. § 1437d(l)(6) (2006)). "[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."

94. *Id.* § 501(A)(iii) ("[P]rohibit any individual or family evicted from housing assisted under the Act by reason of drug-related criminal activity from having a preference under any provision of this subparagraph for 3 years unless the evicted tenant successfully completes a rehabilitation program approved by the agency . . .").

95. See 42 U.S.C. § 1437d(r) (2006). Similar provisions concerning grounds for eviction and ineligibility apply to the Section 8 rent subsidy program that gives income eligible tenants access to private housing. See 42 U.S.C. § 1437f(d)(1)(B)(iii) (2006).

96. See U.S. DEP'T OF HOUS. & URBAN DEV., MEETING THE CHALLENGE: PUBLIC HOUSING AUTHORITIES RESPOND TO THE "ONE STRIKE AND YOU'RE OUT INITIATIVE" (1997). The executive summary enthusiastically proffers "One Strike" as a "strict, straightforward policy that ensures that public housing residents who engage in illegal drug use or other criminal activities on or off public housing property face swift and certain eviction." *Id.*

Federal law and corresponding regulations give PHAs broad discretion to craft their own policies about admissibility and eviction.⁹⁷ However, as indicated by then-HUD Secretary Cuomo, most PHAs have adopted overly broad screening practices, especially for drug convictions, which reject any applicants with criminal histories without any vigorous risk assessment.⁹⁸ As a matter of law and policy, rejecting applicants with convictions should not be automatic. While discretion is afforded to PHA officials to deny admission to a person “engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other resident,” they are not required to do so.⁹⁹

However, with respect to eviction of existing tenants engaged in drug or criminal activity, it was unclear how broadly or narrowly the strict liability of the statute could be interpreted under the law. HUD took the position that the One Strike statute gave local PHAs the power to evict an entire family, no matter how trivial the drug offense—or without regard for the leaseholder’s lack of knowledge or responsibility. The U.S. Supreme Court addressed this question in *Department of Housing & Urban Development v. Rucker* in 2002.¹⁰⁰ In an eight-to-zero decision, the Court ruled in favor of HUD in a class action suit brought by Oakland Housing Authority tenants, including a grandmother named Pearl Rucker (whose mentally ill daughter incurred a drug conviction). The ruling unambiguously clarified that under the Anti-Drug Abuse Act, “public housing authorities [have] the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-

97. LEGAL ACTION CTR., *supra* note 90, at 1.

98. *See generally id.* For example, in New York City, the New York City Housing Authority (the local PHA) screens all household members age 16 or over, and has the discretion to deny housing to families with any member who has been convicted of any criminal offense, including a violation. In general, people with criminal convictions can be made ineligible for public housing for two to six years after completion of their sentences (including probation, parole, or both, as well as the payment of any fines). Crimes involving drugs and alcohol are particularly scrutinized even though many people in New York jails and prisons, especially women, have convictions directly related to substance abuse. Ineligibility arising from a strict application of these barriers does not allow for reunification of parents and children within any meaningful time period.

99. 24 C.F.R. § 966.4(f), (1)(1)–(2) (2015). For example, as a result of litigation, the New York City Housing Authority (NYCHA) adopted an admissions policy that would consider whether an applicant would or would not be likely to interfere with other tenants so as to diminish their enjoyment of the premises by adversely affecting their health, safety, or welfare, and would “consider relevant factors, including the time, seriousness and frequency of the criminal activity, and consider mitigating circumstances, rehabilitation and other factors that may indicate a reasonable probability of favorable future conduct.” *See* NEW YORK HOUS. AUTHORITY, TENANT SELECTION AND ASSIGNMENT PLAN 26 (2016), available at <http://www1.nyc.gov/assets/nycha/downloads/pdf/TSAPlan.pdf>.

100. *See* 535 U.S. 125 (2002); *see also* LEGAL ACTION CTR., *supra* note 90, at 5.

related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity.”¹⁰¹

C. Families: One Strike’s Collateral Damage

It is important to acknowledge that HUD’s eviction scheme was designed to protect vulnerable tenants from criminal activity and restore security and peace to environments that many lamented as unsafe.¹⁰² This is an incredibly important interest. But it is as critical to explore whether One Strike has achieved that goal or whether the collateral damage done to families and the larger community warrants some limiting interventions. Legal scholar Regina Austin insightfully observes:

However legitimate its premises, [One Strike’s] eviction campaign *as implemented* might be aptly styled “‘The War on Drugs’ takes on ‘Moynihan’s Matriarchs’.” Chief among those adversely impacted by the campaign have been poor single minority female heads of household, often senior citizens, who are living with their actual or adopted offspring, one or more of whom, usually an adolescent or young adult male child or grandchild, sells or possesses drugs.¹⁰³

Stated differently, the impact of One Strike redounds to the detriment of some innocent people who have the least power and economic resources to resist its full impact. Low-income tenants, especially older mothers trying to hold families together, are the ones that invoke the most compelling claims of unfairness. As Austin notes, “[c]ultural norms suggest that mothers are supposed to have sufficient social or moral authority with which to deter criminal behavior by their children.”¹⁰⁴ However, evictions can and do routinely occur for minor marijuana use, an activity which is fairly common among youth.¹⁰⁵ It is well established that this type of recreational drug use exists among all racial and eco-

101. *Rucker*, 535 U.S. at 136.

