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THE NEW HOUSING SEGREGATION: THE JIM CROW EFFECTS OF CRIME-FREE HOUSING ORDINANCES

*Deborah N. Archer**

America is profoundly segregated along racial lines. We attend separate schools, live in separate neighborhoods, attend different churches, and shop at different stores. This rigid racial segregation results in social, economic, and resource inequality, with White communities of opportunity on the one hand and many communities of color without access to quality schools, jobs, transportation, or health care on the other. Many people view this as an unfortunate fact of life, or as a relic of legal systems long since overturned and beyond the reach of current legal process. But this is not true. On the contrary, the law continues to play a profound role in creating and legitimizing patterns of racial segregation all across America. Crime-free housing ordinances are one of the most salient examples of the role law plays in producing and sustaining racial segregation today. They are, in this respect, a critical mechanism for effectuating the new housing segregation.

Crime-free housing ordinances are local laws that either encourage or require private landlords to evict or exclude tenants who have had varying levels of contact with the criminal legal system. Though formally race neutral, these laws facilitate racial segregation in a number of significant ways. This is the first article to explain precisely how they do so. The Article contends that crime-free housing ordinances enable racial segregation by importing the racial biases, racial logics, and racial disparities of the criminal legal system into private housing markets. While scholars have examined the important role local laws played in effectuating racial inequality, they have not paid attention to crime-free housing ordinances. In addition to foregrounding how crime-free housing ordinances reinforce and perpetuate racially segregated

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communities, this Article proposes an intervention: a "segregative effects" claim, an underutilized cause of action under the Fair Housing Act of 1968, to challenge this segregative impact. While this intervention would not end the pervasive nature of housing segregation across the United States, it could eliminate at least one of the causes of this persistent problem: a body of law whose formal race neutrality has obscured its racially segregative effects.

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INTRODUCTION

Crime-free housing ordinances and programs are part of the expanding web of zero-tolerance policies adopted by private landlords and public housing authorities. These policies ban renting to individuals with a criminal history or allowing those individuals to live with their families.[1] In many cases, they bar and expel people from rental housing without consideration for the amount of time that has passed since the conviction, the nature of the underlying conduct, the actions of a formerly incarcerated person postconviction, or the preexisting racial and class disparities in the criminal legal system. Take the story of Melvin Lofton. At the age of twenty, Mr. Lofton was convicted for burglary and theft. Today, at the age of fifty-one, Mr. Lofton has been out of prison for over twenty years. Yet his conviction makes it extremely difficult to find housing on his own.[2] Or, consider the story of a New York mother threatened with eviction after her fifteen-year-old son was "banned" because of an arrest for marijuana possession.[3] These stories are not unique. Across the country, people involved in the criminal legal system and their families are being squeezed out of various housing markets. At best, many of these people find themselves with one option: to live in poor communities of color already struggling with a shortage of affordable housing and the impact of high concentrations of residents with criminal records.

The adoption of crime-free housing ordinances and programs ("crime-free ordinances") is becoming a national trend. According to one estimate, approximately 2,000 municipalities across forty-eight states have adopted crime-free housing ordinances.[4] These local ordinances have the purported goal of stemming crime in rental housing by forcing landlords, either through mandatory action or seemingly voluntary guidance, to exclude or evict tenants who have had some degree of contact with the criminal legal

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1. EMILY WERTH, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, THE COST OF BEING "CRIME FREE": LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 2–4 (2013), http://www.povertylaw.org/files/docs/cost-of-being-crime-free.pdf [https://perma.cc/8Z5N-L6QG] (discussing the features of crime-free and nuisance property ordinances); Ann Cammett, *Confronting Race and Collateral Consequences in Public Housing*, 39 SEATTLE U. L. REV. 1123, 1137–38 (2016) (identifying restrictions on housing opportunities as one of the most significant obstacles to successful reentry); Jesse Kropf, Note, *Keeping "Them" Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Caste*, 4 GEO. J.L. & MOD. CRITICAL RACE PERSP. 75 (2012).

2. Camila Domonoske, *Denying Housing over Criminal Record May Be Discrimination, Feds Say*, NPR (Apr. 4, 2016, 1:14 AM), https://www.npr.org/sections/thetwo-way/2016/04/04/472878724/denying-housing-over-criminal-record-may-be-discrimination-feds-say [https://perma.cc/8UAK-PRS6].

3. Manny Fernandez, *Barred from Public Housing, Even to See Family*, N.Y. TIMES (Oct. 1, 2007), https://www.nytimes.com/2007/10/01/nyregion/01banned.html (on file with the *Michigan Law Review*).

4. *Crime Free Multi-Housing: Keep Illegal Activity off Rental Property*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/multi-housing.htm [https://perma.cc/DUG2-EJ9C]. In Illinois alone, over 100 municipalities have adopted crime-free rental housing ordinances. WERTH, *supra* note 1, at 1.

system. As I will explain, while there is no evidence that these ordinances reduce crime, there is reason to believe that they play a role in restricting access to affordable housing and promoting racial segregation.

The impact of crime-free ordinances on racial segregation should be a matter of great public concern. At a time when America's population has become more racially diverse,[5] extreme residential segregation on the basis of race nonetheless persists.[6] The United States has a long and complicated history of racial segregation in housing, enforced through public policies,[7] individual acts of discrimination,[8] and mob violence.[9] The cumulative effects of this segregation on people of color are profound. Research has consistently concluded that Black and Latinx people living in racially segregated communities, with the concentrated poverty that often accompanies such segregation, have profoundly limited life opportunities.[10] Residential segregation affects an individual's access to quality education,[11] employment opportuni-

5. *See* JOHN R. LOGAN & BRIAN J. STULTS, US2010 PROJECT, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 1–2 (2011), https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf [https://perma.cc/3UYL-8WLP] (discussing the growth of communities of color in the United States).

6. *See id.* at 9–10 (discussing the persistence of racial segregation between 1980 and 2000 in some metropolitan areas, and the continuation of this segregation in 2010); William H. Frey, *Census Shows Modest Declines in Black-White Segregation*, BROOKINGS (Dec. 8, 2015), https://www.brookings.edu/blog/the-avenue/2015/12/08/census-shows-modest-declines-in-black-white-segregation [https://perma.cc/62VZ-2DUE] (finding that 2010–2014 census data identified "continued high levels" of segregation, but also some decline in select parts of the country); *see also* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM, at XI–XIII (2004) (discussing some of the obstacles standing in the way of integration).

7. *See infra* notes 38–53 and accompanying text.

8. *See* CASHIN, *supra* note 6, at XI–XII (discussing the racist attitudes that have stood in the way of integration); *infra* notes 44–46 and accompanying text.

9. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA, at VII–VIII, 41–42 (2017); *infra* notes 44, 46.

10. *See, e.g.*, CASHIN, *supra* note 6, at 3; TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 70 (2007) (discussing the harms of concentrated disadvantage); ROTHSTEIN, *supra* note 9, at 186–87 (discussing the fact that young Black people are more likely to live in poor neighborhoods than young White people); MARGUERITE L. SPENCER & REBECCA RENO, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, THE BENEFITS OF RACIAL AND ECONOMIC INTEGRATION IN OUR EDUCATION SYSTEM: WHY THIS MATTERS FOR OUR DEMOCRACY (2009), http://www.kirwaninstitute.osu.edu/reports/2009/02_2009_EducationIntegrationBenefitsReport.pdf [https://perma.cc/39SM-T5PM] (discussing the ways in which socioeconomic and racial segregation decreases life opportunities); *see also* I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009) (discussing criminal law and procedure's role in facilitating segregated spaces).

11. *See* Daniel Kiel, *The Enduring Power of* Milliken*'s Fences*, 45 URB. LAW. 137, 144 (2013); john a. powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749 (1996); Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 499–501 (2010) (shedding light on the academic success disparities between schools in neighboring school districts); Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1418–19 (2014) (discussing the case of Kelley Williams-

ties,[12] government services,[13] and social capital.[14] Residents of racially segregated communities also experience increased contact with the criminal legal system—one of the critical drivers of unequal opportunity in America.[15] Poor, isolated, over-policed, and under-resourced communities of color are a legacy of housing discrimination.[16]

Yet, despite the persistent impacts of residential racial segregation, housing discrimination is often perceived as a relic of history, solved long ago with the passage of the Fair Housing Act of 1968[17] and decades of its enforcement by the government and private citizens. According to this narrative, lingering segregation is largely driven by regrettable but understandable private choices beyond the reach of the law—rational decisions motivated by the desire to live in safe communities with high-quality schools, good amenities, and high property values.[18] The narrative concludes that the fact that safer and more resourced communities happen to be predominantly White

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Bolar, an African American mother of two convicted of two felony counts of tampering with records because she falsified her address to enroll her children into a suburban school).

12. *See* Xavier de Souza Briggs, *More* Pluribus*, Less* Unum*? The Changing Geography of Race and Opportunity*, *in* THE GEOGRAPHY OF OPPORTUNITY 17, 35 (Xavier de Souza Briggs ed., 2005); James R. Elliott, *Social Isolation and Labor Market Insulation: Network and Neighborhood Effects on Less-Educated Urban Workers*, 40 SOC. Q. 199 (1999) (examining how poverty and social networks within a neighborhood affect labor prospects of individuals with low-lower levels of educational training); Katherine S. Newman, *Dead-End Jobs: A Way Out*, BROOKINGS REV., Fall 1995, at 24 (explaining the reasons for the stagnation of jobs in inner city communities).

13. *See* Briggs, *supra* note 12, at 35.

14. *See* Claude S. Fischer, *Network Analysis and Urban Studies*, *in* NETWORKS AND PLACES: SOCIAL RELATIONS IN THE URBAN SETTING 19 (Claude S. Fischer et al. eds., 1977); Capers, *supra* note 10, at 49–52 (discussing the impact of social capital on a person's opportunities in life); Xavier de Souza Briggs, *Bridging Networks, Social Capital, and Racial Segregation in America* 8 (Harvard Univ. Kennedy Sch. of Gov't Faculty Working Paper Series, No. RWP02-011, 2003), https://www.hks.harvard.edu/publications/social-capital-and-segregation-race-connections-and-inequality-america [https://perma.cc/7WHC-NWSP] (summarizing the findings of different studies focused on relationships formed in neighborhoods with different racial makeups).

15. *See generally* Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, *in* CRIME AND INEQUALITY 37 (John Hagan & Ruth D. Peterson eds., 1995) (showing that the racial disparities in crime among people of different races are due to structural disadvantages); Capers, *supra* note 10, at 62–72 (explaining the ways in which the criminal justice system has been racialized).

16. *See* CASHIN, *supra* note 6, at 96; Jonathan Kaplan & Andrew Valls, *Housing Discrimination as a Basis for Black Reparations*, 21 PUB. AFF. Q. 255, 255–56 (2007) (arguing that the history of housing discrimination is partly to blame for current racial inequality); Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 981 (2012) (arguing that White residents have wielded significant power in their ability to choose neighborhoods to live in). *See generally* ROTHSTEIN, *supra* note 9 (summarizing the history of housing discrimination in the United States).

17. Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3631 (2012)).

18. *See* ROTHSTEIN, *supra* note 9, at VII–VIII, XII.

is mostly a result of historic racial discrimination, not current laws, policies, or practices.[19]

As with many narratives about the end of government-sponsored racial discrimination, the truth is significantly more complex. Racial segregation continues to be a problem not simply of history, but of current design. Although the nature of racism in housing continues to change, government policies continue to sustain racial segregation, often working to resegregate communities that had managed to achieve some level of integration.

