Excluded and Evicted: The Impact of Mass Incarceration on Access to Housing for Black and Latinx Tenants

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I. Introduction

In recent years, enormous swells of activism and scholarship have contributed to a national conversation regarding the impact of policing, police brutality, and mass incarceration on Black bodies in the United States. Specifically, evidence that policing and prison policy have been intentionally designed to control and subjugate Black bodies has redirected much of the conversation towards the injustice of these policies, and the impact of removing Black bodies from societal participation via imprisonment or murder at the hands of police. Fifty years out from the implementation of a set of policies known as "The War on Drugs" that ravaged Black communities, these communities are still reeling from the effects. Not only do people with drug convictions make up the majority of those in prison, but the majority of those people are people of color.[1] Compounded by excessive sentencing practices such as "mandatory minimums, combined with cutbacks in parole release," the United States prison population exploded between 1980 and 2010.[2]

In addition to disproportionately incarcerating Black and Latinx people, this country has a documented fear of Blackness as inherently violent and destructive. When encountering unfamiliar Black male faces in particular,

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1. The Sentencing Project, Criminal Justice Facts (2020), https://www.sentencingproject.org/criminal-justice-facts (last visited Nov. 5, 2020).

2. *Id.*

white people often have visceral and physical reactions of fear.[3] By incarcerating significant numbers of Black and Latinx people, this country has found a way to permanently brand certain communities as dangerous. This branding continues once people are released from incarceration and seek to rebuild their lives by seeking housing and employment. Landlords use excessive and restrictive criminal-background screening practices to exclude tenants with even misdemeanor arrests or dropped charges on their records. Nuisance and crime-free ordinances take advantage of disparities in over-policing and fear of Blackness to penalize tenants with eviction if they reach a threshold of calls for law enforcement or are accused of criminal activity. Both types of policies create real and measurable barriers to housing for Black and Latinx people. Those concerned with this discriminatory racial impact—lawyers, housing service providers, community organizers—have taken many approaches to challenge these policies. Alone, neither local and state advocacy nor litigation can sweepingly eradicate these barriers. It will take a comprehensive strategy, with various stakeholders working together, to ensure that the brand of mass incarceration does not continue to burden those with criminal histories as they seek housing.

II. Rise of Mass Incarceration

Since the 1970s, the United States has deliberately emerged as the world leader in imprisoning its own people. Currently, "there are 2.2 million people in the nation's prisons and jails—a 500% increase over the last 40 years."[4] The War on Drugs' targeting of Black communities is directly responsible for this increase. This war, first declared by President Richard Nixon in 1971, marked a drastic expansion in federal drug enforcement and, in turn, the prison population.[5] President Reagan took the War on Drugs to unprecedented heights in the 1980s, where his extensive public fearmongering campaign about the ills of drugs created the environment for harsher drug penalties and zero-tolerance policies.[6] As a result, not only are there more people in prisons today for drug offenses than for all other offenses in 1980, but the "population under correctional control—on probation or parole—has tripled as well, an increase driven almost entirely by

3. Paul Butler, Chokehold: Policing Black Men 19 (2017) ("When people see black men they don't know, they have a physical response that is different from their response to other people. Their blood pressure goes up and they sweat more. When a white person sees an unfamiliar black male face, the amygdala, the part of the brain that processes fear, activates.").

4. The Sentencing Project, *supra* note 1.

5. Drug Policy Alliance, A Brief History of the Drug War (2020), https://drugpolicy.org/issues/brief-history-drug-war (last visited Dec. 14, 2020) ("He dramatically increased the size and presence of federal drug control agencies, and pushed through measures such as mandatory sentencing and no-knock warrants.").

6. *Id.*

drug convictions and other nonviolent crimes."[7] In waging this war, the federal government, aided by the Supreme Court in chipping away Fourth Amendment protections, flooded local police departments with funds and military style equipment.[8] Those departments were then permitted by federal law to retain cash and assets recovered in drug cases, which "gave state and local police an enormous stake in the War on Drugs—not in its success, but in its perpetual existence."[9]

The War on Drugs was not only designed to exist in perpetuity, but it was also designed to specifically target certain communities. The militarized tactics used to wage the War on Drugs have "been employed almost exclusively in poor communities of color."[10] Despite white people making up the vast majority of those who use and sell illegal drugs, "three fourths of all people imprisoned for drug offenses have been black or Latino."[11] As a result, despite comprising only thirty-seven percent of the United States population, people of color make up sixty-seven percent of the United States prison population.[12] These racial disparities in arrests, convictions, and imprisonment, particularly for drug-related offenses, have created a "vast new racial undercaste—a system of mass incarceration that governs the lives of millions of people inside and outside of prison walls."[13]

It is important to note that the policing of Black people is not limited to the state. Many white people view the police as their own personal security forces, which can lead to dangerous encounters with law enforcement for Black people doing nothing but simply existing. The recent wave of "Living While Black" cases demonstrate the lengths white people, backed up by the police, are willing to go to police and exclude Black people. The examples are endless: a white woman called 911 on a New York state senator while he was campaigning;[14] two Black men were arrested while waiting for a meeting at a Starbucks Coffee shop;[15] a white hotel employee called the police on a Black woman and her children for using the swimming pool they paid

7. Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 62 (2010).

8. *Id*. at 76, 79.

9. *Id*. at 80.

10. *Id*.

11. *Id*. at 100

12. The Sentencing Project, *supra* note 1.

13. Alexander, *supra* note 7, at 105.

14. Madeleine Thompson, *She Called Cops When He was Campaigning While Black; He Filed a Bill to Criminalize Racially Biased 911 Calls*, CNN (Aug. 20, 2018, 5:38 PM), https://www.cnn.com/2018/08/20/us/911-call-bill-trnd/index.html.