102. 42 U.S.C. § 11901 (2012) (“[P]ublic and other federally assisted low-income housing . . . suffers from rampant drug-related or violent crime; . . . the increase in drug-related and violent crime . . . leads to murders, muggings, and other forms of violence against tenants [and] local law enforcement authorities often lack the resources to deal with the [problem].”).

103. See Regina Austin, “*Step on a Crack, Break Your Mother’s Back*”: *Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 *YALE J.L. & FEMINISM* 273, 275 (2002).

104. *Id.* at 286.

105. U.S. DEP’T OF HEALTH & HUMAN SERVS., *MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG USE 1975–2015, OVERVIEW, KEY FINDINGS ON ADOLESCENT DRUG USE 14* (2016) (“In 1975 . . . the majority of young people (55%) had used an illicit drug by the time they left high school. This figure rose to two thirds (66%) in 1981 before a long and gradual decline to 41% by 1992—the low point . . . and has remained between 48% and 50% since 2011.”).

omic groups, and is not more prevalent among African Americans.¹⁰⁶ However, parents 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.¹⁰⁷ If the goal of zero-tolerance statutes is to invest these authorities with the power to evict violent drug dealers, they already possess the tools to do so under the criminal law, infused with enhanced militarization of policing.¹⁰⁸ It might seem obvious, but targeting criminal gangs who are running amok in housing projects is the job of law enforcement, which has at its disposal a panoply of criminal statutes to do its work.¹⁰⁹ Since knowledge or fault is not a predicate for evictions for tenants like Pearlie Rucker, local PHAs are wielding power to evict innocent tenants in an overinclusive way, and in doing so have the imprimatur of the U.S. Supreme Court and many policymakers.

After the *Rucker* decision, many denounced the strict liability aspect of the law, as the collateral damage of this brand of zero tolerance became evident almost immediately. Advocates for tenants observed that this discretion “has sometimes operated to create harsh results that no doubt harm the community as well as individuals, their families, and other residents of public housing.”¹¹⁰ Representative Barbara Lee of California attempted to amend One Strike with legislation intended to address the law to exempt elderly tenants and those who were not aware of such criminal activity, from being evicted or denied admissions into a housing project.¹¹¹ Her bills died in committee.¹¹² Recently, zero-

106. Maia Szalavitz, *Study: Whites More Likely to Abuse Drugs Than Blacks*, TIME (Nov. 7, 2011), <http://healthland.time.com/2011/11/07/study-whites-more-likely-to-abuse-drugs-than-blacks/> (“Black youth are arrested for drug crimes at a rate ten times higher than that of whites. But new research shows that young African Americans are actually less likely to use drugs and less likely to develop substance use disorders, compared to whites, Native Americans, Hispanics and people of mixed race.”).

107. *Id.*; see also ALEXANDER, *supra* note 73, at 118; Stevenson, *supra* note 3, at 4.

108. ALEXANDER, *supra* note 73, at 11. “Using . . . federal funds, state and local law enforcement agencies have amassed military arsenals purportedly to wage the failed War on Drugs, the battlegrounds of which have disproportionately been in communities of color.” AM. CIVIL LIBERTIES UNION, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICE 2* (2014), available at <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

109. See Stevenson, *supra* note 3, at 2 (“The last three decades have witnessed a global increase in the criminalization of improper drug use. Criminalization has resulted in increased use of harsh punitive sanctions imposed on drug offenders and dramatic increases in rates of incarceration.”).

110. LEGAL ACTION CTR., *supra* note 90, at 5.

111. H.R. 173, 110th Cong. (2007), available at <https://www.gpo.gov/fdsys/pkg/BILLS-110hr173ih/pdf/BILLS-110hr173ih.pdf>.

tolerance bills have also been condemned by other NGOs, including the American Psychological Association.¹¹³ In 2010 Raquel Rolnik, the United Nations Special Rapporteur on the Right to Adequate Housing, undertook an official visit to the United States to “examine the realization of the right to adequate housing, in particular in relation to subsidized housing programmes, the homeless situation and the foreclosure crisis.”¹¹⁴ In her report,¹¹⁵ she took the opportunity to critique One Strike specifically for its impact on minorities¹¹⁶ and women subject to domestic violence.¹¹⁷

While barriers to public housing are typically framed as an individual problem, the more profound impact of housing instability may be on the family as a whole. Affordable housing is foundational to the economic security of individuals, and especially low-income families. The Center for American Progress estimates that between 33 million and 36.5 million children in the United States—nearly half of U.S. children—now have at least one parent with a criminal record.¹¹⁸ Having a stable home, along with employment, has powerful anti-recidivism effects for parents with criminal histories.¹¹⁹ When parents are rejected from public housing through the One Strike policy they are at greater risk of homelessness

112. *See id.* (“To protect innocent elderly and disabled tenants in public housing and housing assisted under the rental assistance program under section 8 of the United States Housing Act of 1937 from eviction by reason of criminal activity.”).