Local laws are often more central than federal or state laws to 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.[20] Seemingly race-neutral local laws have had a profound role in driving systemic racial exclusion and residential segregation.[21] Exclusionary zoning laws are the paradigmatic example, effectively erecting fences that exclude poor people of color from that community.[22] But exclusionary localism did not begin or end with exclusionary zoning laws.[23]

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19. *See* Kaplan & Valls, *supra* note 16, at 258–59 (arguing that housing discrimination is a central source of racial disparities); Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934 (2015) (discussing different city designs and policies that have left negative, long-term effects on communities of color); Richard Rothstein, Research Assoc., Econ. Policy Inst. & Senior Fellow, Chief Justice Earl Warren Inst. on Law & Soc. Policy, Univ. of Cal. Berkeley Sch. of Law, Modern Segregation (Mar. 6, 2014), https://www.epi.org/files/2014/MODERN-SEGREGATION.pdf [https://perma.cc/76YH-HD4P] ("Segregation is now locked in place by exclusionary zoning laws in suburbs where black families once could have afforded to move in the absence of official segregation, but can afford to do so no longer with property values appreciated.").

20. *See, e.g.*, ROTHSTEIN, *supra* note 9, at 42; Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1860–85 (1994) (discussing how local laws and policies have been used to control the makeup of neighborhoods).

21. *See* Ford, *supra* note 20, at 1861; Wilson, *supra* note 11, at 1418 (identifying the negative effect school district boundaries have on segregation and inequality).

22. Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 878 (2006).

23. Recent examples include ordinances requiring landlords to verify the citizenship status of rental applicants. *See, e.g.*, Rebecca Elliott, *State Sued over Housing Discrimination Law*, HOUS. CHRON. (Feb. 17, 2017, 9:12 PM), https://www.houstonchronicle.com/news/politics/houston/article/State-sued-over-housing-discrimination-law-10941911.php [https://perma.cc/E9ZX-HCFQ] (discussing Texas's law preventing localities from passing Section 8 antidiscrimination ordinances); David Hendee, *Catch-22 Keeps Fremont from Acting on Controversial Housing Ordinance*, OMAHA WORLD-HERALD (Apr. 12, 2015), https://www.omaha.com/news/metro/catch--keeps-fremont-from-acting-on-controversial-housing-ordinance/article_34091da3-ddd3-5643-8076-f474fd328260.html [https://perma.cc/2ZLK-UKWQ] (explaining that the Fremont, Nebraska ordinance requires renters to apply for an "occupancy license," which asks them to confirm their citizenship status and requires that those found to be in the country unlawfully have the license revoked); *cf.* Adam Belz, *Judge Strikes Down Minneapolis Section 8 Protection*, STAR TRIB. (June 8, 2018, 9:04 PM), http://www.startribune.com/judge-strikes-down-minneapolis-section-8-anti-discrimination-law/484998931/ [https://perma.cc/7VTV-S6HN] (discussing an antidiscrimination ordinance in Minneapolis struck

Crime-free ordinances are an emerging and increasingly effective tool of exclusionary localism. Proponents of crime-free housing ordinances, which have their roots in the law enforcement community and are based on principles of policing, assert that the ordinances will deter criminal activity in a community by punishing private landlords and tenants for the suspected criminal activity of residents.[24] The ordinances and programs take various forms, but all encourage or require landlords in the municipality to take steps aimed at keeping people with criminal legal system contacts out of rental housing and, ultimately, out of the municipality altogether.[25]

Troublingly, crime-free ordinances extend the reach and impact of these types of exclusionary policies, moving them from optional to mandatory for private landlords and stretching the definition of "criminal activity" beyond any reasonable definition of crime. These ordinances affect people who cannot reasonably be said to pose a threat to the health or safety of other residents. Crime-free ordinances not only block tenants like Mr. Lofton because of unreasonably long periods of time during which convictions are considered. By casting such a wide net, they also may exclude individuals with convictions for shoplifting, jaywalking, or driving on a suspended license. Even more disturbing, crime-free ordinances criminalize and exclude people without any conviction at all: the individual stopped by the police on an almost daily basis because of discriminatory policing or the friends repeatedly accused of loitering for hanging out in a community park.

There is a long history of using the narrative of Black criminality as a justification for segregation.[26] Indeed, the assumption of Black dangerousness stubbornly remains a central part of America's cultural view and a relentless narrative that drives debate and policy ranging from criminal justice reform to education. Crime-free ordinances fit squarely into this historical narrative. So it should be no surprise that laws ostensibly motivated by the desire to keep certain communities "safe" would act as a fence against racial integration. Racial discrimination and racial disparities in the criminal legal system are undeniable. By using contact with the criminal legal system as a tool for exclusion, documented racial biases in policing and the criminal legal system are imported into the private housing market, furthering systemic racial exclusion and residential segregation.

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down by a judge, thereby allowing landlords to continue rejecting applicants using Section 8 vouchers).

24. *See Crime Free Programs: A Brief History*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/history.htm [https://perma.cc/SM9Q-CGT4].

25. *See infra* Section II.B.

26. *See* Brief for the National Black Law Students Ass'n as Amicus Curiae Supporting Petitioner, Buck v. Davis, 137 S. Ct. 759 (2017) (No. 15-8049); GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914, at 45 (1987); ROTHSTEIN, *supra* note 9, at 41–42.

Study of the issues raised by crime-free housing ordinances is just emerging in the legal literature.[27] This Article is the first to explore in-depth the racially exclusionary impact of crime-free ordinances. The Article proceeds in five parts. Part I provides a brief overview of the ways in which exclusionary local laws and policies have contributed to racial disparities and segregation. My aim is to suggest that crime-free ordinances emerged against the backdrop of a range of historical practices of predominantly White communities, who have deployed their local authority as a fence to ward off racial integration. Part II then turns to crime-free housing ordinances themselves. Here, I offer a critical examination of the nationwide trend of towns and cities enacting crime-free housing ordinances. Part II focuses particularly on examples from Minnesota and Florida to identify common elements of these ordinances. Part III explores some of the public policy and civil rights concerns raised by crime-free housing ordinances. Although crime-free ordinances present a range of troubling issues, this Part will focus on the impact these ordinances may have on policing people of color, the role they play in advancing a narrative that stigmatizes people with criminal convictions, the racial bias that often motivates their adoption, and the potential they hold to arm police officers with a new tool for harassment and discrimination. Part IV sets forth the ways that crime-free ordinances combine with racialized policing and racial disparities in the criminal legal system to perpetuate racial segregation. Finally, Part V argues that the segregative effects cause of action under the Fair Housing Act should be used to challenge the cumulative impact crime-free ordinances have in reinforcing or perpetuating racially segregated communities. A segregative effects claim challenges a policy or practice that harms communities by "creating, increasing, reinforcing, or perpetuating segregated housing patterns."[28] In focusing on the community-based impact of housing policies and practices, the segregative effects provision presents a mechanism to prevent communities from using the racial bias embedded in the criminal legal system to maintain segregation.

I. EXCLUSIONARY LOCALISM AND RACIAL SEGREGATION

Localism—the delegation of political power to decentralized and autonomous local governmental units—is a foundation of the American political

27. *See* Kathryn V. Ramsey, *One-Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law*, 65 UCLA L. REV. 1146 (2018) (examining crime-free municipal ordinances as an outgrowth of federal "one-strike" policies); Sarah Swan, *Home Rules*, 64 DUKE L.J. 823 (2015) (arguing that home rule authority is increasingly used by municipalities as a form of third-party policing, governing families and intimate spaces).

28. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,468–69 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100); *see also* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2523–24 (2015); Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 713 (2017).

system.[29] Localism enables residents of a municipality to make decisions on a range of local policies and the provision of local services.[30] Localism is deeply rooted in American legal and political culture, with most localities enjoying considerable autonomy over political, economic, and regulatory concerns.[31] This authority is so institutionalized that we seldom question the exclusionary impact of localism, viewing the resulting community-based inequalities as the natural order of things. This Part provides a brief overview of localism and its role in creating and perpetuating residential segregation.

Scholars of local government law have explored the benefits of localized political power. The theoretical benefits of localism are substantial. They include opportunities for governmental innovation and the potential for increased efficiencies born of local competition for residents.[32] Indeed, local governments have historically broken new ground in public health, education, sanitation, and infrastructure development.[33] One of the primary justifications for localism is the idea that small units of government facilitate robust political participation and civic engagement.[34] In essence, the idea is

29. *See* Richard Briffault, *Our Localism* (pt. 2), 90 COLUM. L. REV. 346, 357 (1990) (discussing how local government law has affected the development of cities); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1988 (2000) (arguing that localism has helped create segregated communities); Wilson, *supra* note 11, at 1425, 1432–33 (discussing the definition of political decentralization—localism—and its prominence).

30. Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1115 (1996) ("Local government law enables people who live within these discrete areas to organize themselves into distinct political units and gives those units power to make decisions with respect to a range of public policies and services.").

31. *See* Richard Briffault, *Our Localism* (pt. 1), 90 COLUM. L. REV. 1, 1 (1990) ("State legislatures, often criticized for excessive interference in local matters, have frequently conferred significant political, economic and regulatory authority on many localities."); Cashin, *supra* note 29, at 1998–2001 (explaining that "the values of democratic participation, efficiency, and community" make localism popular in the United States).

32. *See* Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 257 (1993) (discussing the values of local control and decentralization).

33. Briffault, *supra* note 31, at 15; *see* ERNEST S. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE PROGRESSIVE YEARS AND THEIR AFTERMATH, 1900–1920, at 85–99, 216–30 (1974).

34. Cashin, *supra* note 29, at 1998–2000 (discussing why citizen participation is viewed as a normative justification for localism); *see* GREGORY R. WEIHER, THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION 2–3 (1991); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1068–70 (1980) (arguing that individual participation is an important political value and that such individual involvement can only occur in small political units); Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 930 (1988) ("Participation is again in the air. Apparently fueled by current debates concerning decentralized power and republican versus pluralist traditions in our political and legal theory, those concerned with political decisionmaking have turned their attention to calls for increased public involvement in the process." (footnotes omitted)); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418–21 (1956) (positing the theory that people elect to live in the community that best provides the resources they desire, and that once they are in that community

that "citizen participation in governmental affairs is an important political value that can only be achieved through small units of government because only through such units is meaningful hands-on participation by individual citizens possible."[35] Moreover, people will only participate if they see that their political efforts will meaningfully affect their daily lives.[36] Accordingly, the primary focus of individual participation in local governance in most communities is on issues that affect the private lives of residents—"their homes, families, privacy and personal security."[37]

The theoretical benefits of local governance do not always measure up to reality, particularly when it comes to the power of local governments to exclude classes of individuals. Scholars have highlighted the exclusionary potential of local citizens exercising their political power to "protect" their own communities, critiquing localism as a politically reinforced tool for strengthening social inequalities and perpetuating race and class segregation.[38] Sheryll Cashin has argued that "the values of civic participation and efficiency that undergird localism clash with the values of fairness and equity when one confronts the real world impact of local autonomy."[39] As she further explains, "[t]he decentered nature of American governance . . . has given birth to a systematic practice of exclusion."[40]

Local control includes the power to exclude.[41] Too frequently the authority invested in local governments has been used to exclude residents

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they attempt to maintain the status quo of that community); Wilson, *supra* note 11, at 1425 ("[S]cholars also contend that political decentralization facilitates democracy and democratic values because smaller local governments are closer to citizens and more readily allow citizens to participate in the democracy.").

35. Cashin, *supra* note 29, at 1998–99; Clayton P. Gillette, *Fiscal Federalism and the Use of Municipal Bond Proceeds*, 58 N.Y.U. L. REV. 1030, 1076–79 (1983) ("Given the distance between electors and elected at the state and national levels, local politics remains the last bastion of political participation."); Gillette, *supra* note 34, at 952 ("[O]nly at the local level [can] the mass of individuals . . . fully participate and realize their potential.").

36. Cashin, *supra* note 29, at 1998–99; Frug, *supra* note 34, at 1068–70 ("No one is likely to participate in the decisionmaking of an entity of any size unless the participation will make a difference in his life.").

37. Briffault, *supra* note 29, at 440.

38. *See id.* at 440–41 (arguing that the residential concerns of local politics are usually focused on maintaining homogeneity and protecting against "deterioration," which is usually attributed to an influx of lower-income people and people of color); Cashin, *supra* note 29, at 1988 ("Localism . . . has helped to produce fragmented metropolitan regions stratified by race and income."); David D. Troutt, *Katrina's Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1145–46 (2008); Wilson, *supra* note 11, at 1420 (discussing the ways in which localism has bolstered "exclusion and inequality in public education along the lines of race and class"). *See generally* Briffault, *supra* note 31 (discussing the history of localism and how it has been used to facilitate segregation).