15. Yon Pomrenze & Darran Simon, *Black Men Arrested at Philadelphia Starbucks Reach Agreements*, CNN (May 2, 2018, 10:40 PM), https://www.cnn.com/2018/05/02/us/starbucks-arrest-agreements/index.html.

for as guests;[16] and, earlier last year, a white woman called the police on a Black man birdwatching in Central Park when he asked her to leash her dog and was caught on tape lying to the police in claiming that the man had physically attacked her.[17] Not only is the state actively working to subjugate and disenfranchise Black people through over-policing and mass incarceration, but white people are able to harness the power of the criminal justice system to demand "that police set and enforce an entitlement to racial stratification in the form of a white right to exclude."[18] Particularly when coupled with a nuisance or crime-free ordinance, explained in more detail below, these encounters might be the reason that an individual gets evicted from their home.

III. Barriers to Housing Erected by Mass Incarceration

When someone is released from incarceration, the sentence is often long from over. A criminal conviction, particularly a felony conviction, operates as a branding tool that places that person "into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal."[19] Society has deliberately set up barriers to education, employment, civic participation, and even housing for those with criminal backgrounds. Moreover, the continual presence of mass incarceration threatens to criminalize people of color at various turns, which can have a direct impact on housing access. Two particularly pernicious examples—restrictive criminal background screening and nuisance/crime-free ordinances—provide stark examples of the grip mass incarceration holds beyond the confines of a cell.

A. Overly Restrictive Criminal Background Screening

Starting with the most straightforward, landlords across the country routinely use overly restrictive criminal background screening to exclude applicants with criminal histories from their properties. Whether done by the landlords themselves, or via a third-party screening company, landlords will set unreasonable parameters for applicants under the guise of protecting other tenants and property. Often, these policies take the form of "blanket bans," or a complete and outright ban on any applicant who has any kind of criminal history. These bans exclude applicants regardless of the severity of the past criminal behavior, the time elapsed since the conviction, or any evidence of rehabilitation. In addition to outright blanket bans, many landlords impose functional blanket bans using excessive

16. Alisha Ebrahimji, *Hotel Employee Calls Police on Black Family Using the Pool as Guests,* CNN (July 1, 2020, 2:06 PM), https://www.cnn.com/2020/07/01/us/hampton-inn-black-family-pool-trnd/index.html.

17. Amir Vera & Laura Ly, *White Woman Who Called Police on a Black Man Bird-Watching in Central Park Has Been Fired,* CNN (May 26, 2020, 4:21 PM), https://www.cnn.com/2020/05/26/us/central-park-video-dog-video-african-american-trnd/index.html.

18. Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness As Nuisance,* 69 Am. U. L. Rev. 863, 880 (2020).

19. Alexander, *supra* note 7, at 96.

"lookback periods." A lookback period is the set amount of time, in years, that a landlord will go back in considering criminal backgrounds. While some are more reasonable, such as three or five years, many landlords create functional bans by having lookback periods as long as fifty to ninety-nine years. Others may institute partial bans, such as bans on applicants with any type of felony conviction, which is often seen as more reasonable, despite many felonies being non-violent and the existence of one on someone's record not likely determining whether they actually pose a risk as a tenant.

No matter the form, any policy that excludes applicants with a criminal history will, by definition, have a disparate impact on Black applicants because Black people are "more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences."[20] In issuing guidance on the use of criminal-background screening, the U.S. Department of Housing and Urban Development (HUD) recognized this impact, explaining that "[b]ecause of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics."[21] HUD continued on to state that these types of policies should be evaluated according to a disparate-impact framework, which would require housing providers to show that their screening criteria serves a legitimate interest not served by any other less discriminatory alternative. Without such a justification, the HUD guidance declared that this type of practice would violate the Fair Housing Act.[22]

The impact of these types of criminal background screening practices cannot be understated: they make a significant amount of housing unavailable to those with criminal convictions, who are disproportionately Black and Latinx. Again, the disparities among those with involvement with the criminal justice system are extremely stark. When people are then released from custody, being able to find housing is key to being able to establish one's life. Policies that automatically or functionally exclude those with criminal histories then have a direct and discriminatory impact on the ability of people of color to find housing. For example, a study conducted by the Equal Rights Center in Washington, D.C., found that of the tests the center conducted of various area housing providers using testers with criminal histories, twenty-eight percent "revealed a criminal records screening

20. The Sentencing Project, *supra* note 1.

21. U.S. Dep't Hous. & Urb. Dev., Office of Gen. Counsel Guidance on Application of FHA Standards to the Use of Criminal Records by Providers of Hous. and Real Estate-Related Transactions 10 (Apr. 4, 2016).

22. *Id*. ("A discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act.").

policy in place that may have an illegal disparate impact based on race."[23] Based on the companies and types of housing that used these policies, the study found that nearly 5,000 units in the Washington, DC area—an area where it is already extremely difficult to find affordable housing, regardless of criminal history—"are unavailable to individuals with any felony conviction from any point in time, and to many individuals with a misdemeanor conviction."[24]

These collateral consequences to criminal convictions are, at their core, issues of fairness and justice. Regardless of one's views regarding the goals of incarceration being punitive versus rehabilitative, it is fundamentally unfair to release someone from incarceration and then place barriers to every basic form of societal reintegration. Coupled with the racial disparities in arrests and convictions, these barriers reinforce racial subjugation by relegating Black and Latinx people with criminal backgrounds to certain neighborhoods, jobs, and positions in society.