113. Daniel C. Marston, *Unintended Consequences of “Zero Tolerance” Policies*, THE SES INDICATOR, Jan. 2016, available at <http://www.apa.org/pi/ses/resources/indicator/2016/01/unintended-consequences.aspx> (citing the problem of homelessness on children and adults).

114. *U.N. Special Rapporteur on the Right to Adequate Housing Criticizes Federal One-Strike Policies*, NAT’L HOUS. LAW PROJECT, <https://nhlp.org/node/1332>.

115. Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, A/HRC/13/20/Add 4 (Feb. 12, 2010), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.20.Add.4_AEV.pdf.

116. *Id.* at 26 n.58 (“At current levels of incarceration a black male in the United States today has a greater than a 1 in 4 chance of going to prison during his lifetime, while a Hispanic male has a 1 in 6 chance, and a white male has a 1 in 23 chance of serving time.”).

117. *Id.* at 25–26 (noting that “[t]hese policies also negatively target victims of domestic abuse, as they do not take into account whether tenants who are subject to eviction are the victims or perpetrators of criminal activity. Landlords have evicted women from their homes if they report abuse to police, even if their abuser does not live with them. This serves as an obvious disincentive for women to report abuse, encourages a dangerous cycle of secrecy around domestic abuse, and may force women to choose between abuse and homelessness.”).

118. *See* REBECCA VALLAS ET AL., CTR. FOR AM. PROGRESS, REMOVING BARRIERS TO OPPORTUNITY FOR PARENTS WITH CRIMINAL RECORDS AND THEIR CHILDREN: A TWO-GENERATION APPROACH 1 (2015), available at <https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf>.

119. *Id.* at 4 (“A study by the National Institute of Justice finds that having any arrest during one’s life diminishes job prospects more than any other employment-related stigma, such as long-term unemployment, receipt of public assistance, or having a GED certificate instead of a high school diploma.”).

and family disintegration.¹²⁰ Moreover, the inability to establish safe and consistent housing can leave some families vulnerable to intervention by child welfare agencies.¹²¹

The effects of a young person in subsidized housing who is involved in a criminal offense or participates in even minor drug activity can be even more devastating. In lieu of wholesale eviction some PHAs allow for “permanent exclusion” of offending parties, even minors, in order for the leaseholder to retain their tenancy. Such a situation creates a conflict of interest between parents and their offspring,¹²² leaving many families with the terrible choice of whether to send a member into exile for life or relinquish the family’s home. In New York, 4,698 individuals were permanently excluded from the New York City Housing Authority (NYCHA) for criminal activity between 2007 and 2014.¹²³ After exclusion, families are subject to a relatively unknown aspect of the permanent exclusion policy: They must endure the humiliation of having investigators walk through their homes for years of unannounced inspections to ensure that the offending party is not visiting.¹²⁴ While permanent exclusions are often voluntary, they are obtained in a coercive atmosphere where there is undue pressure to sign an agreement. Since most tenants are unrepresented when signing stipulations, many do not believe that they have any further legal recourse.¹²⁵ In any event, it is unclear what standards PHAs use to lift the permanent exclusion, as they are not usually published as regulations.

Since the *Rucker* decision, tenants continue to be evicted under a strict liability standard. It is difficult to calculate the total number of people who have been evicted or ruled inadmissible based on criminal convictions, or have been deterred from applying because they thought they might be deemed ineligible. Moreover, criminal history exclusions can

120. *Id.* at 10.

121. See *Family Unification Program*, NAT’L CTR. FOR HOUS. & CHILD WELFARE, <http://www.nchcw.org/family-unification-program.html> (last visited May 22, 2016) (“Eligible families include those families who are in imminent danger of losing their children to foster care primarily due to housing problems and families who are unable to regain custody of their children primarily due to housing problems.”).

122. See Wendy J. Kaplan & David Rossman, *Called “Out” at Home: The One Strike Eviction Policy and Juvenile Court*, 3 DUKE F. FOR L. & SOC. CHANGE 109, 110 (2011) (noting that “[n]owhere does the clash of ideologies between rehabilitation for delinquent children and safe housing for low-income families play out more dramatically than in the collateral consequences for public housing tenants with children in the juvenile justice system. These children and their families are threatened with eviction and subsequent homelessness.”).

123. See Batya Ungar-Sargon, *NYCHA Questioned on Policy of Banning Arrested Residents*, CITY LIMITS (June 2, 2015), <http://citylimits.org/2015/06/02/nycha-questioned-on-policy-of-banning-arrested-residents/>.

124. *Id.*

125. *Id.*

include not only criminal convictions but also evidence of drug *activity* including arrests and prior drug use.¹²⁶ Because they have broad discretion, many PHAs have taken the position that any criminal justice involvement or even evidence of drug or alcohol abuse renders you ineligible for tenancy, or worse, subject to eviction. Critically, the One Strike policy, although technically race-neutral, reinforces racial stigma because African Americans experience mass criminalization most acutely, making them statistically more vulnerable to exclusions from subsidized housing.¹²⁷ On its face the disparate impact of race should prompt reconsideration, or at least a thorough appraisal of the law in order to minimize its racial impact. Given the history of racial discrimination in federal housing policy, it is more than appropriate to scrutinize this policy thoroughly. As such, opportunities to begin the process of rolling back these deleterious policies have begun to present themselves.