39. Cashin, *supra* note 29, at 1997.

40. *Id.* at 1993; *see also* Briffault, *supra* note 31, at 41, 57 (discussing the functions and effects of exclusionary zoning laws).

41. Troutt, *supra* note 38, at 1146 ("Local control must mean the power to exclude even more than the power to include . . . .").

deemed "undesirable."[42] Unfortunately, that undesirability is often defined along racial lines. In this way, localism has been a driver of racial exclusion and segregation by limiting movement across municipal boundaries. As Richard Briffault has written, this brand of localism

> results in a local politics aimed at the maintenance of class and ethnic homogeneity. Local homogeneity is attained by separate incorporation, often followed by the adoption of exclusionary land-use policies. Although most common in affluent areas, exclusion is not the prerogative of the wealthy; less well-to-do communities are just as concerned about maintaining community status against the deterioration usually attributed to the influx of racial and ethnic minorities and poorer people . . . . "[O]ne need only attend a few public hearings on controversial zoning changes in suburban areas to realize that the people consider their right to pass judgment upon their future neighbors as sacred."[43]

The long history of racially exclusionary localism reaches back to "sundown towns," which excluded Black people through ordinances and policies, exclusionary covenants, threats, and harassment by local law enforcement officers.[44] Hundreds of cities across America have been sundown towns at some point in their history.[45] Not only were Black people barred from living in these towns, but Black people who entered the town or were found there after sunset were subject to harassment, threats, and acts of violence.[46] As

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42. Briffault, *supra* note 30, at 1134; *see also* Cashin, *supra* note 29, at 1987 ("Marginalized populations, particularly the minority poor who are regulated to poverty-ridden, central city neighborhoods, are largely excluded from participating in the favored quarter's economic prosperity.").

43. Briffault, *supra* note 29, at 441 (quoting RICHARD F. BABCOCK & FRED P. BOSSELMAN, EXCLUSIONARY ZONING 90 (1973)).

44. JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 4 (2005) ("Many towns drove out their black populations, then posted sundown signs. . . . Other towns passed ordinances barring African Americans after dark or prohibiting them from owning or renting property; still others established such policies by informal means, harassing and even killing those who violated the rule."); ROTHSTEIN, *supra* note 9, at 42.

45. LOEWEN, *supra* note 44, at 4–7 (revealing that sundown towns have existed almost everywhere in the country).

46. *Id.* at 228–29; ROTHSTEIN, *supra* note 9, at 42 (stating that "police and organized mobs" enforced policies "forbidding African Americans from residing or even from being within town borders after dark"). Black people were not the only people driven out of communities by sundown laws and related harassment. For example, in the late 1800s, Chinese people were driven out of Idaho. LOEWEN, *supra* note 44, at 51. In 1870, Chinese people constituted approximately one-third of Idaho's population. *Id.* By 1910, almost none remained. *Id.* In Gardnerville, Nevada, the town blew a whistle at 6:00 p.m. each day to alert Native Americans of the need to leave the town by sundown. *Id.* at 23. And, in parts of Colorado, signs were posted that read, "No Mexicans After Night." Peter Carlson, *When Signs Said 'Get Out' in 'Sundown Towns,' Racism in the Rearview Mirror*, WASH. POST (Feb. 21, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/02/20/AR2006022001590.html [https://perma.cc/V69V-43AK].

Richard Rothstein writes, "[s]ome towns rang bells at sundown to warn" Black people to leave.[47]

Other scholars have written extensively about the role that local laws and policies have played, and continue to play, in creating racially segregated communities and preserving racial segregation.[48] But it is important to highlight, as one researcher demonstrated, that local political boundaries and control over entry into the community "facilitate a recruitment and selection process" that contributes to economic and racial inequality.[49] As citizens use local authority to shape their daily lives, they too often employ a narrow conception of self-interest that rests on racial and economic differences.[50]

Although localities are creatures of the state and can only exercise power the state has delegated, states have delegated to localities significant authority that has been reinforced by the courts.[51] State and federal courts have repeatedly supported strong local government and local control of fundamental services.[52] A series of Supreme Court decisions in the 1970s affirmed the power of localities to construct "desirable communities" using devices that disproportionately exclude people of color and ratified the sanctity of the exercise of local powers within jurisdictional boundaries.[53]

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47. ROTHSTEIN, *supra* note 9, at 42.

48. *See, e.g.*, *id.* (discussing the history of laws that have created and helped maintain segregated communities in the United States); Cashin, *supra* note 29, at 1988 (arguing that localism has facilitated the creation of segregated communities); Ford, *supra* note 20, at 1861 ("[A]n important source of segregation and of the isolation and oppression of minorities that accompany it, is the autonomous municipality that forms a racially homogenous jurisdiction."); Troutt, *supra* note 38, at 1145–46; Wilson, *supra* note 11, at 1418.

49. Cashin, *supra* note 29, at 1993.

50. *Id.* at 2015 ("[F]ragmentation gives effect to and inculcates a narrow conception of self-interest, one premised on cultural, racial, and economic differences that effectively blinds citizens to their potential regional allies.").

51. Briffault, *supra* note 31, at 7, 100–02 (discussing Supreme Court cases holding that educational decisionmaking should be done on the local level); Troutt, *supra* note 38, at 1147 (discussing cases).

52. Briffault, *supra* note 31, at 1 ("State courts, usually characterized as hostile to localities and condemned for failing to vindicate local rights against the states, have repeatedly embraced the concept of strong local government and have affirmed local [regulatory] power and local control of basic services.").

53. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (sustaining local exclusion of subsidized housing and finding that a community can zone itself solely for single-family households and refuse to rezone to accommodate a small subsidized housing project); Warth v. Seldin, 422 U.S. 490 (1975) (rejecting the right of outsiders to challenge a locality's zoning, refusing to take a regional perspective on the impact of local zoning practices, and effectively precluding federal judicial review of most local exclusionary zoning practices); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (holding that municipalities can exclude nontraditional households and affirming local zoning power and the right of localities to exclude potential residents whose presence would be inconsistent with the local vision of proper community character); Milliken v. Bradley, 418 U.S. 717 (1974) (underscoring the lack of state derivative liability for local misconduct, rejecting interdistrict busing as a remedy for unconstitutional segregation in the Detroit school system, and concluding that the state and its school districts stood on independent legal footings); San Antonio Indep. Sch. Dist. v. Rodri-

Through exclusionary housing policies that masquerade as race-neutral principles of rational planning and home rule, homogeneous municipalities can, and do, act on their worst biases.[54] Many local communities exercise their local power to relegate poor people of color to marginalized, resource-starved neighborhoods, away from the economic prosperity of their own communities.[55] For centuries, local governments have enacted land use, zoning, and tax policies that prevent poor or minority residents from being able to move into those communities. While many commentators point to zoning laws as the paradigmatic example of exclusionary localism, other examples abound. In examining the impact of Hurricane Katrina on racial segregation in New Orleans, David Troutt highlighted powerful examples of the exclusionary exercise of local authority in the aftermath of the hurricane. Three days after Hurricane Katrina, Jefferson Parish armed police officers closed the Gretna Bridge to Black evacuees desperately fleeing flooded New Orleans.[56] In addition to the incident on the Gretna Bridge, in the days after Hurricane Katrina, predominantly White St. Bernard Parish enacted an ordinance preventing homeowners from renting out their homes to anyone other than a blood relative without a permit to prevent the relocation of Black New Orleanians seeking new homes.[57] Similarly, following the hurricane, Jefferson Parish passed a resolution barring construction of any multifamily housing with the use of state-issued tax credits[58]—a move that was both racially and economically exclusionary.

Localism has a causal connection to racial segregation and concentrated poverty. Arguably, localism is "the primary agency behind resegregation, without which it would neither have been accommodated nor sustained."[59]

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guez, 411 U.S. 1 (1973) (holding that significant differences in spending, taxing, and educational quality between local school districts based on delegation of responsibility for school funding to public schools of unequal wealth was not a sufficient basis for invalidating the school finance system).

54. *See* PAUL KANTOR, THE DEPENDENT CITY REVISITED: THE POLITICAL ECONOMY OF URBAN DEVELOPMENT AND SOCIAL POLICY 164 (rev. & updated ed. 1995); Cashin, *supra* note 29, at 1993 (citing one study finding that the desire for racial exclusion more strongly influenced local law than did the desire for better services and lower taxes); Troutt, *supra* note 38, at 1166 n.228.

55. Cashin, *supra* note 29, at 1987 ("Marginalized populations, particularly the minority poor who are regulated to poverty-ridden, central city neighborhoods, are largely excluded from participating in the favored quarter's economic prosperity.").

56. Troutt, *supra* note 38, at 1110.

57. Bill Quigley, Editorial, *Eighteen Months After Katrina*, TRUTHOUT (Feb. 27, 2007), http://www.nathanielturner.com/eighteenmonthsafterkatrinabillquigley.htm [https://perma.cc/437W-LV7J]; *see also* Angela A. Allen-Bell, *Bridge over Troubled Waters and Passageway on a Journey to Justice: National Lessons Learned About Justice from Louisiana's Response to Hurricane Katrina*, 46 CAL. W. L. REV. 241, 266–68 (2010) (noting that the Crescent City Bridge was also blocked off so that individuals, most of whom were African American, seeking refuge from the floodwaters could not enter Jefferson Parish).

58. Quigley, *supra* note 57.

59. Troutt, *supra* note 38, at 1146.

One scholar pointedly called localism the modern successor to legal racial segregation.[60]

II. THE RISING TIDE OF CRIME-FREE ORDINANCES

Crime-free ordinances are a step in the evolution of exclusionary localism.[61] Though the ordinances vary in form and force, their common theme is keeping "undesirable" people out of rental housing. At the voluntary end of the spectrum, a municipality may offer a certification program for rental properties, which allows landlords to advertise their properties as "crime free" if the landlords or property managers attend a training session and take measures the municipalities claim will improve the safety of their properties, such as conducting criminal background checks.[62] At the mandatory end, these ordinances make alleged criminal activity a violation of the rental agreement and effectively allow police officers to decide (1) whether a potential tenant's criminal history disqualifies him from rental housing in the community, or (2) whether a tenant must be evicted because of alleged criminal activity, which requires revocation of a landlord's authorization to rent her property for failing to act on those police determinations.[63] This Part discusses the regulatory architecture of crime-free housing ordinances and contextualizes the problems they pose. It starts by laying out the history of crime-free ordinances and continues by describing the standard provisions of the ordinances using specific examples.

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60. *Id.* at 1115.

61. Not surprisingly, the adoption of crime-free ordinances is not limited to White communities. Majority-minority communities, like Savannah, Georgia, and Dallas, Texas, have also adopted crime-free ordinances or programs. DALL. POLICE DEP'T, NUISANCE ABATEMENT ORDINANCE UPDATE (2017), https://dallascityhall.com/government/Council%20Meeting%20Documents/pscj_3_nuisance-abatement-ordinance-update_combined_102317.pdf [https://perma.cc/KFZ9-L7YP]; Rachel Goodman, *Savannah Police Suspend Its Discriminatory 'Crime Free Housing Program*,' ACLU (Feb. 1, 2018, 2:30 PM), https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/savannah-police-suspend-its-discriminatory-crime-free [https://perma.cc/JR2W-U5NW]; Naheed Rajwani, *Dallas Police Can Now Shame Property Owners Who Tolerate Crime with a Sign*, DALL. NEWS (Dec. 13, 2017), https://www.dallasnews.com/news/crime/2017/12/13/dallas-police-can-now-shame-property-owners-tolerate-crime-sign [https://perma.cc/7J3L-MFM5]. This subset of crime-free ordinances is part of its own trend. Communities of color have often adopted or endorsed the racially biased programs and practices of other jurisdictions with the hope of creating safer communities for themselves, often with devastating consequences for their own members, particularly Black men. *See, e.g.*, JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017) (exploring how majority-Black communities endorsed criminal justice policies that disproportionately impact Black men).