B. Nuisance and Crime-Free Ordinances

Nuisance and crime-free ordinances are passed under the guise of keeping neighborhoods safe, with the discriminatory impact of penalizing low-income people of color and survivors of domestic violence. Though they can take various forms, nuisance ordinances generally operate by labelling "conduct associated with a property—whether by resident, guest, other person—a 'nuisance' and require or incentivize the landlord to abate the nuisance under threat of various penalties."[25] One version places limits on the amount of calls for law-enforcement services to a particular property or unit. Once a property or unit has met the determined threshold and is declared to be a nuisance property, the city can order the landlord to take any number of abatement measures, including eviction of the tenant. If landlords refuse to abate the nuisance, they are often threatened with criminal or civil fines and suspension and/or termination of rental licenses and occupancy permits. Another common type deems certain activity on the premises as nuisance activity, and a certain number of instances can result in eviction. Often this includes a law-enforcement response or alleged criminal activity on the premises—regardless of whether a citation, arrest, or conviction occurs. Alarmingly, these ordinances often permit the eviction of tenants "regardless of whether [the] tenant was [a] victim of

23. Equal Rights Center, Unlocking Discrimination: A DC Area Testing Investigation About Racial Discrimination and Criminal Records Screening Policies in Housing 6 (2016), https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf.

24. *Id.*

25. Kathleen Pennington, Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances, Presentation at the Office on Violence Against Women (Oct. 20, 2016).

criminal activity, including domestic violence," and "regardless of where the alleged criminal activity occurred."[26]

Similar to the aforementioned type of nuisance activity, some jurisdictions have implemented strictly crime-free ordinances, where any alleged criminal activity on the property (and sometimes, even off the premises) is automatic grounds for eviction. The International Crime-Free Association, founded by former police officers, has been instrumental in marketing these Crime-Free Multifamily Housing ordinances and their associated elements to police departments and jurisdictions across the country. Currently, the program boasts operation in 2000 cities across 48 different states.[27] Marketed as an advertising and safety tool, the Crime-Free Multi-Housing Association offers to "certify" properties as "Crime-Free" if they attend required trainings and implement certain changes on the property.[28,29] These changes include additional lighting in dimly lit areas, or additional mirrors/cameras in various areas of the premises.[30] Landlords in the program are also required to have all tenants sign a Crime-Free Lease Addendum, agreeing that they can be terminated if a member of the household or one of their guests commits a crime on the property. Additionally, when nuisance and crime-free ordinances are in place in one jurisdiction, they can reinforce one another. For example, in the city of Vista, California, when a property has crossed the established threshold for nuisance activity, the landlord is then required to enroll in the Crime-Free Multi-Housing Program.[31]

Facially, it may seem completely legitimate for landlords to regulate the behavior of tenants in this way, but many tenants are unfairly harmed by these ordinances. Even as it relates to the process itself, many of these ordinances have little to no procedural protection for tenants. Including limited avenues for appeal or challenging an eviction under the ordinance, the standard of proof for establishing a violation is often very low. For those that penalize nuisance activity based on calls for law enforcement, it is usually sufficient that a law-enforcement officer responded at all, regardless of whether the call was frivolous or ultimately resolved without a charge or conviction. In Fort Bragg, California, it is sufficient that an officer "respond[ed] to the property resulting in the issuance of citations or the

26. *Id*.

27. Int'l Crime Free Ass'n, Crime Free Multi- Housing: Keep Illegal Activity off Rental Property, http://www.crime-free-association.org/multi-housing.htm (last visited Nov. 5, 2020).

28. *Id*.

29. While this discussion of the Crime Free Association's programs focuses on its application to multifamily rental properties, the Association also markets these tools in a more limited fashion to a variety of housing types including mobile home and RV parks, condominiums, businesses, and self-storage facilities.

30. Int'l Crime Free Ass'n, *supra* note 27.

31. Vista, Cal., Mun. Code § 9.40.030.

making of arrests."[32] For those that penalize alleged criminal behavior, the ordinances do not require proof beyond a reasonable doubt as is required for criminal convictions. Many will allow for eviction by a much less rigorous standard, creating significant due process concerns. For example, in Oceanside, California, the standard for evaluating whether drug-related activity occurred on the premises is judged by a reasonable-person standard, including factors such as "steady traffic day or night to a particular unit."[33]

Victims of crime, and in particular survivors of domestic violence, are a group of tenants that are disproportionately harmed by these ordinances. The story of Lakisha Briggs of Norristown, Pennsylvania, is a painful example of the impact of these ordinances. Ms. Briggs called the police twice on a boyfriend who continued to show up to her apartment and violently assault her.[34] Norristown had a three-strikes rule for calls to law enforcement.[35] The last time that Ms. Briggs was assaulted, causing injuries so severe that she had to be airlifted to the hospital, she refrained from calling the police out of fear—not of her abuser, but of being evicted.[36] She described this dilemma, saying "If I called the police to get him out of my house, I'd get evicted. . . . If I physically tried to remove him, somebody would call 911 and I'd be evicted."[37] Unfortunately, that is exactly what happened. A neighbor called the police, and, when Ms. Briggs came home from the hospital, there was an eviction notice on her door.

Additionally, when certain groups have heightened likelihood of interactions with law enforcement, these ordinances reinforce discrimination in a variety of ways. In spite of significant discussion about the impact and potential solutions for victims of crime and survivors of domestic violence, much less attention has been paid to the broader disparate impact of these ordinances based on race. Domestic violence itself disproportionately impacts Black women, who experience rates of domestic violence at higher rates than women of other races and are already less likely to seek help or resources,[38] and this discussion has already highlighted racial dispari-

32. Fort Bragg, Cal., Code § 6.12.040 (U).

33. Oceanside, Cal., Code § 20.33 (f)(2).

34. Lakisha Briggs, *I was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911,* Guardian (Sept. 11, 2015, 6:45 PM), https://www.theguardian.com/commentisfree/2015/sep/11/domestic-violence-victim-town-wanted-me-evicted-calling-911.