III. REMEDIES: CHALLENGES AND OPPORTUNITIES

Decades of overcriminalization have made the United States a leader in incarceration, but the practice of using coercive state practices to address social issues has created more problems than it has solved. One Strike housing law is a prime example of the unintended consequences of implementing an inflexible policing scheme. Enough time has elapsed to allow policymakers to determine whether the goals of public housing tenants' safety and security have been well met by strict liability rules, or whether we need to develop a more flexible system to constrain the collateral damage of the current system. There is evidence to suggest that there is some agreement among politicians, policymakers, and community members that the "law and order" approach to solving social problems is being reconsidered.¹²⁸ The interest of policymakers and advocacy

126. See 42 U.S.C. § 13661(c) (2012). Authority to deny admission to criminal offenders "in selecting among applicants for admission to . . . federally assisted housing, if the public housing agency . . . determines that an applicant or any member of the applicant's household is or was . . . engaged in any drug-related or violent criminal activity or other criminal activity . . . the public housing agency or owner may—(1) deny such applicant admission to the program or to federally assisted housing." *Id.*

127. NHLP reports that at the end of 2005, the Bureau of Justice Statistics reported that African Americans accounted for approximately forty percent of all state or federal inmates with a sentence of more than one year. See NAT'L HOUS. LAW PROJECT, *supra* note 86, at 3.

128. Julie Hirschfeld Davis & Gardiner Harris, *Obama Commutes Sentences for 46 Drug Offenders*, N.Y. TIMES (July 13, 2015), http://www.nytimes.com/2015/07/14/us/obama-commutes-sentences-for-46-drug-offenders.html?_r=0 ("Overhauling the criminal justice system has become a bipartisan venture. Like Mr. Obama, Republicans running for president are calling for systemic changes. Lawmakers from both parties are collaborating on legislation. And the United States Sentencing Commission has revised guidelines for drug offenses, retroactively reducing sentences for more than 9,500 inmates, nearly three-quarters of them black or Hispanic."); see also Dan Roberts & Karen McVeigh, *Eric Holder Unveils New Reforms Aimed at Curbing U.S. Prison Population*, THE

groups in reforming the most punitive aspects of criminal justice policies is a welcome development. This may provide an opening to challenge exclusionary practices in public housing, especially given their disproportionate racial impact.¹²⁹

A. Policy Changes

The collateral damage of One Strike policies has emerged as a particularly acute problem at a time when affordable housing in urban areas is increasingly difficult to obtain. Some of the more than 630,000 people exiting prison or jail every year¹³⁰ seek to reside with family members in public housing but are typically precluded from doing so. At the same time, federal policy under the Second Chance Act of 2007¹³¹ encourages practices that are consistent with supportive reentry of the formerly incarcerated, including housing access.¹³² Desperate family members with criminal convictions who move in with leaseholders without permission from PHAs live in the shadows and put their entire families at risk of eviction if they are found out. In 2008, the National Housing Law Project (NHLP),¹³³ a tenant advocacy organization, suggested that the goal should be to “dispel the myth that PHAs and owners of federally assisted housing are required to exclude individuals with criminal records.”¹³⁴ They advocated that “[l]ifetime bans of persons with criminal records are generally not required by federal law and are inconsistent with studies regarding recidivism.”¹³⁵ Further, they are at odds with other federal reentry objectives that seek to ease a person’s reintegration into society.¹³⁶ Successful reintegration is still an important goal.

GUARDIAN (Aug. 12, 2013, 2:23 PM), <http://www.theguardian.com/world/2013/aug/12/eric-holder-smart-crime-reform-us-prisons> (Holder referring to mass incarceration as “ineffective and unsustainable”).

129. Much of the conversation about reforming the criminal justice system flows from a recognition of the disproportional impact of race.

130. E. ANN CARSON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2014 (2015), available at <http://www.bjs.gov/content/pub/pdf/p14.pdf> (“In 2014, 6% of all black males ages 30 to 39 were in prison, compared to 2% of Hispanic and 1% of white males in the same age group.”).

131. Second Chance Act of 2007, Pub. L. No. 110-199 (2008).

132. See 42 U.S.C. § 17501(a) (2012) (“The purposes of the Act are . . . (2) to rebuild ties between offenders and their families, while the offenders are incarcerated and after reentry into the community, to promote stable families and communities.”).

133. See generally NAT’L HOUS. LAW PROJECT, <https://www.nhlp.org>.

134. See NAT’L HOUS. LAW PROJECT, *supra* note 86, at 2.

135. *Id.* (noting that “[r]easonable admission policies should require that each applicant be individually measured and that evidence of mitigating factors and rehabilitation should always be considered”).