62. *See, e.g.*, WILLIAM D. GORE, SAN DIEGO CTY. SHERIFF'S DEP'T, SAN DIEGO COUNTY CRIME FREE MULTI-HOUSING PROGRAM: KEEPING ILLEGAL ACTIVITY OUT OF RENTAL PROPERTY, at v, 14–16 (2007) [hereinafter SAN DIEGO COUNTY CRIME FREE MULTI-HOUSING PROGRAM], http://www.sdsheriff.net/documents/cfmh_manual.pdf [https://perma.cc/Q9SG-23J5]; *infra* notes 135–155 and accompanying text.

63. *See, e.g.*, FARIBAULT, MINN., CODE § 7-42 (2018).

A. *History of Crime-Free Ordinances*

Crime-free ordinances have their roots in the law enforcement community and are historically police-sponsored programs.[64] The first programs

64. *See Crime Free Programs*, *supra* note 24. Municipalities have often adopted chronic nuisance ordinances hand in hand with crime-free municipal ordinances. Chronic nuisance ordinances classify a broad range of tenant activities, ranging from noise violations to contact with the local police department, as a nuisance and incentivize or require landlords to evict tenants who engage in those activities. *See* NYCLU & ACLU, MORE THAN A NUISANCE: THE OUTSIZED CONSEQUENCES OF NEW YORK'S NUISANCE ORDINANCES 6 (2018), https://www.nyclu.org/sites/default/files/field_documents/nyclu_nuisancereport_20180809.pdf [https://perma.cc/DB4M-E95K] ("Nuisance ordinances are local laws that allow a city to label a property a nuisance when it is the site of a certain number of police responses or alleged nuisance conduct, a category that can include assault, harassment, stalking, disorderly conduct, city code violations, and much more."). These ordinances seek to label rental properties as a nuisance where they have surpassed a threshold of contact with the local police department. Because chronic nuisance ordinances may penalize tenants for police visits to rental property, whether called by the tenant or a third party, they raise distinct issues for crime victims and domestic violence survivors. *See, e.g.*, WERTH, *supra* note 1, at 8–9 ("By linking law enforcement's activity at a property with the possibility of eviction of the tenants and/or penalties against the landlord, ordinances can actually deter tenants, landlords, and concerned citizens from reaching out to the police . . . ."); 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 [https://perma.cc/9M3J-KVR8] (telling the story of Lakisha Briggs, who was afraid to call police on her abusive boyfriend because she had been warned that her landlord would be forced to evict her if she called the police again); Julian Spector, *Get Abused, Call 911, Get Evicted*, CITYLAB (Nov. 13, 2015), https://www.citylab.com/equity/2015/11/get-abused-call-911-get-evicted/402709/ [https://perma.cc/KLB7-Y8LL] (noting that victims of domestic abuse are one group of people who may call 911 frequently). To date, the primary focus of challenges to crime-free and nuisance ordinances has been the way these laws punish landlords and tenants for calls for police assistance and the impact on vulnerable individuals, particularly survivors of domestic violence and people with disabilities. *See, e.g.*, Complaint, Watson v. City of Maplewood, 2018 WL 2184347 (E.D. Mo. May 11, 2018) (No. 4:17-01268-JCH) (challenging an ordinance that authorized the revocation of a resident's occupancy permit due to requests for police assistance with domestic violence issues or because of crimes occurring on the property); Complaint, Markham v. City of Surprise, No. 2:15-01696-SRB (D. Ariz. Aug. 27, 2015) (challenging a municipal ordinance pressuring landlords to evict a tenant if the tenant calls the police more than four times in thirty days or for crimes occurring at the property); Complaint, Briggs v. Borough of Norristown, No. 2:13-cv-02191-ER (E.D. Pa. Apr. 24, 2013) (challenging a municipal ordinance under which a domestic violence victim was facing eviction because she requested police protection from an abusive ex-boyfriend); Bd. of Trs. of the Vill. of Groton v. Pirro, 58 N.Y.S.3d 614 (App. Div. 2017) (challenging a nuisance law that made landlords liable if they accumulate enough "points" under the ordinance); *see also* Vicki Been & Leila Bozorg, *Spiraling: Evictions and Other Causes and Consequences of Housing Instability*, 130 HARV. L. REV. 1408, 1432 (2017) (reviewing MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016)) (discussing impact of local nuisance ordinances on vulnerable populations and the risk of unfair evictions). Advocacy on behalf of those two groups led the Department of Housing and Urban Development to issue guidance on the application of the Fair Housing Act to local nuisance and crime-free ordinances against crime victims and people in need of emergency services. *See* U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE ENFORCEMENT OF LOCAL NUISANCE

were created by the International Crime Free Association (ICFA), an organization founded in 1992 by a member of the Mesa Police Department in Arizona.[65] The stated goal of the ICFA is to use "law enforcement based crime prevention"[66] to keep illegal activity, and the tenants believed to bring it, off of rental property.[67] In practice, the work of the ICFA has been to spread the adoption of crime-free ordinances across the United States and create a web of communities unwelcoming to outsiders, whether or not those individuals have had any meaningful involvement with the criminal legal system and whether or not those individuals pose an actual threat to the safety of the community.

To promote its vision of a crime-free community, ICFA offers nine "crime free programs," including distinct programs for multi-housing,[68] rental homes, mobile homes, condominiums, and motels.[69] At the core of the crime-free programs is a partnership between local law enforcement agencies and landlords, with the program being implemented under the supervision of local law enforcement.[70] The ICFA offers resources and information to rental property managers or owners and individual officers or police departments interested in implementing its crime-free program, including crime-free training modules[71] and model language for lease addenda.[72] ICFA's program consists of three phases—landlord and management training, police officer inspection and certification of the property, and inclusion of a crime-free lease addendum—and a rental property can only be certified as crime free upon completion of all three phases of the program.[73] The ICFA advertises the benefits of a fully certified rental property as reduced crime, reduced exposure to civil liability, and a stable resident base.[74]

The ICFA has a pronounced focus on drugs and gang activity in rental properties, warning, "[w]hen drug criminals and other destructive tenants operate out of rental property, neighborhoods suffer and landlords pay a

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AND CRIME-FREE HOUSING ORDINANCES AGAINST VICTIMS OF DOMESTIC VIOLENCE, OTHER CRIME VICTIMS, AND OTHERS WHO REQUIRE POLICE OR EMERGENCY SERVICES (2016).

65. *See Crime Free Programs*, *supra* note 24.

66. *Crime Free Programs: Keep Illegal Activity off Rental Property*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/index.html [https://perma.cc/2CL2-HKES].

67. *See Crime Free Multi-Housing*, *supra* note 4.

68. The ICFA uses the term multi-housing to refer to apartment complexes. *See id.*

69. *Crime Free Programs*, *supra* note 66.

70. *Id.*

71. *Upcoming Instructor Trainer Workshop*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/workshop-2017.htm [https://perma.cc/BW52-LXBT].

72. *Crime Free Association Site Index: Keep Illegal Activity off Rental Property*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/site_index.htm [https://perma.cc/8DSX-BBD7].

73. *Crime Free Multi-Housing*, *supra* note 4.

74. *See id.*

high price."[75] The specific harms identified by the ICFA include a decline in property values, with the activity of gangs affecting the reputation of the entire neighborhood; property damage resulting from abuse, retaliation, and police raids; civil penalties as the result of seizure; and fear and frustration from dealing with "dangerous and threatening" tenants.[76] The Crime Free Multi-Housing Program (CFMH) is aimed at apartment complexes.[77] According to the ICFA, the CFMH is ground zero in the fight to keep rental housing safe; the ICFA believes that illegal activity in rental housing migrates from apartment complexes to condominiums and single-family rental homes.[78] The advertised benefits of adopting this program include a stable and satisfied tenant base, reduced police calls for service, lower maintenance and repair costs, reduced exposure to civil liability, and increased personal safety for tenants, landlords, and property managers.[79]

B. *Standard Provisions*

The principles and goals of the ICFA's Crime Free Multi-Housing Program have been adopted, largely verbatim, by municipalities around the country.[80] There are four common provisions found in many of these ordinances: (1) licensing programs and mandatory landlord training programs; (2) a crime-free database or background screenings; (3) a crime-free lease addendum; and (4) an enforcement scheme that encourages eviction and exclusion. As adopted, these ordinances compel private landlords to reject tenants deemed unsuitable by the municipality and stretch the definition of "criminal activity" beyond any reasonable definition of crime. These ordinances bar people who cannot reasonably be said to pose a threat to the health or safety of other residents.

1. Rental Housing Licensing Programs

Many communities around the country have general rental housing licensing programs with the goal of protecting public health, safety, and welfare of tenants, but not all are packaged with a crime-free ordinance. General

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75. *Id.*; *e.g.*, *Crime Free Multi-Housing Program*, SARTELL MINN., http://www.sartellmn.com/crime-free-multi-housing-program [https://perma.cc/DAM4-QCWT].

76. *Crime Free Multi-Housing*, *supra* note 4.

77. *Id.*

78. *Crime Free Rental Housing: Keep Illegal Activity off Rental Property*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/rental_housing.htm [https://perma.cc/8FUU-X9HS].

79. *Crime Free Multi-Housing*, *supra* note 4.

80. *Id.* ("The International Crime Free Multi-Housing Program has spread to nearly 2,000 cities in 48 U.S. states . . . ."). Municipalities that do adopt these crime-free ordinances will often adopt principles from the CFMH program and at times even verbatim language provided by the ICFA. This makes it difficult to divorce crime-free ordinances from the CFMH program.

rental housing licensing programs often require the identification of a local contact person, municipal inspection of rental units and common areas, and provision of basic safety and living standards.[81] In these communities, renting a dwelling without a license is illegal.[82] Crime-free ordinances typically are passed as part of a larger rental housing licensing program for all landlords and property managers engaged in residential renting in the municipality, and they require compliance with the crime-free ordinance provisions in order for landlords to obtain or maintain their residential operator's license.[83]

Municipalities with crime-free programs often make rental housing licenses contingent upon participating in some variation of a landlord or property manager training program.[84] These programs are usually modeled after the CFMH training programs.[85] The training packet used by CFMH establishes guidance on everything from "Crime Prevention Through Environmental Design"[86] to improving landlord relationships with responding police officers.[87] For example, in San Diego—a program that is modeled on the CFMH and Mesa, Arizona programs—the training program is an eight-hour course taught by lawyers, police officers, and fire personnel.[88] The training program covers the following topics: (1) crime prevention through

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81. *See, e.g.*, *Residential Rental Licenses*, CITY OF REHOBOTH BEACH, https://www.cityofrehoboth.com/%3Cnolink%3E/residential-rental-licenses [https://perma.cc/TK8X-35H6]; *Residential Rental Licensing Program*, CITY OF NEW HAVEN, https://www.newhavenct.gov/gov/depts/lci/rental_property/residential_rental.htm [https://perma.cc/TN83-6KWY]; *Rental Licensing*, ROSEVILLE MINN., https://www.cityofroseville.com/3188/Rental-Licensing [https://perma.cc/Y85F-CZAJ]; *Rental Housing Program*, CITY OF BOWIE MD., https://www.cityofbowie.org/625/Rental-Housing-Program [https://perma.cc/4DLD-T2VB]; *Rental Housing License*, INVER GROVE HEIGHTS, https://www.invergroveheights.org/655/Rental-Housing-License [https://perma.cc/CZX4-KGTM]; *Rental License Application*, CITY OF COVINGTON, http://www.covingtonky.gov/forms-documents/view/rental-license-application [https://perma.cc/43CG-FY5R].

82. *See* sources cited *supra* note 81.

83. *See, e.g.*, SCHAUMBURG, ILL., CODE § 99.10.05(A) (2015); FARIBAULT, MINN., CODE § 7-42 (2017); LAS VEGAS, NEV., CODE § 6.09.020(A) (2012).