35. *Id.*

36. *Id.*

37. Erik Eckholm, *Victims' Dilemma: 911 Calls Can Bring Eviction*, N.Y. Times (Aug. 16, 2013), https://www.nytimes.com/2013/08/17/us/victims-dilemma-911-calls-can-bring-eviction.html.

38. Feminista Jones, *Why Black Women Struggle More with Domestic Violence,* Time (Sept. 10, 2014, 2:04 PM), https://www.mic.com/articles/192576/mercy-hospital-chicago-shooting-tamara-oneal-juan-lopez#.ufBRURJc9.https://time.com/3313343/ray-rice-black-women-domestic-violence.

ties in interactions with the criminal justice system. Just as overly restrictive criminal-background screening disproportionately excludes people of color from finding housing due to these racial disparities, so do nuisance and crime-free ordinances disproportionately expel people of color from their existing housing.

These ordinances also act as an extended arm of mass incarceration and over-policing that are enforced disproportionately against Black and brown tenants. A study of nuisance and crime-free ordinances in Milwaukee, Wisconsin, found that properties in Black neighborhoods were cited one in sixteen times, while white neighborhoods were cited just one in forty-one times.[39] Additionally, white neighbors often remain fearful of Black and brown faces, and the aforementioned examples of Living While Black cases provide pertinent examples of how that fear could easily translate into someone losing their home. If a white neighbor calls the police on their Black neighbor, regardless of the frivolous nature of that call, that tenant may be subject to eviction if the threshold is met, they may be unfairly treated or detained by police in violation of a crime-free lease addendum, or they may even be subject to deadly police violence. Black people, compared to population share, are disproportionately stopped, arrested, and convicted of crimes.[40] Even if these charges or arrests are ultimately dismissed, those tenants may still be subject to eviction under a strikeout calls for service rule or a crime-free lease addendum.

More generally, the use and enforcement of these ordinances are tools of continued surveillance and geographical restriction of Black and Latinx bodies. Black and Latinx communities are often blamed for perceived increases in crime or deterioration of neighborhoods, which fuels fear in white neighbors and creates a perceived need for additional policing or local regulations to correct the alleged problem. Professor Deborah Archer astutely notes that "local laws are often more central than federal or state laws in creating and perpetuating racially segregated neighborhoods. Exclusionary local laws and policies are among the primary mechanisms used by predominantly White communities to ward off racial integration."[41] With nuisance and crime-free ordinances on the books, and documented disproportionate policing of Black and brown people, jurisdictions have created a mechanism to exclude Black people from certain communities.

The exclusion of individual Black and Latinx tenants as a result of nuisance and crime-free ordinances has further impacts on residential racial segregation in general. Archer further explains that racial segregation will be reinforced as "people of color excluded by crime-free ordinances will

39. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequence of Third-Party Policing for Inner-City Women*, 78 Am. Socio. Rev. 117, 125 (2012).

40. NAACP, Criminal Justice Fact Sheet, https://www.naacp.org/criminal-justice-fact-sheet (last visted Nov. 5, 2020); *see also* The Sentencing Project, *supra* note 1.

41. Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 Mich. L. Rev. 173, 178 (2019).

likely be squeezed into predominately minority communities" and that these policies may likewise have a chilling effect on integration, as "people of color who are excluded by crime-free ordinances in one community may also avoid seeking housing in other predominantly White neighborhoods for fear of intolerance, prejudice, and violence, a fear likely reinforced by their experience seeking housing in or eviction from communities with crime-free ordinances."[42] A case out of Maplewood, Missouri, demonstrates this potential impact. The city of Maplewood had a nuisance ordinance that declared that any tenant who was the subject of two or more calls for emergency service as a nuisance, regardless of whether they were a survivor of domestic violence or a victim of another crime.[43]Additionally, Maplewood required all tenants to have an individual occupancy license, rather than one that applies to the property.[44] Once a tenant crossed this threshold, not only could they be evicted, but their occupancy license could be revoked, meaning that the tenant would not be able to rent anywhere else in the city of Maplewood. Disproportionate enforcement of nuisance and crime-free ordinances on people of color can contribute to the exclusion of these tenants from entire neighborhoods and cities.

Lastly, nuisance and crime-free ordinances can work in tandem with restrictive criminal background screening policies to both exclude individual Black and Latinx applicants from housing as well as maintain residential racial segregation. If jurisdictions have nuisance or crime-free ordinances that could threaten a landlord's occupancy permit or rental license, the landlord may be incentivized to exclude households where a member has a criminal history up-front due to a biased fear that that tenant may be more likely to be a nuisance or commit a crime while living on the property.

Housing is a fundamental right, and a fundamental source of stability. Without housing, someone may not be able to apply for a job, or even apply for a driver's license. Barriers such as the ones discussed above provide yet another way for this country's unjust criminal justice system to continue its subjugation and exclusion of Black and Latinx communities.

IV. Methods for Advocates to Challenge Overly Restrictive Criminal Background Screening and Nuisance/Crime-Free Ordinances

A. Local Advocacy

While relatively new to the public interest, legal services providers have been seeing the impact of overly restrictive criminal-background screening policies and nuisance/crime-free ordinances in the communities that they have served for years. Across the country, local advocacy by policy

42. *Id.* at 213.