136. See Lahny R. Silva, *Criminal Histories in Public Housing*, 2015 WIS. L. REV. 375, 384 (2015) (arguing that the use of criminal history information as the basis for disqualification from federal public housing is patently inconsistent with contemporary federal reentry objectives); see also Second Chance Act of 2007, Pub. L. No. 110-199, § 3(b)(1), 122 Stat. 657, 658 (codified as

Competing federal policies that are working at cross-purposes prompted intervention from at least one high-level government official soon thereafter. In 2011, then-HUD Secretary Shaun Donovan issued a letter to PHAs¹³⁷ reminding them of the discretion given to PHAs when considering people leaving the criminal system and encouraging them to “allow ex-offenders to rejoin their families in the Public Housing or Housing Choice Voucher programs, when appropriate.”¹³⁸ Given the official sanction of the HUD Secretary, it seemed likely that the general practices of PHAs would change, but there was no comprehensive sea change in policy among PHAs.

One Strike remained in place as the default policy in many places, and most PHAs throughout the country have prevented formerly incarcerated people from returning to their homes or living with their family members in subsidized housing. In response to this problem, cities such as New York, Oakland, and Chicago have implemented reforms in tenant-selection criteria that ensure a person’s application for housing is not negatively impacted by a criminal record.¹³⁹ While commendable, these

amended at 42 U.S.C. § 17501(b)(1) (2012)). The Act was intended “[t]o reauthorize the grant program for reentry of offenders into the community in the Omnibus Crime Control and Safe Streets Act of 1968, to improve reentry planning and implementation, and for other purposes.” *Id.*

137. Letter from Shaun Donovan, Sec’y, and Sandra B. Henriquez, Assistant Sec’y for Pub. & Indian Hous., U.S. Dep’t of Hous. & Urban Dev., to Public Housing Authority Directors (June 17, 2011), available at <http://nhlp.org/files/Rentry%20letter%20from%20Donovan%20to%20PHAs%206-17-11.pdf>.

138. *Id.*

139. See VERA INST. FOR JUSTICE, PUBLIC HOUSING FOR PEOPLE WITH CRIMINAL HISTORIES: FACT SHEET (2015), available at <http://www.vera.org/sites/default/files/resources/downloads/public-housing-criminal-histories-fact-sheet.pdf>. For example, Chicago Housing Authority launched a pilot program for 30 people who have completed a year of case management at one of three participating service providers. *Id.* Providers issue a certificate to participants, which they can use as proof of mitigation of circumstances, and continue to work with them for an additional year. The pilot serves people with families in public housing developments and in Section 8 housing, as well as people who wish to move into their own subsidized unit. A similar pilot is underway with the Cook County Housing Authority. NYCHA operates the Family Reentry Pilot Program—a partnership between NYCHA, the New York City Department of Homeless Services, the Corporation for Supportive Housing, and the Vera Institute of Justice (Vera). *Id.* Through the program, formerly incarcerated people join their families in public housing under temporary permission and receive case management services from partnering nonprofits to facilitate successful reentry. Participants who complete the program can ultimately be added to the household’s lease or can choose to use this as a temporary housing option while they get on their feet. And Oakland Housing Authority’s (OHA) Maximizing Opportunities for Mothers to Succeed (MOMS) program, in operation now for 13 years, connects mothers in medium or minimum security at the Santa Rita jail to housing provided by OHA. *Id.* To be eligible, mothers must participate in a counseling, education, and employment assistance program in the jail and continue with case management services once they return to their community. The housing authority has eleven units set aside for program participants. At the conclusion of the approximately 12-month program, women who successfully meet their programmatic goals and lease requirements can apply for permanent housing, and their prior conviction will not be

are pilot projects and do not represent an overall shift in policy. Since *Rucker* unanimously upheld the One Strike provisions, PHAs had no incentive to radically change course and, instead, continued to vest decisionmaking on individual cases to local housing managers who either apply the strict liability standard or use vague criteria to exercise discretion. However, in 2015, HUD released guidance¹⁴⁰ clarifying the One Strike policy and laying out best practices for public housing authorities. It reminds PHAs that HUD does not require them to adopt or enforce One Strike rules that deny admission to anyone with a criminal record or require automatic eviction any time a household member engages in criminal activity in violation of their lease. It also makes clear that *arrests without conviction* are not sufficient grounds for eviction or denial of housing.¹⁴¹ To this end, PHAs were put on notice that they could not afford to ignore the disparate racial impact of arrest record screening.¹⁴² As noted in a report from the Shriver Center, “These entities are specifically tasked with the duty to administer these federally assisted housing programs in a manner that will affirmatively further fair housing.”¹⁴³ The Fair Housing Act outlaws housing discrimination, including racially neutral policies that have an unjustified disparate impact on racial minorities. Though facially neutral, arrest record screening disparately impacts racial minorities because their rate of arrest is disproportionate to that of the general population.¹⁴⁴ Thus, HUD has an interest in monitoring the criteria that PHAs use to screen out tenants for arrests that did not result in conviction. Regardless of the nature of the criminal activity, all PHAs should establish and clarify their criteria for tenant selection and evictions and, at the very least, adopt the 2015 clarifying recommendations of HUD.

held against them. The program is planning to expand to 30 units and will include units for fathers leaving jail.

140. U.S. DEP’T OF HOUS. & URBAN DEV., GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 2 (2015), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf> (“The purpose of this Notice is 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.”).

141. *Id.* at 3–4.