84. *E.g.*, SCHAUMBURG, ILL., CODE § 99.10.05(A) (2015); LAS VEGAS, NEV., CODE § 6.09.020(A) (2014).

85. In fact, a number of training manuals available on police department websites contain a copyright page establishing that the material is taken from the ICFA. *See, e.g.*, LAS VEGAS METRO. POLICE DEP'T, LAS VEGAS CRIME FREE MULTI-HOUSING PROGRAM: LANDLORD TRAINING MANUAL, at i (2013) [hereinafter LAS VEGAS CRIME FREE MULTI-HOUSING PROGRAM]; SAN DIEGO COUNTY CRIME FREE MULTI-HOUSING PROGRAM, *supra* note 62.

86. *Crime Free Multi-Housing*, *supra* note 4; *see also* SAN DIEGO COUNTY CRIME FREE MULTI-HOUSING PROGRAM, *supra* note 62; LAS VEGAS CRIME FREE MULTI-HOUSING PROGRAM, *supra* note 85, at 15. Crime Prevention Through Environmental Design aims to deter crime in the parking lots or common areas of rental buildings. SAN DIEGO CRIME FREE MULTI-HOUSING PROGRAM, *supra* note 62.

87. *See* SAN DIEGO COUNTY CRIME FREE MULTI-HOUSING PROGRAM, *supra* note 62, at 13.

88. *Id.*

environmental design; (2) understanding crime prevention resident selection; (3) commonsense self-defense; (4) establishing community rules and policies; (5) building apartment community; (6) good property management; (7) partnerships with the sheriff's department; (8) partnerships with the fire department; (9) dealing with noncompliance; and (10) applying federal fair housing laws.[89] Property managers must attend a training program every other year to maintain the building's certification.[90] Other topics that may be covered in training and certification programs include the benefits of screening applicants for contacts with the criminal legal system and a discussion of gangs, drugs, and related criminal activity.[91]

Rental housing licensing programs often contain provisions requiring fines and suspension or revocation of a license for failure to comply with provisions of the crime-free ordinance.[92] For example, in Hesperia, California, the crime-free ordinance gives the Hesperia City Council broad discretion to create a fee structure for owners whose properties have consistent violations of the crime-free policy.[93] In Minneapolis, Minnesota, the crime-free ordinance also allows for revocation of a rental license.[94] Notably, the city may choose to stop any adverse licensing action where the landlord has initiated eviction proceedings against tenants that the city or police department have identified as problematic.[95]

2. Background Checks and Crime-Free Databases

Many municipal crime-free ordinances either require or encourage landlords to conduct criminal background checks before renting to a pro-

89. *Id.*

90. *Id.* at 14.

91. *Crime Free Multi-Housing*, *supra* note 4.

92. WERTH, *supra* note 1, at 4; *see, e.g.*, CAROL STREAM, ILL., CODE § 10-12-4(F)(3) (2016); DULUTH, MINN., CODE § 29A-41 (2008); FARIBAULT, MINN., CODE §§ 7-42(3)(d)-(g) (2017); ST. LOUIS PARK, MINN., CODE § 8-334(b)(5) (2010); ORLAND PARK, ILL., CRIME FREE HOUSING RENTAL REQUIREMENTS FOR OWNERS/AGENTS OF RENTAL HOUSING 2–3, https://www.orland-park.il.us/DocumentCenter/Home/View/1768 [https://perma.cc/8XY2-43FB]; *Frequently Asked Questions*, HANOVER PARK POLICE DEP'T, https://www.hpil.org/Faq.aspx?QID=68 [https://perma.cc/T3RR-AEM7] ("The owners who actively work with the police department in an attempt to resolve the problem should have no concern. The Village will not automatically suspend or revoke a rental license for a property that has residents or guests, who engage in criminal activity, or that meets the nuisance standard.").

93. HESPERIA, CAL., CODE §§ 8.20.80–8.20.090 (2017) (leaving open the possibility to levy fines against landlords who fail CFTED inspections). Hesperia removed—after the threat of litigation—provisions requiring mandatory evictions by police or landlords for tenants in violation of the crime-free ordinance. Rene Ray De La Cruz, *Hesperia Amends Crime Free Housing Program*, DAILY PRESS (July 28, 2017, 3:33 PM), https://www.vvdailypress.com/news/20170728/hesperia-amends-crime-free-housing-program [https://perma.cc/P9E9-MNAF].

94. MINNEAPOLIS, MINN., CODE § 244.2020(f) (2014).

95. *Id.* § 244.2020(g).

spective tenant.[96] Even where these checks are not mandated by the applicable ordinance, municipalities often encourage landlords to screen tenants during their landlord training programs.[97] Simply encouraging background checks can be enough to make them commonplace.[98] The CFMH model landlord training manual[99] specifically informs landlords that "it is not illegal to deny residency to an application based on their criminal history."[100] The manual further warns that once the applicant discloses their criminal history, the landlord must make an immediate decision to accept or reject the application of a prospective tenant: "If you accept the application, you may lose the right to deny the applicant later for any information they have disclosed."[101]

In some jurisdictions, landlords are encouraged to look beyond criminal convictions when screening potential tenants. Hesperia, California, maintains a "Crime Free Screening Program"[102] that allows landlords to request information on arrests involving a prospective or current adult tenant.[103] In Minneapolis, the city has created an alert system that allows landlords to receive near-instant updates of any alleged criminal activity of a current tenant.[104] Finally, Orlando, Florida, allows crime-free certified properties to have access to a criminal database that tracks everyone who has been arrest-

96. WERTH, *supra* note 1, at 15.

97. *Id.*

98. *See* Luther Krueger, "Crime-Free Multi-Housing" and Other Public Policy Means of Mass Relocation 2, 4–5 (Oct. 2010) (unpublished manuscript) (on file with the *Michigan Law Review*) (explaining the "sticks" and "carrots" landlords are presented with, which either pressure them or incentivize them to make use of the tools that cities with crime-free housing programs offer).

99. While the ICFA website does not include a model manual, the manuals provided by San Diego County and the Las Vegas Police Department contain copyright statements attributing ownership to the International Crime Free Association, Inc. *See* SAN DIEGO COUNTY CRIME FREE MULTI-HOUSING PROGRAM, *supra* note 62, at 3; LAS VEGAS CRIME FREE MULTI-HOUSING PROGRAM, *supra* note 85, at 2. Moreover, they contain large sections that are identical copies of each other. This Article therefore refers to these pages as part of a model training manual.

100. LAS VEGAS CRIME FREE MULTI-HOUSING PROGRAM, *supra* note 85, at 27. *Compare id.* ("[Y]ou should not discriminate on the basis of an arrest; but only on a conviction."), *with Crime Free Lease Addendum*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/lease_addendums_az_english.htm [https://perma.cc/3B54-CC4R] (noting that violation of the crime-free policy can be established without a conviction).

101. LAS VEGAS CRIME FREE MULTI-HOUSING PROGRAM, *supra* note 85, at 28. Interestingly, the ICFA-modeled training manuals suggest that a prospective tenant with a conviction for felony embezzlement may pose less danger than someone with a misdemeanor assault charge, highlighting an obvious class dimension to the screening process. *Id.* at 27 ("A felony embezzlement charge may not be a threat, but a misdemeanor charge for assault may constitute a threat.").

102. HESPERIA, CAL., CODE § 8.20.050(B) (2017).

103. *Id.* §§ 8.20.050(A), (B)(1).

104. *See* MINNEAPOLIS, MINN., CODE § 244.2020(c) (2014).

ed within the city.[105] The database not only includes felony arrests of adult tenants but also tracks all arrests for misdemeanors and juvenile felonies.[106]

3. Crime-Free Lease Addendum

According to the ICFA, the "heart and soul" of the Crime Free Multi-Housing program is the rigorous implementation of the model Crime Free Lease Addendum.[107] The program encourages municipalities to adopt ordinances that include a crime-free lease addendum, which allows for the eviction of tenants who are believed to have engaged in or facilitated criminal behavior.[108]

The sample addendum available on the ICFA website states, "[a] *single* violation of any of the provisions of this added addendum shall be deemed a *serious* violation, and a material and irreparable non-compliance. It is understood that a single violation shall be good cause for immediate termination of the lease . . . ."[109] Under ICFA's model, a tenant risks eviction if he or she has engaged in or facilitated an act of criminal activity. The model addendum does not specifically define what constitutes criminal activity for purposes of the agreement. Other provisions prohibit certain types of illegal activity as defined by state laws, such as prostitution, criminal street gang activity, assault, and dealings with controlled substances.[110]

The ICFA model lease addendum does not explicitly state whether actionable criminal activity is limited to convictions. However, a common crime-free lease addendum provision states, "[u]nless otherwise provided by law, proof of violation shall not require a criminal conviction, but shall be by a preponderance of the evidence."[111] This leaves ambiguous which interactions with the criminal legal system are sufficient to rise to the level of "criminal activity" and raises the specter of discretion informed by bias. Moreover, in the model CFMH training manual, the program encourages landlords to establish relationships with police departments and to gather information

105. Bianca Prieto, *Crime-Free Apartment Program Starting in Orlando*, ORLANDO SENTINEL (Jan. 30, 2011), http://articles.orlandosentinel.com/2011-01-30/news/os-orlando-crime-free-multihousing-20110130_1_crime-free-multi-housing-complexes-crime-free [https://perma.cc/VF2G-WNZF].

106. *Crime Free Multi-Housing*, CITY OF ORLANDO, http://www.cityoforlando.net/police/crimefreemultihousing/ [https://perma.cc/MXG3-GJHW].

107. *Crime Free Multi-Housing*, *supra* note 4.

108. *See Crime Free Lease Addendums: Keep Illegal Activity off Rental Property*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/lease_addendums.htm [https://perma.cc/4KFN-T3MC].

109. *Crime Free Lease Addendum*, *supra* note 100 (emphases added).

110. SCHAUMBURG, ILL., CODE § 99.10.05(F)(7) (2019) (including an exhaustive list of prohibited crimes such as homicide, prostitution, bodily harm, theft, disorderly conduct, gambling, and interference with public officers).

111. *See Crime Free Lease Addendum*, *supra* note 100.

even in cases where the officer makes no arrest or formal report.[112] Taken with the violation provision above, the guidance in the manual opens the possibility that a mere arrest—or even a stop that results in neither arrest nor conviction—might suffice for termination of a lease. Consequently, these provisions often provide inadequate notice to tenants regarding the types of interactions with the criminal legal system that may establish a violation of the crime-free lease addendum.

Furthermore, localities differ on whether criminal activity must be committed on the premises to constitute a violation of the crime-free lease addendum. The ICFA model lease addendum suggests that municipalities and landlords adopt a policy that establishes a violation if the activity was committed "on or near" the premises.[113] These policies create a "buffer zone" extending the possibility of a lease violation beyond the premises.[114] Some municipalities adopt even more restrictive policies. In Schaumburg, Illinois, any alleged criminal activity committed within the city limits by the tenant, a member of the tenant's household, or even a guest is deemed a violation of the crime-free lease addendum.[115] Like Schaumburg, most ordinances establish a violation of the lease addendum where the tenant, other member of the household, or guest is alleged to be involved with criminal activity.[116]

When a tenant violates the crime-free lease addendum, the ordinances give the landlord the authority to evict tenants for these activities, including those committed by guests or other members of the household.[117] Some go

112. *See* SAN DIEGO COUNTY CRIME FREE MULTI-HOUSING PROGRAM, *supra* note 62, at 71–74 (recommending that landlords try to gather information from police officers engaging at one of the owner's rental units and that landlords request police surveillance of specific tenants).

113. *Crime Free Lease Addendum*, *supra* note 100.

114. *See* WERTH, *supra* note 1, at 17–18 ("[S]ome municipalities apply these ordinances to the conduct . . . that occurs at a different location from the property where the tenant lives. . . . [A]pplying these ordinances to criminal conduct that takes place off the property can exacerbate fair housing problems.").