43. *Id.*

44. ACLU, *Rosetta Watson v. Maplewood* (Apr. 10, 2017), https://www.aclu.org/cases/rosetta-watson-v-maplewood.

advocates, housing service providers, the media, and more have proven extremely effective in demonstrating the discriminatory and devastating impacts of these policies and targeting those impacts with local advocacy and legislation. The Twin Cities area of Minnesota, which also happens to be my hometown, provides two excellent illustrations of advocacy at work.

In Minneapolis, the city council was persuaded to pass an ordinance that greatly restricts the ability of landlords to conduct overly restrictive criminal-background screening. The ordinance provides landlords with the choice to either agree to do an individualized review of tenants with criminal histories—rather than automatic bans of any kind—or adopt the city's set inclusive screening criteria.[45] If a landlord chooses to do individualized review, which involves a review of the nature and circumstances of the conviction and any evidence of rehabilitation, they must also agree to review any supplemental evidence provided by the tenant and provide a written justification for exclusion of the tenant.[46] Should they choose to use the inclusive screening criteria set by the city, landlords will be severely restricted in the type of convictions that they can use as a basis to exclude a tenant as well as how far back in time they can consider convictions. Under this criteria, landlords cannot exclude applicants based on arrests that did not result in convictions, convictions that have been vacated or expunged, juvenile determinations, misdemeanor convictions older than three years, and felony convictions older than seven years—excluding drug convictions, and violent offenses older than ten years.[47] Ordinances like Minneapolis's provide an example of balancing the purported interests of landlords in the safety of their tenants and property, while restricting landlords' ability to unfairly exclude those with criminal history who pose no risk as tenants.

A local advocacy effort to challenge nuisance and/or crime-free ordinances requires multiple avenues of attack and a coordinated effort of stakeholders. One potential avenue of attack is direct landlord education about the discriminatory impact of these ordinances, which can be powerful in areas where landlords are more receptive to examining fair-housing issues. This outreach can be done by local government agencies, legal services providers, or other organizations that work on fair housing issues. Additionally, outreach can be made to any landlord or realtor associations who produce model leases to ensure that their terms do not include restrictive nuisance or crime-free terms.

The southwest Minneapolis suburb of St. Louis Park provides a great example of a community of invested stakeholders working together to successfully advocate for repeal of a particularly pernicious crime-free policy. Enacted in 2008 under the rental housing ordinance, the policy allowed for a tenant's eviction if they or a guest allegedly committed a crime,

45. Minneapolis, Minn., Code § 244.2030(c).
46. *Id*. § 244.2030(e)(2).
47. *Id.* § 244.2030(c)(1).

regardless of whether the tenant was present, charged, or convicted of a crime.[48] In fact, over a five-year period from 2013 to 2018, two out of three tenants who were evicted under the policy were never even charged with a crime.[49] Additionally, "more than half of the tenants who were evicted without being charged were accused of possessing a small amount of marijuana or paraphernalia," which carried a penalty equivalent to a speeding ticket in the state of Minnesota.[50] These data points reveal that St. Louis Park police were forcing roughly three households out of their homes per month for crimes that were never committed or that were so minor that they would be punished by a simple fine. Anecdotal evidence from legal service providers operating in the region suggests that despite the city being overwhelmingly white, the crime-free policy was enforced disproportionately against people of color.[51]

Legal services providers, local media, and even a few landlords mounted a several-year campaign against the ordinance. Two landlords sued the city, citing due process concerns related to the ordinance requiring landlords to evict tenants without any avenues for appeal.[52] While the ordinance was amended to allow landlords to appeal, for many, that was not enough. One former legal aid attorney met with a local reporter to discuss his concern about the ordinance and its discriminatory impacts.[53] Several public records requests later, local news station KSTP released a story outlining the level of enforcement and impact of St. Louis Park's ordinance. Just weeks later, the city appointed a working group to evaluate the ordinance, which later recommended complete repeal. In August of 2020, the St. Louis Park City Council voted to repeal the crime-free policy.[54] City by city, county by county, a combined and targeted advocacy effort can make a world of difference. By working to amplify the issues that they were seeing in their communities, local housing and legal services providers were able to shed light on an unjust crime-free ordinance and successfully advocate for repeal. As a result, renters throughout the city are no longer at risk of frivolous and discriminatory eviction.

48. *Evicted Before Convicted: St Louis Park Police Order Landlords to Force People from their Homes*, KSTP Eyewitness News (Nov. 20, 2018, 10:26 PM), https://kstp.com/news/evicted-before-convicted-st-louis-park-police-order-landlords-to-force-people-from-their-homes/5149900.

49. *Id.*

50. *Id.*

51. Interview with Lawrence McDonough, Senior Minnesota Counsel, National Anti-Eviction Project, Lawyers' Committee for Civil Rights Under Law (Oct. 15, 2020).

52. Javinsky-Wenzek v. City of Saint Louis Park, No. 0:11-cv-02228-JRT-JSM (D. Minn. filed Aug. 5, 2011).

53. Interview with Lawrence McDonough, *supra* note 51.

54. Kirsten Swanson, *Landlords, Housing Advocates Reflect on Repeal of Controversial Housing Ordinance in St. Louis Park*, KSTP (Aug. 16, 2020, 10:25 PM), https://kstp.com/news/landlords-housing-advocates-reflect-on-repeal-of-controversial-housing-ordinance-in-st-louis-park-august-18-2020/5832132/?cat=1.