142. MARIE CLAIRE TRAN-LEUNG, SHRIVER CTR., WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING viii (2015), available at <http://povertylaw.org/sites/default/files/images/publications/WDMDFinal.pdf> (“HUD should enforce the Fair Housing Act against any housing providers whose use of arrests disproportionately and unjustifiably impacts minority groups.”).

143. *Id.* at vii.

144. *Id.* at 26.

Similarly, HUD has also issued guidance to landlords and home sellers who turn away candidates with criminal records, stating that they may be engaging in race-based discrimination because of disproportionate rates of incarceration.¹⁴⁵ These new government interventions emerged after the Supreme Court upheld the constitutionality of disparate impact doctrine under the Fair Housing Act. A housing provider violates the Act when the provider's policy or practice has an unjustified discriminatory racial effect, even when the provider had no intent to discriminate.¹⁴⁶ To this end, HUD Secretary Julián Castro made the larger point: "When landlords refuse to rent to anyone who has an arrest record, they effectively bar the door to millions of folks of color for no good reason."¹⁴⁷ These developments have opened up new legal possibilities to challenge the effects of disparate impact in housing and come with the imprimatur of the HUD Secretary.

B. The Current Legal Services Environment

While new opportunities to assert legal claims for housing discrimination have emerged, funding for indigent legal services to carry out these important goals has been sharply curtailed.¹⁴⁸ While the federal government has increased the resources available for policing, especially in its prosecution of the drug war,¹⁴⁹ access to civil legal aid for low-income people has diminished.¹⁵⁰ Thus, the current environment

145. U.S. DEP'T OF HOUS. & URBAN DEV., GUIDANCE ON APPLICATION OF THE FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016), available at http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf ("Criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers. While having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another.").

146. See 24 C.F.R. § 100.500 (2015); Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015).

147. See Camila Domonoske, *Denying Housing Over Criminal Record May Be Discrimination*, *Feds Say*, NPR (Apr. 4, 2016, 1:14 AM), <http://www.npr.org/sections/thetwo-way/2016/04/04/472878724/denying-housing-over-criminal-record-may-be-discrimination-feds-say>.

148. *House Spending Bill Cuts LSC Budget by 20%*, LEGAL SERVICES CORP. (June 3, 2015), <http://www.lsc.gov/media-center/press-releases/2015/house-spending-bill-cuts-lsc-budget-20>.

149. *Wasted Tax Dollars*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/wasted-tax-dollars> (last visited May 22, 2016) ("Over the past four decades, federal and state governments have poured over \$1 trillion into drug war spending and relied on taxpayers to foot the bill.").

150. ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2013, at 1, 9 (2013), available at <http://www.clasp.org/resources-and-publications/publication-1/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-3.pdf> ("While state funding is lower than in the most recent past, state activity on civil legal aid continues to increase . . . [A]t best, there is one legal aid attorney for every 6,415 low-income persons. In contrast, the ratio of attorneys delivering personal legal services to the general population is approximately one for every 429 persons, or fourteen times more.").

renders legal support for public housing tenants underfunded or unavailable. This manifests in different ways. First, although PHAs ought to apply discretion rather than outright rejection of applicants with criminal convictions, those discretionary provisions are often vague and do not provide a predictable basis for whether any applicant is actually meeting the criteria set forth. For example, individuals with a criminal record who are seeking admission to federally subsidized housing can be successful in gaining admission when they have established mitigating circumstances and/or “evidence of rehabilitation.”¹⁵¹ The rules regarding the consideration of mitigating circumstances vary amongst PHAs, but they are required by regulation to consider mitigating factors.¹⁵² However, the unavailability of legal support can make it difficult for a person to present an effective case for rehabilitation, especially when the standards are unclear. Under ordinary circumstances, it is difficult for nonlawyers to navigate the system and even more so when standards are unclear. Access to counsel would generally increase the odds of success, especially for those people with criminal convictions seeking to join stable households that already exist in public housing.

Second, in a time of fiscal austerity, there is a dearth of legal representation available for the poor. Resources are circumscribed for housing cases involving termination of tenancy or exclusion cases. Some legal aid organizations are precluded by statute from litigating these types of cases at all. For example, the Legal Services Corporation (LSC)¹⁵³—the nation’s largest publicly funded provider of civil legal services—is specifically prohibited from “[r]epresenting people who are being evicted from public housing because they face criminal charges of selling or distributing illegal drugs.”¹⁵⁴ LSC-funded law offices serve an enormous number of clients, and many of them engaged in traditional housing cases, which are not associated with criminal activity. In addition to this specific prohibition, they cannot participate in the positive development

151. 24 C.F.R. § 960.203(d); see NAT’L HOUS. LAW PROJECT, *supra* note 86, at 43.

152. NAT’L HOUS. LAW PROJECT, *supra* note 86, at 43.

153. See *How Legal Aid Works*, LEGAL SERVS. CORP., <http://www.lsc.gov> (last visited May 22, 2016) (“Legal Services Corporation (LSC) is an independent nonprofit established by Congress in 1974 to provide financial support for civil legal aid to low-income Americans. LSC promotes equal access to justice by providing funding to 134 independent non-profit legal aid programs in every state, the District of Columbia, and U.S. Territories. LSC grantees serve thousands of low-income individuals, children, families, seniors, and veterans in 813 offices in every congressional district.”).