115. SCHAUMBURG, ILL., CODE § 99.10.05(F)(3)–(4) (establishing liability whether or not the guest is under the tenant's control).

116. *See* WERTH, *supra* note 1, at 3 (explaining that a crime free lease "is an agreement that makes criminal (and sometimes other) activity by tenants, their household members, their guests, and other specified third parties a violation of the lease that can be the basis for an eviction."). For examples of city ordinances containing similar provisions, see HESPERIA, CAL., CODE § 8.20.050(C)(1)(a)(i) (2019) (requiring that the Crime Free Lease Addendum include a provision stating that household members and guests shall not engage in criminal activity); FARIBAULT, MINN., CODE § 7-43(10)(b) (2018) ("A tenant is responsible for compliance with all applicable City Code, nuisance, and violations of disorderly conduct . . . including violations committed by household members or guests."); MINNEAPOLIS, MINN., CODE § 244.2020(a) (2013) (indicating that landowners must take appropriate action "following conduct by tenants and/or their guests on the licensed premises which is determined to be disorderly").

117. Marie Claire Tran-Leung, *Beyond Fear and Myth: Using the Disparate Impact Theory Under the Fair Housing Act to Challenge Housing Barriers Against People with Criminal Records*, 45 CLEARINGHOUSE REV. 4, 5 (2011); *see also* SCHAUMBURG, ILL., CODE § 99.10.05(F)

as far as encouraging eviction upon a single violation of the provision,[118] while others leave it to the "sole discretion" of the landlord to determine what actions to take.[119]

The following Section provides a more granular analysis of crime-free housing ordinances, using Faribault, Minnesota—a mandatory program—and Orlando, Florida—a voluntary program—as case studies.

C. *Specific Crime-Free Housing Ordinances Examined*

1. Faribault, Minnesota

The Faribault, Minnesota crime-free ordinance went into effect in 2015 with goals that move far beyond crime reduction. The ordinance seeks to assure "that rental housing in the City of Faribault is decent, safe, and sanitary and is so operated and maintained not to become a nuisance to the neighborhood or to become an influence that fosters blight and deterioration or creates a disincentive to reinvestment in the community."[120] The Faribault ordinance is among the harshest in the country.[121] First, the ordinance creates a requirement that all owners of rental housing obtain a license from the city to operate a rental dwelling and lays out a series of requirements for obtaining and retaining that license, including compliance with the crime-free housing provisions of the ordinance.[122] The ordinance also provides a number of reasons that a license can be revoked or not renewed. Among the reasons are "[f]ailure to actively pursue the eviction of a tenant or otherwise terminate the lease with a tenant who has violated the provisions of this Article or Crime Free Drug Lease Addendum or has otherwise created a public nuisance."[123]

The ordinance also requires all licensees to conduct criminal background checks, going back at least three years, on all prospective tenants or occupants who are eighteen years or older.[124] The landlord must retain the results of the criminal background check for at least one year after the check, even if the prospective tenant is rejected, and for a year after the tenancy

(mandating a crime-lease provision in every residential lease and stating that violations of the provision furnish grounds for eviction).

118. *See, e.g.*, SCHAUMBURG, ILL., CODE § 99.10.05(F)(5) ("One or more violations . . . of this Lease Section constitute a substantial violation and a material noncompliance with the Lease. Any such violation is grounds for termination of tenancy and eviction from the leased premises.").

119. *See, e.g.*, HESPERIA, CAL., CODE § 8.20.050(C)(2)(c).

120. FARIBAULT, MINN., CODE § 7-36.

121. Litigation has been filed to challenge the Faribault ordinance under the Fair Housing Act, the Equal Protection Clause of the Fourteenth Amendment, and the Minnesota Constitution. Jones v. City of Faribault, No. 18-cv-01643 (D. Minn. filed June 13, 2018).

122. FARIBAULT, MINN., CODE § 7-38(1).

123. *Id.* § 7-42(3)(g).

124. *Id.* § 7-44(4).

ends.[125] The ordinance does not, however, provide any guidance on what criteria should be used in assessing and reviewing the criminal background check. The Faribault Police Department does provide guidance and encourages landlords to look beyond criminal convictions during background checks and to consider arrests and even police contact. A Faribault police officer who runs the crime-free program on behalf of the Faribault Police Department said:

> In our crime-free classes that property owners and managers are required to attend, I explain that, sometimes during the criminal history checks, you can find out more information by coming to the PD and asking for public data that would show police contacts . . . . There may not be a conviction, but there is a wealth of information.[126]

Faribault's ordinance also provides the text of a crime-free lease provision that is mandatory for every new or renewed lease.[127] The text of the mandatory lease provision prohibits a "[r]esident, any members of the resident's household or a guest or other person under the resident's control" from engaging in "illegal activity, including drug-related illegal activity" on or near the premises, as well as acts "intended to facilitate illegal activity" on or near the premises.[128] Finally, it prohibits members of the household from engaging in the manufacture, sale, or distribution of illegal drugs anywhere.[129] A single violation of the crime-free lease addendum "shall be deemed a serious violation and material non-compliance with the lease."[130] Importantly, the ordinance does not define what constitutes illegal activity—making any violation of the law grounds for eviction after a single violation.

The ordinance also prohibits disorderly conduct on all licensed premises and makes it the responsibility of the landlord to prevent disorderly conduct by tenants and their guests, including through eviction.[131] The ordinance specifically provides that to find that disorderly conduct occurred, "[i]t shall not be necessary that criminal charges be brought in order to support such finding, nor shall the dismissal or acquittal of such a criminal charge operate as a bar to any action under this Section."[132]

Finally, the ordinance gives the Faribault police the power to order eviction of a tenant pursuant to the lease addendum without an arrest or conviction. If the police department determines that a premises or dwelling unit

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125. *Id.* § 7-44(4)(d).

126. Gunnar Olson, *Mixed Emotions: Landlords, Officials Measure Success Differently for Crime-Free Multi-Housing Program*, FARIBAULT DAILY NEWS (Mar. 29, 2017), http://www.southernminn.com/faribault_daily_news/news/article_c76a6322-04d9-52c8-bab3-c3d0ce77a299.html (on file with the *Michigan Law Review*).

127. FARIBAULT, MINN., CODE § 7-44(3).

128. *Id.* § 7-44(3)(a)–(b).

129. *Id.* § 7-44(3)(d).

130. *Id.* § 7-44(3)(e) (emphasis omitted).

131. *Id.* § 7-43(1)–(2).

132. *Id.* § 7-43(5).

was used in violation of the crime-free provisions, or that a tenant or occupant is in violation of the provision, the licensee must terminate the tenancy of all tenants occupying the unit and may not enter into a new lease with any of them for a period of one year.[133]

2. Orlando, Florida

In 2009, Orlando, Florida, adopted a voluntary Crime Free Multi-Housing Program.[134] An Orlando police officer described the program as designed to "squeez[e] out all of the people who just don't want to do right, so good people can have a nice, quiet place to live."[135] The program has three components. First, property owners and managers who want to participate in the program can attend an eight-hour seminar presented by the police department.[136] "During this training class, managers and property owners will learn about the crime prevention theory, lease agreements and eviction issues . . . [and] on-going security management."[137] The second component of the program is called "Crime Prevention Through Environment Design."[138] Here, the Orlando Police Department assesses the property to confirm that it meets the security requirements of the program.[139] The final component, and the centerpiece of the program, allows a property to advertise that it has "Full Certification" if the property management agrees to include a crime-free lease addendum, modeled on the ICFA model lease addendum, in all of its leases to help with the removal of "problem tenants."[140] The Orlando lease addendum provides that once a property owner or manager is notified that a tenant has been arrested, he or she "can fill out an eviction form and give the [accused] resident seven days to move out."[141] "A resident does not have to be convicted to get evicted."[142] In one example, an Orlando resident was caught smoking marijuana and was evicted from his apartment within the week for violating the crime-free lease addendum.[143]

By becoming fully certified, Orlando properties have access to the Orlando GOAL Database, which provides data about "police actions" involving

133. *Id.* § 7–44(5)(a).

134. *9 Investigates: Crime Free Multi-Housing Program Proves Successful*, WFTV (Mar. 21, 2014, 5:42 PM), https://www.wftv.com/news/local/9-investigates-successful-crime-free-multi-housing_nfjgn/106830752 [https://perma.cc/U9E2-NEE2].

135. Prieto, *supra* note 105.

136. *Crime Free Multi-Housing*, *supra* note 106.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *9 Investigates*, *supra* note 134.

142. *Id.*

143. *Id.*

their tenants and others in their community.[144] Specifically, the database lists "all persons arrested on Crime Free Certified Properties, as well as other properties in the Database."[145] All adult misdemeanor and felony arrests, as well as juvenile felony arrests, are entered into the database.[146] Certified properties also have access to a "Tenant Criminal Violation/Eviction List" that identifies all renters who have been evicted pursuant to the Crime Free Multi-Housing Program.[147] The purpose of this list, according to the City of Orlando, is to "track[] the criminal violators so they cannot migrate from community to community."[148] The top of the list states, "[t]he person(s) named on this list have been involved in Police-documented criminal activity and/or evicted because of Police-documented criminal activity. Involvement in any criminal activity while a resident of a Crime Free Multi-Housing Community is a violation of the Crime Free Multi-Housing Standards and is subsequently grounds for eviction."[149] The list is automatically sent to property managers every week.[150]

Between 2009 and 2014, approximately 1,400 renters were evicted under the program.[151] One of those people was Leroy Ebanks. When he was twenty-one years old, police suspected that Mr. Ebanks participated in breaking into a car.[152] Police questioned him and he denied any involvement.[153] In connection with his questioning, the police checked Mr. Ebanks's criminal history, which showed that he had two prior arrests but no convictions.[154] The officers turned that information over to the rental complex where Mr. Ebanks lived, and the building management immediately started eviction proceedings.[155]

III. OVERVIEW OF NORMATIVE CONCERNS

While seeking to maintain the safety of rental properties is a laudable goal, the widespread adoption of tenant-screening and eviction practices based on contacts with the criminal legal system raises a host of public policy

144. *Crime Free Multi-Housing*, *supra* note 106.

145. *Id.*

146. *Id.*

147. *9 Investigates*, *supra* note 134.

148. *Crime Free Multi-Housing*, *supra* note 106.

149. *9 Investigates*, *supra* note 134.

150. *Crime Free Multi-Housing*, ORANGE COUNTY SHERIFF'S OFF., https://www.ocso.com/Crime-Information/Crime-Prevention/Crime-Free-Multi-Housing [https://perma.cc/PYN9-YKHQ] ("Property managers will be sent an automatic weekly report which will provide notification of arrests for criminal incidents occurring on your property as well as the arrests of tenants.").

151. *9 Investigates*, *supra* note 134.

152. Prieto, *supra* note 105.

153. *Id.*

154. *Id.*

155. *Id.*

and civil rights concerns. Although a full exploration of these issues is beyond the scope of this Article, there are concerns, beyond the segregative impact, that warrant mention here. Those concerns include evidence of intentional racial discrimination, promotion of destructive narratives around people with criminal legal system contacts, and importation of harmful and discredited policing practices into the private housing market.

A. *Adoption in Response to Increasing Racial Diversity in the Community*

Crime-free housing ordinances are often adopted following burgeoning racial diversity, not burgeoning crime. Indeed, there is evidence surrounding the adoption of some of these ordinances that racial segregation may be more than an unfortunate by-product. Faribault, Minnesota, is an instructive example. The Faribault crime-free ordinance was passed in 2014 with a goal of getting rid of "problem tenants" living in downtown Faribault.[156] There is reason to believe that the language of "problem tenants" operated as a "dog whistle."[157] Nearly all of the racial and ethnic minority households in downtown Faribault live in rental housing.[158]

The Black population of Faribault, composed almost entirely of Somali immigrants and refugees, nearly tripled between 2000 and 2010.[159] The 2010 census showed an increase of 214% in Faribault's Black population since 2000 and a 263% increase in the Black population living in the downtown area of Faribault during the same period.[160] The overall number of Black households increased 542% in that decade.[161] Although residents of Faribault began complaining about increases in crime during this period, the overall crime rates in Faribault did not, in fact, increase dramatically.[162]

In 2013, resident complaints of increased drug activity and theft in downtown Faribault had become a hot button issue, but police reported that records did not support any claims of an increase.[163] The police chief report-

156. *See* Complaint at 45, Jones v. City of Faribault, No. 18-cv-01643 (D. Minn. June 13, 2018); Memorandum from Andy Bohlen, Faribault Police Chief, to Brian J. Anderson, Faribault City Adm'r, Information on Central Avenue Concerns (Oct. 10, 2013) (on file with author).