The most significant limitation related to using a local advocacy strategy is scope. Advocacy efforts, no matter the size, require a great deal of organization, repeated appeal and engagement, and a lot of time. The result may ultimately be successful, but that success is limited to the city-level geographic area. Additionally, cities typically have fewer resources to allocate. While advocacy may be successful in advocating for repeal or revision of ordinances related to criminal background screening or nuisance/crime-free ordinances, cities may lack the resources to allocate for public education and enforcement to make the make the impact of the policies meaningful.

B. State-Level Advocacy and Preemption

Compared to small and even large city councils, state legislatures are uniquely positioned to harness greater levels of resources and provide relief to larger swaths of people in need. Additionally, state legislation can preempt the ability of individual cities or counties from enacting discriminatory or unfairly restrictive laws. For example, a few states have recently passed legislation to reduce the impact of both overly restrictive criminal background screening and nuisance/crime-free ordinances.

Aimed at broader collateral consequences of convictions in both housing and employment, advocates in Pennsylvania successfully lobbied for the Clean Slate Act that was passed in 2018. The Act provides for automatic sealing of certain criminal records, including "arrests that did not result in convictions, summary convictions from more than 10 years ago, and some second and third-degree misdemeanor convictions."[55] Compared to some cities or states that have ramped up avenues for individuals to have records expunged—often on their own time or at their own expense—Pennsylvania has automated the process and removed an additional barrier to those with criminal backgrounds. The Clean Slate Act is a demonstration of how state legislators, with one sweeping motion, can remove significant barriers to housing or employment for an enormous number of people.

Quasi-state District of Columbia also serves as a great example, having passed the Fair Criminal Record Screening for Housing Act in 2016. The Act completely prohibits housing providers from inquiring about arrests that did not result in a conviction at all, and prevents providers from inquiring about an applicant's criminal history prior to extending a conditional offer.[56] Once a conditional offer has been extended, a landlord is only permitted to inquire about certain convictions for serious offenses that occurred within the last seven years.[57] Landlords must consider six factors when evaluating an applicant's criminal history:

55. R. Courtney, *5 Things to Know About Clean Slate*, Cmty. Legal Servs. (July 10, 2019), https://mycleanslatepa.com/5-things-to-know-about-clean-slate.

56. D.C. Office of Human Rights, Returning Citizens and Housing, https://ohr.dc.gov/page/returningcitizens/housing (last visited Nov. 5, 2020).

57. *Id.*

> (A) The nature and severity of the criminal offense; (B) The age of the applicant at the time of the occurrence of the criminal; (C) The time which has elapsed since the occurrence of the criminal offense; (D) Any information produced by the applicant, or produced on the applicant's behalf, in regard to the applicant's rehabilitation and good conduct since the occurrence of the criminal offense; (E) The degree to which the criminal offense, if it reoccurred, would negatively impact the safety of the housing provider's other tenants or property; and (F) Whether the criminal offense occurred on or was connected to property that was rented or leased by the applicant.[58]

Only after consideration of these factors can a landlord withdraw a conditional offer, and must do so with a written justification, as well as notice to the applicant that they have the right to file a complaint with the DC Office of Human Rights (DCOHR).[59] The Act further provides for public enforcement of the Act via DCOHR and financial penalties to be levied against landlords who violate the Act. Several 2020 Democratic presidential candidates included these types of policies in their platforms, advocating for "ban the box" initiatives that would limit the ability of landlords to inquire about prior criminal convictions, especially before a conditional offer of housing has been provided.[60]

With regard to nuisance and crime-free ordinances, states have taken measures to eliminate or lessen their discriminatory impact. As discussed earlier, much of the discussion and action around nuisance and crime-free ordinances have been directed at protecting survivors of domestic violence and other victims of crime from being evicted after calling for emergency service. In California, housing advocates, including the National Housing Law Project, successfully lobbied for a state level carve-out for survivors of domestic violence or victims of crime. Signed into law in 2018, AB-2413 amends the California tenancy law to void any law or lease provision that limits or penalizes a tenant or resident's "right to summon law enforcement assistance as, or on behalf of, a victim of abuse, a victim of crime, or an or an individual in an emergency."[61] Following the aforementioned case of Norristown, Pennsylvania, resident Lakisha Briggs and her subsequent lawsuit against her city, Pennsylvania took a similar step in shielding survivors of abuse and victims of crime from eviction. Pennsylvania municipalities are now entirely preempted from enacting ordinances that "penalize a resident, tenant, or landlord for a contact made for police or emergency assistance by or on behalf of a victim of abuse, . . . a victim of crime, . . . or an individual in an emergency."[62]

58. *Id.*

59. *Id.*

60. Stephen R. Miller, Housing Policy Ideas from the 2020 Presidential Candidate Platforms (Mar. 3, 2020) (unpublished), *available at* https://ssrn.com/abstract=3547833 or http://dx.doi.org/10.2139/ssrn.3547833.

61. Cal., Civ. Code § 1946.8(c).

62. 53 Pa. Cons. Stat. § 304(b) (2020).

Provisions like these are most certainly a benefit and necessity for those in need of emergency assistance, victims of crime, and survivors of domestic violence, but these kinds of carve-outs only go as far as to remedy the discriminatory disparate impact of these ordinances on women, who disproportionately experience domestic violence. While Black women experience higher rates of domestic violence than other races,[63] this type of preemption or carve-out does nothing to counter the broader discriminatory racial impact of nuisance or crime-free ordinances. Calls for emergency assistance may not always be tied to an emergency or an actual crime being committed, as many of the "Living While Black" cases show. Any policy that penalizes interactions with law enforcement will, due to drastic racial disparities in our criminal justice and policing systems, disproportionately and negatively impact people of color. Failure to rein in these kinds of ordinances allows for continued eviction and exclusion of Black and Latinx tenants from their homes.