154. 45 C.F.R. § 1633.3 (2015); see also *About Statutory Restrictions on LSC-Funded Programs*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs> (“The Legal Services Corporation Act (42 U.S.C. 2996 et seq.) stipulates that LSC-funded programs cannot use either LSC or private funds for certain activities. The 1996 Appropriations Act (Pub. L. 104-134) and subsequent legislation introduced new restrictions that apply to funds from all sources—federal, state, local, and private—except tribal funds.”).

of the law in this area as they are also precluded from bringing class action lawsuits¹⁵⁵ or representing prisoners.¹⁵⁶ This represents a large number of potential litigants who are denied access to legal service. As noted previously, African Americans are many times more likely to be under correctional control than others.¹⁵⁷

Finally, for legal-aid bureaus that are not publicly funded, or not subject to LSC restrictions, there may be a reluctance to take housing cases arising from past or current criminal activity. The practice of legal services for the poor, as it has evolved, tends to divert lawyers and scarce resources away from clients who do not represent what is colloquially referred to as the “deserving poor.”¹⁵⁸ Although this is not a policy preference that is directly articulated in standards for service provision, many providers have to make difficult choices about the clients they will serve and thus inadvertently prioritize their resources based on perceptions of *worthiness*. People with criminal convictions tend to fall in the “undeserving category,” despite the fact that their actual legal needs may be greater. In this way, criminal records can serve as a proxy for “undesirable” in delineating a class of clients to whom you can or should deny services.¹⁵⁹ The fact that all criminal convictions are not the same, whether in kind, severity, or circumstance, is irrelevant to many decisionmakers. There are a wide variety of factors that determine whether any given person is suitable for representation and deserving of resources in order to defend their rights. In dealing with clients for whom criminal convictions represent a barrier to housing, some legal service providers mimic the tendency to make blanket exclusions that PHAs resort to when deciding not to exercise their discretion in favor of applicants with criminal convictions. This is not to suggest that there are not many local ser-

155. 45 C.F.R. § 1617.3.

156. *Id.* § 1637.3 (describing that LSC funding precludes participation in civil litigation on behalf of an incarcerated person, as plaintiff or defendant, nor any administrative hearing challenging the conditions of incarceration).

157. See PEW CHARITABLE TRUSTS, 1 IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 5 (2009), available at <http://www.convictcriminology.org/pdf/pew/onein31.pdf> (“Looking at the numbers through the lenses of race . . . reveals stark differences. Black adults are four times as likely as whites and nearly 2.5 times as likely as Hispanics to be under correctional control. One in 11 black adults—9.2 percent—was under correctional supervision at year end 2007.”).

158. See MICHAEL B. KATZ, THE UNDESERVING POOR: AMERICA’S ENDURING CONFRONTATION WITH POVERTY 9 (2013) (discussing categories of people such as welfare recipients that the American public generally consider undeserving of public aid). Katz notes that “incarceration had become the welfare state for black males, signifying more than any rhetoric their place among the undeserving poor.” *Id.*

159. See David Luban, *SILENCE!: Four Ways the Law Keeps Poor People from Getting Heard in Court*, LEGAL AFF., May-June 2002, available at http://legalaffairs.org/issues/May-June-2002/review_luban_mayjun2002.msp (noting that Legal Services Restrictions are a “silencing doctrine” for entire classes of litigants, including all prisoners, including those not convicted of a crime).

vice providers around the country that are responding to this important need. However, given the shortage of available housing for low-income families who are confronted with the effects of criminal justice involvement, the need for individual client services, policy advocacy, and law development in this area is acute.

C. Imagining a “Family Defense” Project

Legal services providers are not the only legal resource available to intervene in the justice gap that exists for families dealing with the effects of mass criminalization. Law schools have opportunities to do justice in the communities that they serve. And many law clinics and other members of the academy serve that function admirably by contributing to justice pursuits with community members—and with law students. To that end, legal scholar and teacher Jane Aiken observes, “Everything we do as law teachers suggests something about justice.”¹⁶⁰ She observes that “[w]e communicate a great deal about the (un)importance of justice when we do not focus on it explicitly Legal education often ignores the significant role that lawyers play in shaping public policy.”¹⁶¹ In my view, developing a course to offer legal and other support for families experiencing barriers to public housing based on criminal justice involvement is a worthy project, especially when you contextualize the modern problem of housing access within the federal government’s participation in race-based discriminatory practices.