157. *See generally* IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS (2014).

158. RICE COUNTY HOUSING STUDY: AN ANALYSIS OF THE HOUSING NEEDS OF THE CITIES IN RICE COUNTY, at DF-12 (2012), http://www.faribault.org/DocumentCenter/View/579/2011-Rice-County-Housing-Study--Countywide-PDF [https://perma.cc/LJ37-TWLJ].

159. *Id.* at F-119.

160. *Id.* at F-119, DF-6.

161. *Id.* at F-22.

162. Complaint, *supra* note 156, at 7–9, (stating that crime rates generally decreased between 2000 and 2014).

163. Rebecca Rodenborg, *Faribault Police, Business Owners Take a Look at Downtown Crime*, FARIBAULT DAILY NEWS (Mar. 2, 2013), http://www.southernminn.com/faribault_daily_news/news/article_4c1c5b25-7c58-5053-8de5-c60caac77469.html (on file with the *Michigan Law Review*).

ed that he believed the issues were largely a result of cultural differences in the way Somali residents of Faribault used public space and noted that the police department would seek to decrease pedestrian traffic in the target areas.[164]

The decision to exempt certain properties from the Faribault crime-free ordinance also demonstrates an intent to focus on the growing Black population while lessening the impact on the White residents of Faribault. In Faribault, the ordinance exempts single-family dwellings occupied by a relative of the owner.[165] This provision is more likely to exempt White residents, who are more likely to own their own home than to live in rental property.[166] This exemption allows White property owners to rent to their presumably White relatives without concern for those relatives' history with the criminal legal system. Similar exemptions are included in crime-free ordinances around the country.[167]

Finally, signs of intent are also evident in some of the statements local officials made when discussing and adopting crime-free ordinances. Local officials have proudly proclaimed their intent to "move the bad guys out of town," or to keep out undesirables, or the criminal element.[168] These statements are often coded expressions of racial animus. Indeed, in housing discrimination cases, courts have found similar statements to be " 'camouflaged' racial expressions."[169]

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164. Memorandum from Andy Bohlen, *supra* note 156; *see also* Complaint, *supra* note 156, at 7–13, (describing the racial animus that fueled the Faribault housing ordinance and other similar proposals intended to silence and control the Somali population).

165. FARIBAULT, MINN., CODE § 7-38(1)(a)(1) (2018).

166. RICE COUNTY HOUSING STUDY, *supra* note 158, at F-23.

167. *See, e.g.*, CAROL STREAM, ILL., CODE § 10-12-4(B)(1) (2014) (exempting landlords of the residential rental license requirement for single-family dwellings occupied "by a member of the owner's immediate family"); ST. LOUIS PARK, MINN., CODE § 8-328 (2007) (exempting owners from having to attend a training program if their "only rental housing is either unoccupied or a dwelling unit homestead by a relative").

168. Katie Dahlstrom, *DeKalb's Crime Free Housing Program Gets Mixed Reviews*, DAILY CHRON. (Feb. 27, 2014), https://www.daily-chronicle.com/2014/02/26/dekalbs-crime-free-housing-program-gets-mixed-reviews/ajjphlv [https://perma.cc/P2YL-55JE]; *see also* Rodenborg, *supra* note 163.

169. *See* Smith v. Town of Clarkton, 682 F.2d 1055, 1066 (4th Cir. 1982) (finding reference to "an influx of 'undesirables' " and concerns about "personal safety due to the influx of 'new' people" to be coded racial expressions); *see also* Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 610 (2d Cir. 2016) (acknowledging racially coded nature of statement, "keep Garden City what it is"); Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par., 648 F. Supp. 2d 805, 811–12 (E.D. La. 2009) (analogizing concerns about the "criminal element" or protecting "similar values" and references to concerns about " 'crime,' 'blight,' and 'quality of life' . . . to the types of expressions that courts in similar situations have found to be nothing more than 'camouflaged racial expressions.' " (quoting *Smith*, 682 F.2d at 1066)); Atkins v. Robinson, 545 F. Supp. 852, 874 (E.D. Va. 1982) (finding statement that someone "feared the projects 'would degenerate to slum-like conditions, with an abundance of crime' " to be a "veiled reference to race"); *cf.* Doe v. Village of Mamaroneck, 462 F. Supp. 2d 520, 530, 540

B. *The Promotion of Destructive Messages Concerning People with Criminal Legal System Contacts*

The narratives about formerly incarcerated people that are often embedded in the structure of crime-free ordinances and promoted through training and descriptive materials can deepen the social stigma experienced by formerly incarcerated people returning home and contribute to the cycle of recidivism. In the past several years, correctional facilities have released "record numbers" of formerly incarcerated people who then sought to successfully reenter their communities.[170] However, several structural barriers hinder their efforts, including "bars to obtaining government benefits, voting disenfranchisement, disqualification from educational grants, exclusion from certain business and professional licenses, and exclusion from public housing."[171] This list of collateral consequences[172] is compounded by social stigma and stereotyping that feed private discrimination and limit the ability of formerly incarcerated people to make connections with their community and build supportive networks. The messages crime-free ordinances convey about formerly incarcerated people perpetuate this social stigma and stereotyping.

Formerly incarcerated people return to a society that is hostile to their inclusion. Generally, they "are assumed to be dangerous, aggressive, and unworthy of trust, and upon release are met with suspicion and hostility."[173] This social stigma and stereotyping can affect every aspect of formerly incarcerated individuals' lives, including their capacity to build positive social connections.[174] The social exclusion can complicate their participation in the

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(S.D.N.Y. 2006) (finding "quality of life" concern pretext for racial animus in harassment of day laborers).

170. Michael Pinard, *A Reentry-Centered Vision of Criminal Justice*, 20 FED. SENT'G REP. 103, 103 (2007).

171. Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 258 (2004); *see also* CLEAR, *supra* note 10, at 58 (discussing some of the employment restrictions that have been placed on individuals who were formerly incarcerated); Jamil A. Favors, *Deconstructing Re-entry: Identifying Issues, Best Practices and Solutions*, 21 U. PA. J.L. & SOC. CHANGE 53, 61–64 (2018) (discussing some of the difficulties faced by individuals reentering their communities). *See generally* 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 (2006) (discussing barriers to reentry).

172. Collateral consequences, the indirect consequences that flow from a criminal conviction, include a "range of social and civil restrictions" and can have an astonishing impact on recidivism rates. *See* Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 590 (2006).

173. Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 269 (2009) (discussing the stigma associated with having been incarcerated).

174. *See* CLEAR, *supra* note 10, at 8–9 (discussing how the criminalization of Black men has harmed that group's social image and the practical, negative effects this has on employment prospects); JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE

life of their communities and consign them "to the margins of legitimate society."[175] In the end, the social stigma and marginalization play into the cycle of recidivism.[176]

Moreover, the stigma surrounding formerly incarcerated people is often intertwined with racial stereotypes. Unfortunately, "for many Americans, crime has a [B]lack" or Brown face.[177] Thus, formerly incarcerated Black people generally fight against "double stigma" related to their status and historical narratives of Black people as dangerous and violent.[178] Indeed, the narrative of Black dangerousness and excessive criminality remains a relentless part of our cultural view, seeping into debates about race on topics from criminal justice reform to parenting, education, and housing.[179]

San Diego County presents an example of the dangerous messages conveyed through crime-free programs. In San Diego, the intended message is clear: "When you think of criminals, think of predators."[180] San Diego County's program analogizes individuals with criminal legal system involvement to weeds, stating that as the weed grows "it roots, sprouts, and chokes out healthy plants. A single weed quickly overtakes an entire garden. When criminal activity is allowed to flourish, the effect is the same."[181] This imagery shapes the lens through which society views people with criminal legal system contacts. It says that people who have committed a crime are a cancer, unable to change, and undeserving of compassion or consideration. People are encouraged to act through fear; there is no room for second chances.

DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY (2001), http://research.urban.org/UploadedPDF/from_prison_to_home.pdf [https://perma.cc/B5BJ-98GC] ("[T]he stigma attached to incarceration makes it difficult for ex-prisoners to be hired.").

175. Pinard & Thompson, *supra* note 172, at 590; *see also* Eumi K. Lee, *The Centerpiece to Real Reform? Political, Legal, and Social Barriers to Reentry in California*, 7 HASTINGS RACE & POVERTY L.J. 243, 251–56 (2010) (arguing that the barriers to reentry contribute to the high rates of recidivism); Thompson, *supra* note 171, at 273 (arguing that social isolation faced by people with criminal convictions "effectively relegate[s] ex-offenders to the margins of legitimate society, stigmatizing them and further highlighting their separation from law-abiding members of society").

176. Lyles-Chockley, *supra* note 173, at 271.

177. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994).

178. CLEAR, *supra* note 10, at 8–9 ("The social concept of the 'dangerous young black man,' so deeply ingrained in our nation's consciousness, continues to fuel punitive politics." (citations omitted)); Lyles-Chockley, *supra* note 173, at 269.

179. *See* Brief for the National Black Law Students Ass'n, *supra* note 26, at 5–16 (explaining the history of the view that Black people are uniquely violent and dangerous). *See generally* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003) (presenting research that suggests that prospective employers treat Black applicants as if they have a criminal record, regardless of whether they disclose one or not).

180. SAN DIEGO COUNTY CRIME FREE MULTI-HOUSING PROGRAM, *supra* note 62, at 2.

181. *Id.* at 1.

The stigma born of this narrative is particularly harmful because of its impact on housing options for formerly incarcerated people. Housing is critically important for successful reentry and can present a significant challenge for individuals returning from incarceration.[182] Many rental property owners state that they would not knowingly rent their property to someone with a criminal conviction and often deny rental applications based on the fact that an individual has a criminal record.[183] This is also a problem embedded in the structure of these programs and ordinances. Most crime-free programs require or encourage landlords to conduct criminal background checks for all rental applicants. The screenings established by these ordinances and advocated by the trainings have the effect of sending the message "that all tenants with criminal histories are more likely to bring criminal activity" with them.[184]

C. *Importing Harmful Policing Practices into the Private Housing Market*

Crime-free housing ordinances provide the criminal legal system with a broader province of impact and influence.[185] The ICFA has advertised that crime-free ordinances are driven by law enforcement and based on principles of policing.[186] Race plays an undeniable role in policing in the United States. In using principles of policing in both design and implementation, crime-free ordinances import racially discriminatory policing practices into the private housing market.

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182. TRAVIS ET AL., *supra* note 174, at 35 (discussing the barriers people released from prison face in finding housing); Lyles-Chockley, *supra* note 173, at 282 ("The denial of crucial social benefits—including food stamps and federally subsidized housing—is a final, and sometimes devastating, blow to ex-offenders attempting to successfully integrate into their communities."); Thompson, *supra* note 171, at 278–79 (discussing how housing has been a barrier to reentry); *see* Archer & Williams, *supra* note 171, at 543; Pinard & Thompson, *supra* note 172, at 595.

183. TRAVIS ET AL., *supra* note 174, at 35 ("Landlords typically require potential tenants to list employment and housing references and to disclose financial and criminal history information. For these reasons, offenders are often excluded from the private housing market."); Thompson, *supra* note 171, at 278 ("Private property owners often inquire into the individual's background and tend to deny housing to anyone with a criminal record . . . .").