C. Litigation

Finally, litigation can serve as an important tool in the arsenal for challenging both overly restrictive criminal background screening policies and nuisance/crime-free ordinances. Two recent cases, in particular, highlight the success of litigation against both individual housing providers and applicant-screening companies who engage in restrictive background screening. In October 2019, our team at the Lawyers' Committee for Civil Rights Under Law, along with co-counsel from the Washington Lawyers' Committee for Civil Rights and Urban Affairs and law firm BakerHostetler, filed a suit against Kay Management Co., a property owner and manager with properties all across Maryland and Virginia. A Black couple and their children had been living in one of their Virginia properties for years without incident. They applied for a larger unit and were informed by Kay Management staff that they would be subject to a credit and background check, which revealed minor convictions (speeding tickets, personal possession of drugs) from almost a decade earlier. Not only was their application for a new unit denied, but they were issued a notice to vacate and had to move. The couple sought assistance from Housing Opportunities Made Equal of Virginia (HOME), who engaged in several tests of Kay Management's various properties. The tests revealed Kay Management had a blanket ban on all applicants with criminal backgrounds.

Our co-counsel team then brought suit on behalf of both the individuals and HOME as an organizational plaintiff, alleging that Kay Management's blanket ban violated the Fair Housing Act because it had a disparate impact based on race. In our complaint, we were able to show that in the geographic area where the building was located, Black and Latinx people were significantly more likely to have criminal histories due to disparities in

63. Jones, *supra* note 38.

the criminal justice system.[64] As such, a policy that categorically excluded applicants with criminal histories would have a disparate impact based on race. The case ultimately settled, resulting in a drastic overhaul of the criminal background screening policy. Rather than a blanket ban, Kay Management's new policy "implements a 5 year look-back for most crimes; 12 years for homicide-related offenses and forcible felony sex-related offenses; 10 years for felony drug/narcotics-related offenses involving sale, distribution, or manufacturing; and 25 years for those listed on the sex offender registry."[65] Additionally, Kay Management will conduct individualized review of applicants with criminal histories in accordance with the HUD Guidance on the subject. While not a sweeping law that would impact the entire city or state, the new policy will impact tenants in the 12,000 apartments that Kay Management owns,[66] which significantly opens up more housing opportunities for Black and Latinx applicants in the Maryland and Virginia area.

As the willingness to challenge overly restrictive background screening increases, so do the justifications landlords espouse to justify their policies. With the rise of third-party screening companies, many landlords argue that they are not liable for any discriminatory impact because they just do what the software instructs them to do. *Connecticut Fair Housing Center v. Corelogic Rental Property Solutions* begs to differ. Corelogic's "CrimSafe" rental software performs credit and background checks on applicants on behalf of landlords. The software then spits out a "yes" or "no," telling the landlord whether to accept or reject an applicant. The individual plaintiff in this suit was a mother who had been living at a Connecticut housing complex when her son was injured in an accident that left him severely disabled. She applied for tenancy on his behalf so he could live with her as she cared for him. Using CoreLogic software, the apartment management denied his application and refused to provide any information as to why. The woman later found out the application was denied based on CoreLogic's background check that surfaced her son's dropped shoplifting charge from years earlier.[67]

The suit alleges that CoreLogic violated the Fair Housing Act under a disparate impact theory. However, because the Fair Housing Act typically applies to actual housing providers, the question presented is whether third-party screening companies used by landlords, such as CoreLogic, can

64. Mara B. Kniaz v. Kay Mgmt. Co., No. 19-CV-01343-LO-IDD (E.D. Va. filed Oct. 23, 2019).

65. Press Release, Housing Opportunities Made Equal of Virginia, HOME, Kay Management Company, and Former Tenants Reach Settlement Regarding Criminal Background Screening Policy That HOME Alleged Disproportionately Excluded Black and Latinx Housing Applicants (July16, 2020) (on file with author).

66. *Kniaz*, *supra* note 64.

67. Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC, No. 3:18-CV-705 (VLB) (D. Conn. Aug. 7, 2020).

be held liable for discrimination under the Fair Housing Act, just like individual housing providers. Litigation remains ongoing, and both the disparate impact and disparate treatment claims survived a motion for summary judgment filed by Defendants.[68] With the rise of third-party screening companies, this case is an important one to watch. The ability to hold screening companies and the landlords that use them accountable for discrimination can go a long way to limiting the barrier that overly restrictive criminal-background screening policies create for applicants with criminal histories.

There are, however, several limitations to a litigation-based approach.[69] To start, a client is needed. While many are impacted by these ordinances, it can be difficult to locate a client without being plugged into local housing and legal services organizations. Even then, if someone is unqualified for legal-aid assistance based on their financial or immigration status, it may be hard to find them all. Without knowledge of a specific tenant who has been evicted, the investigative process can be long and sometimes costly. Different types of policies or ordinances have their own specific challenges as well. For nuisance ordinances, once an ordinance is located in a city or other municipality, records requests will be necessary to establish how often and against whom the ordinance is being enforced. One may be able to narrow down a specific property or client that way, provided that the city responds to the request in a full or timely manner. To challenge overly restrictive criminal background screening, once a client or property is identified, in order to demonstrate a disparate impact, an expert will likely have to conduct specific statistical analysis of the area where the challenged policy operates. Upfront fees of experts can be very costly. In addition to expert costs, litigation itself is a very long, drawn-out, and costly process. Filing fees, expert fees, discovery related costs, and attorney hours all contribute to the expense. From investigation to settlement or trial, the process can last multiple years, and that does not take into account potential appeals. Attorneys should be prepared to explain this issue to potential clients, knowing that it may impact their decision to serve as a plaintiff.