Many law students come to law school seeking to do justice but are quickly demoralized after engaging in a law school experience that bears little resemblance to their vision of helping people with critical legal and other problems. However, law teachers, through clinical and other experiential practice, have a role “cultivat[ing] in students . . . the capacity for action,” generated by difficult social problems and unjust conditions.¹⁶² Providing students with opportunities to engage requires not simply skills and professional development, but the expansion of “deep critique”¹⁶³ and a critical analysis of the systems in which all of us operate. To advance this justice imperative, it is important to contextualize the issues that arise from public housing exclusionary practices beyond sim-

160. Jane Harris Aiken, *Striving to Teach “Justice, Fairness, and Morality,”* 4 CLINICAL L. REV. 1, 4 (1997).

161. *Id.* at 6. “Legal education often ignores the significant role that lawyers play in shaping public policy. It includes little or no discussion of the social consequences of a lawyer’s acts and decisions not to act. Yet, practicing lawyers make legally significant decisions on a daily basis, perhaps as much or more so than do judges, legislators and administrators.” *Id.*

162. See Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201, 231 (2016).

163. See *id.*

ple legal frameworks. For example, it is important to understand the history of racist exclusionary practices that created a segregated housing system, which continues to marginalize African Americans. Similarly, it is important to understand the political context of the war on drugs and mass criminalization and its disproportionate impact on people of color. Moreover, it is important to understand how tenants currently experience intersecting systems of subordination that affect marginalized communities. When contextualized in this way, our work as legal advocates can begin.

Public housing exclusion cases are good vehicles to organize around a justice campaign: one that provides opportunities for policy advocacy, administrative law practice, community organizing, and, most of all, deep client engagement. Many clinical professors (or those that teach other experiential modules) tend to work on problems and teach students within narrowly defined substantive areas. For example, family law clinics tend to work on child welfare, domestic violence, divorce, custody, child support, or other traditional family law cases. Likewise, immigration professors and students work on immigration and related problems, criminal defenders defend, and so on. Many of us recognize that there is a great deal of intersectional work in what we do and that our clients do not present as “legal problems,” but rather as people with problems—sometimes legal, often more complex. However, due to external and internal constraints of time, experience, and training, we shy away from more holistic representation that is required when we meet a client dealing with a variety of oppressive systems.

One way to think about this issue, conceptually, would be for a program to reorient and respond substantively as a *family defense* clinic or project.¹⁶⁴ This makes sense if you think of public housing problems—along with child welfare, immigration, public benefits, criminalization, and other issues—as representative of myriad issues that affect low-income families who operate at the intersection of regulations that constrain their life choices. To the extent that their problems hinder their ability to function and maintain family integrity (as they define it) we become defenders. In that sense, the goal of such a program is to serve *low-income families*, with all of the complex issues that manifest, rather

164. Where they exist “family defense” programs tend to focus on protecting poor families from the incursions of state child welfare systems. See e.g., *Family Defense Clinic Celebrates 25 Years Providing Interdisciplinary Family Representation*, NYU LAW (Jan. 26, 2016), <http://www.law.nyu.edu/news/family-defense-clinic-25th-anniversary>. These are critically important programs. However, I see family defense in an even broader context: the protection of the family from *myriad* forms of state intervention, all of which serve to undermine families’ ability to thrive and erode family integrity in the ways that they define it. The problems created by One Strike housing policies provide such an example.

than confine our practice to litigating in *substantive areas* of law. Law clinics have an obligation to collaborate with clients and communities that are most in need and whose problems represent a level of complexity that might deter legal services organizations from providing help. This is where law clinics—and law students—should enter.

In this type of project, law schools can incorporate experiential learning programs to train students to advocate for clients seeking to overcome criminal record barriers at local PHAs. These cases can be ideal for student advocates for several reasons. First, the initial challenges to denials from PHAs often happen at the housing manager level, where informal advocacy can be effective, but also happen later in administrative hearings. Students can operate as nonlawyers to advocate in either milieu, with faculty supervision. In fact, to the extent that local legal aid bureaus represent tenants in administrative hearings at PHAs, these hearings are sometimes conducted by paralegals. Second, these cases are also labor intensive—one primary reason that legal aid offices often do not accept them. Students have the opportunity to construct a “dossier” for clients, helping them compile a portfolio containing evidence of rehabilitation, the standard to overcome presumptions of eligibility; or to overcome permanent exclusions where appropriate; or to assist formerly incarcerated clients in joining family members in public housing. Finally, students have an opportunity to develop professional client relationships, developing interviewing and counseling skills as they work with clients to navigate a byzantine housing system. They can also partner with clients (and community-based organizations) to engage in important education projects and policy advocacy, as well as organize to meet the specific articulated goals of tenants in any given housing development.

Overall, these tasks create exceptional pedagogical opportunities, as students confront the reality of administrative bureaucracies that inform the lives of tenants. In turn they can use their newly acquired legal skills to address a critical gap in services, as the need for client representation in this area is great. No doubt many clinical programs of all kinds are already engaging in substantive work to address the excesses of the One Strike regime. A family defense project creates an expansive array of possibilities that only begin with public housing cases but meets the clients where they are to potentially develop more comprehensive interventions.

CONCLUSION

Throughout much of the twentieth century, the federal government has actively sanctioned a number of policies that have created obstacles to affordable housing for African Americans: redlining, racially restric-

tive covenants, and the war on drugs with its attendant One Strike exclusionary housing policies. The defining feature of these policies is that, through disproportionate impact, they have all served to reinforce racial and economic inequality for low-income African-American families.

At a time when the nation is beginning to reconsider its obsession with hypercriminalization, one appropriate place to begin is in reassessing the practice of excluding people with even minor criminal convictions from subsidized housing and to create a more just and rational policy. The crisis of affordable housing in urban areas requires that we confront these inflexible exclusionary housing policies by recognizing the collateral damage to families that has ensued.