Litigation can also be limited in the scope of the resolution's impact. While challenging a nuisance or crime-free ordinance can result in the invalidation of the ordinance as a whole, if the parties reach a settlement, that settlement may or may not have a broader impact beyond the individual client. The Maplewood, Missouri, suit is an example of a settlement that included revision of the ordinance, but in other cases a municipality may only be willing to pay damages or offer some other form of relief to

68. *Id.*

69. This section discusses numerous limitations of a litigation-based approach. Generally, plaintiffs who have been denied housing or evicted via these types of policies will have standing to sue. While there may be some circumstances in which standing issues arise, this discussion purposefully omits discussion of potential standing issues, as it would require a client-specific analysis that is beyond the scope of this article.

the plaintiff. Similarly, with regard to criminal background screening policies, without a law prohibiting or limiting such screening, litigation would likely be on a provider-by-provider basis. Any resolution may therefore only apply to the plaintiff, and it may not result in a change in policy by the provider or at any other property. Litigation can, however, play a role in highlighting the discriminatory impact of these policies and spur other forms of advocacy to go beyond the courts to remedy the issue at the state or local level.

Last, one significant potential limitation to the use of litigation in these types of cases is the looming elephant in the room—the future of the disparate impact rule. Disparate impact liability, or the liability for even facially neutral policies or practices that have a disparate impact on members of protected classes, has been recognized under the Fair Housing Act across all nine appeals circuits.[70] In 2013, the Obama administration promulgated a regulation codifying the three-step burden shifting framework for evaluating disparate impact claims. First, the plaintiff must show "that a challenged practice caused or predictably will cause a discriminatory effect."[71] The burden then shifts to the defendant to show "that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[72] Even then, the plaintiff has the opportunity to demonstrate that those interests can be served "by another practice that has a less discriminatory effect."[73] Additionally, the Supreme Court formally recognized the availability of disparate impact claims in the 2015 *Texas Department of Housing & Community Affairs v. Inclusive Communities* decision, and, while the Court favorably cited the 2013 regulation several times, it did not explicitly establish or endorse a standard for evaluating disparate impact claims.[74]

In 2019, under the direction of HUD Secretary Ben Carson and President Donald Trump, HUD published a Notice of Proposed Rulemaking that would make significant revisions to disparate impact rule. After receiving over 45,000 comments,[75] the majority of which urged HUD not to make the proposed changes, the final rule was published in September 2020. This new rule essentially guts disparate impact liability in favor of defendants. Specifically, the rule eliminates liability for policies or practices that perpetuate segregation, drastically raises the pleading standard for plaintiffs to practically insurmountable burden, significantly lessens the burden of defendants and adds additional defenses to liability that have no basis

70. Tex. Dep't Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 535 (2015).

71. 24 C.F.R. § 100.500(c) (2013).

72. *Id.*

73. *Id.*

74. *Tex. Dep't Hous. & Cmty. Affs.*, 576 U.S. at 527.

75. 85 Fed. Reg. 60,289 (Sept. 24, 2020).

in case law or previous regulations.[76] Three lawsuits have been filed to declare the changes arbitrary and capricious under the Administrative Procedure Act, one of which also filed to enjoin implementation of the rule.[77] In that case, *Massachusetts Fair Housing Center & Housing Works v. HUD*, the plaintiff has successfully moved for preliminary injunction, staying implementation of the rule for now.[78] However, because President Trump was ultimately not reelected, the crusade against disparate impact will likely end, as there is a significant chance that under President Joe Biden's administration, HUD will take steps to reinstate the disparate impact rule in a manner similar to the 2013 Obama regulation.

V. Conclusion

Our criminal justice system is designed not only to target communities of color, but also to be purely punitive, both while individuals are incarcerated and once they have been released. Rather than maximize use of rehabilitative and diversion programs, our system incarcerates hundreds of thousands of overwhelmingly Black and Latinx people for minor crimes, addictions, or even for just being too poor to afford bail. Once released, our society then brands those who have criminal backgrounds in manners that prevent them from accessing even basic necessities post-release, such as housing and employment. Landlords use restrictive screening to outright exclude applicants from housing opportunities. Over-policing of Black and brown communities works in tandem with nuisance and crime-free ordinances to attach eviction consequences to interactions with law enforcement. The extensive use of both types of policies across the country has real and drastic impacts on the ability of those with criminal backgrounds and other Black and brown tenants to find safe and affordable housing. Lawyers, organizers, and housing service providers must work together on comprehensive strategies to highlight the discriminatory racial impact of these post-incarceration barriers. These efforts will require a combination of targeted litigation and state and local advocacy to ensure that housing, a fundamental necessity, is available to all, regardless of past, present, or future interactions with the criminal justice system.

76. *Id.* at 60,332 (to be promulgated at 24 C.F.R. § 100.500).

77. Mass. Fair Hous. Ctr. & Hous. Works, Inc. v. U.S. Dep't Hous. & Urb.an Dev., No. 1:20-cv-11765 (D. Mass. filed Sept. 28, 2020); Nat'l Fair Hous. Alliance v. Carson, No. 3:20-cv-07388 (N.D. Cal. filed Oct. 22, 2020); Open Cmtys. All. v. Carson, No. 3:20-cv-01587 (D. Conn. filed Oct. 22, 2020).

78. Mass. Fair Hous, Ctr. and Hous. Works, Inc. v. HUD, No. 3:20-cv-11765-MGM (D. Mass. Oct. 25, 2020) (order granting preliminary injunction).