184. Tran-Leung, *supra* note 117, at 5; *see also* WERTH, *supra* note 1, at 15 ("[L]andlords that are encouraged or required to screen prospective tenants are likely to err on the side of rejecting anyone with a record."); *cf.* LAS VEGAS CRIME FREE MULTI-HOUSING PROGRAM, *supra* note 85, at 27 (emphasizing that it is not illegal to deny residency based on criminal history and recommending that landlords looking over applicants' criminal histories ask themselves if the crimes committed are those that "pose[] a threat to [the landlord's] residents"). Recall, however, that the ICFA model training manual suggests that a prospective tenant with a conviction for felony embezzlement may pose less danger than someone with a misdemeanor assault charge, highlighting an obvious race and class dimension to screening. *Supra* note 101.

185. *See* Swan, *supra* note 27, at 833 (discussing the way that civil ordinances are used in the service of crime control).

186. *See Crime Free Multi-Housing*, *supra* note 4 ("The Crime Free Programs are innovative, law enforcement based crime prevention solutions designed to help keep illegal activity off rental property.").

Race has always played a critical role in policing. Racism is a defining feature of American society, a feature that is urgently felt throughout the criminal legal system. As Ta-Nehisi Coates writes, when reflecting on his friend's killing at the hands of police officers:

> I knew that Prince was not killed by a single officer so much as he was murdered by his country and all the fears that have marked it from birth.
>
> At this moment the phrase "police reform" has come into vogue, and the actions of our publicly appointed guardians have attracted attention presidential and pedestrian. You may have heard the talk of diversity, sensitivity training, and body cameras. These are all fine and applicable, but they understate the task and allow the citizens of this country to pretend that there is real distance between their own attitudes and those of the ones appointed to protect them. The truth is that the police reflect America in all of its will and fear, and whatever we might make of this country's criminal justice policy, it cannot be said that it was imposed by a repressive minority. The abuses that have followed from these policies—the sprawling carceral state, the random detention of Black people, the torture of suspects—are the product of democratic will.[187]

Policing is not immune to the racism that plagues the rest of society. Indeed, this country has a general problem of racialized policing—racialized encounters, stops, frisks, arrests, and violence.[188] Under the reign of contemporary policing, people of color, particularly Black and Latino men, are stigmatized, brutalized, and burdened with fines and arrest records at an alarming rate. Under contemporary policing models, officers too frequently rely on racial stereotypes of people of color that make them presumptively people of interest to the police.[189]

By linking an individual's encounters with police officers to the possibility of being denied access to private housing, crime-free ordinances add a new dimension to the sad history of race shaping access to housing. Crime-

187. TA-NEHISI COATES, BETWEEN THE WORLD AND ME 78–79 (2015).

188. *See* I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1255–56 (2017) (providing evidence of racial profiling in New York City, Los Angeles, Philadelphia, Minnesota, Maryland, Boston, North Carolina, New Jersey, and other American cities); John J. Donohue III & Steven D. Levitt, *The Impact of Race on Policing and Arrests*, 44 J.L. & ECON. 367, 367 (2001) (finding that an increase in "white police increase[s] the number of arrests of nonwhites but do[es] not systematically affect the number of white arrests"); Bennett L. Gershman, *Use of Race in "Stop-and-Frisk": Stereotypical Beliefs Linger, but How Far Can the Police Go?*, N.Y. ST. B. ASS'N J., MAR.–APR. 2000, at 42, 42 (explaining that a study done by the New York state attorney general's office found that Blacks were over six times more likely to be stopped than Whites, and Hispanics more than four times as likely).

189. *See* Capers, *supra* note 188, at 1254–55 (discussing the problems with and evidence of racial profiling); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 163 (2016) (explaining the variables that "converge to render African Americans vulnerable to repeated police interactions"); Kevin R. Johnson, *Race Profiling in Immigration Enforcement*, 28 HUM. RTS., Winter 2001, at 23, 23 (discussing how the Supreme Court "opened the door to Border Patrol reliance on race" in conducting immigration stops).

free ordinances allow the racial bias, both explicit and implicit, that has woven itself into the fabric of American policing to more easily weave itself throughout the private housing market.

Conversely, these ordinances can also affect policing by leading to increased contact between people of color and police officers through aggressive, zero-tolerance police responses to these ordinances. Crime-free ordinances share several hallmarks with one of the most well-known models of zero-tolerance policing: broken windows. The broken windows model of policing focuses on the importance of disorder in generating and sustaining more serious crime.[190] Broken windows theory does not argue that disorder is directly linked to serious crime; instead, it posits that disorder leads to increased fear and withdrawal from residents, which then allows more serious crime to move in because of decreased levels of informal social control.[191] In translating this theory to policing policy and practice, the belief is that police officers can disrupt this cycle by focusing on disorder, reducing fear and resident withdrawal, and promoting informal social control. The reality of broken windows policing is "aggressive enforcement of quality-of-life crimes . . . as a way to suppress more serious crimes."[192] Crime-free ordinances operate in a similar vein. The ordinances focus on preempting criminal activity by engaging the police and community to exclude people believed to bring criminal activity—no matter how minor.

Around the country, broken windows policing has led to the criminalization and over-policing of individuals and communities of color. Crime-free ordinances have the potential to do the same. Zero-tolerance policing has imposed an enormous cost on communities of color.[193] Poor people of color have been the primary targets of zero-tolerance policing and "disproportionately exposed to the police."[194] This is due, in part, to the implicit as-

190. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [https://perma.cc/9SC3-KUXP].

191. *Id.*

192. Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 FORDHAM URB. L.J. 539, 542 (2016) (identifying broken windows policing as one of the policing tools used to "disrupt criminal activities"); *see also* Carbado & Rock, *supra* note 189, at 163 (stating that Black communities are targeted by proactive policing practices because of the stereotype that Black people are "criminally inclined").

193. K. Babe Howell, *The Costs of "Broken Windows" Policing: Twenty Years and Counting*, 37 CARDOZO L. REV. 1059, 1061 (2016) (noting that Eric Garner was arrested for selling loose cigarettes by a unit that was designated to address quality-of-life conditions as part of broken windows policing).

194. Carbado & Rock, *supra* note 189, at 167; *see also* Fagan et al., *supra* note 192, at 544 ("The metrics of the 'new policing' pointed to the neighborhoods with the highest crime rates as the targets of police activity. These usually were the places with concentrated poverty and often were minority neighborhoods."); Howell, *supra* note 193, at 1060 ("[W]hat zero-tolerance policing does is make public spaces *very, very dangerous* for black people, Latino people, poor people, LGBTQ people, people with substance abuse problems, people with mental health problems, and homeless people.").

sociation of people of color, particularly Black people, with criminality.[195] The result is increased scrutiny and police interactions.[196] While the theory may aim to make public spaces safe, in actuality zero-tolerance policing has made public spaces hazardous for people of color by criminalizing conduct that is not a threat to public safety and is routinely ignored in affluent or White communities, such as loitering, jaywalking, or playing loud music.[197] In the end, "[t]he risk of being subjected to a stop, summons, or arrest for de minimis offenses means that many individuals, and particularly young men of color, in aggressively policed neighborhoods experience a certain amount of fear each time they leave their homes."[198]

Crime-free ordinances may increase the risk of police–citizen interactions, leading people of color to fear everyday interactions. They may also increase the possibility that stigma, the state of being "a disfavored or dishonored individual in the eyes of society,"[199] will burden their lives in that community. For people of color, everyday interactions are often a source of racial indignity—they are denied the right to be ordinary, "unencumbered by racial stigma and by the status of subordination."[200] In explaining the im-

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195. CLEAR, *supra* note 10, at 8–9 ("The increasing criminalization of black men has meant that, as a group, black men are stigmatized."). *See generally* Capers, *supra* note 188, at 1255–56 (laying out the disproportionate rates at which Black people are stopped by the police).

196. Lyles-Chockley, *supra* note 173, at 269–70.

197. *See* Carbado & Rock, *supra* note 189, at 163 (explaining that, because of racial segregation, Black communities are often concentrated in "high crime areas" that are targeted through proactive policing campaigns); Howell, *supra* note 193, at 1059 (describing the broken windows policy implemented in New York City under Rudolph Giuliani as one that consisted of zero-tolerance policing but mostly only as applied to "communities of color and vulnerable populations"); *see also* AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 4, 91-97 (2013), https://www.aclu.org/report/report-war-marijuana-black-and-white [https://perma.cc/HUZ8-BX7Y] (reporting on the disproportionate rates at which people of color are stopped and prosecuted when compared to White people who are, statistically speaking, equally or more likely to commit similar offenses).

198. Howell, *supra* note 193, at 1060.

199. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004); *see also* Elise C. Boddie, *Ordinariness as Equality*, 93 IND. L.J. 57, 60 (2018) ("When stigma is internalized it corrupts one's sense of self. . . . Thus, racially stigmatized persons are not only externally diminished by social judgments but also become agents of their own debasement.").

200. Boddie, *supra* note 199, at 57; *see also* Aris Folley, *Woman Reportedly Arrested After Harassing Two Women for Speaking Spanish*, HILL (Oct. 4, 2018, 10:17 AM), https://thehill.com/blogs/blog-briefing-room/news/409865-white-woman-arrested-after-harassing-two-women-for-speaking [https://perma.cc/R99Q-9S2P]; Jessica Guynn, *BBQ Becky, Permit Patty and Why the Internet Is Shaming White People Who Police People 'Simply for Being Black*,' USA TODAY (July 18, 2018, 6:30 AM), https://www.usatoday.com/story/tech/2018/07/18/bbq-becky-permit-patty-and-why-internet-shaming-white-people-who-police-black-people/793574002/ [https://perma.cc/WEY8-HAVU]; Alanne Orjoux et al., *Attorney in Rant That Went Viral Says He's Not a Racist and Offers an Apology*, CNN (May 22, 2018, 7:11 PM), https://www.cnn.com/2018/05/22/us/aaron-schlossberg-attorney-racist-rant-apology/index.html [https://perma.cc/S6U4-RCZZ].

portance of "ordinariness" in achieving equality, Elise Boddie examines the story of Philando Castile, a Black man who was shot and killed in his car by a police officer in St. Paul, Minnesota, during a traffic stop. Mr. Castile had been stopped by the police more than forty-six times before that day, with only six of the forty-six stops for offenses an officer could have observed before pulling him over.[201] In describing the way these forty-six stops may have eroded Mr. Castile's dignity and the burden of stigma, Boddie asks:

> Did the possibility of being pulled over occupy his thoughts as he was driving? Did he plan how he would respond—what he would say and how he would act if the police stopped him again? Did he ever feel demeaned or humiliated by the police in prior stops? And, if so, did the sight of a police car make him anxious or fearful?[202]

Crime-free housing ordinances will intensify scrutiny and increase adverse police interactions, turning everyday interactions into sources of anxiety, trauma, and indignity.

IV. THE RACIALLY EXCLUSIONARY REALITY OF CRIME-FREE ORDINANCES

Crime-free ordinances will disproportionately affect Black people. However, the racial impact of crime-free housing ordinances will reach far beyond the individual resident. Government housing policy is never neutral in its impact on racial segregation; the policy will either exacerbate segregation or help to reverse it.[203] Eviction or rejection of a housing application based on almost any type of criminal legal system exposure will further systemic racial exclusion because of the racial disparities in who has a criminal record.[204] The impact is heightened because of the breadth of crime-free ordinances. The exclusions are not only based on convictions but, by design and implementation, on *any* contact with the criminal legal system—from claims that a person is suspicious, to stops, to arrests, to convictions.[205] The exclu-

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201. Eyder Peralta & Cheryl Corley, *The Driving Life and Death of Philando Castile*, NPR (July 15, 2016, 4:51 AM), https://www.npr.org/sections/thetwo-way/2016/07/15/485835272/the-driving-life-and-death-of-philando-castile [https://perma.cc/B5WP-4U8X].

202. Boddie, *supra* note 199, at 60.

203. ROTHSTEIN, *supra* note 9, at 190.

204. *See* Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 IND. L.J. 421, 423–24 (2018) (noting that Black and Latinx people are incarcerated at disproportionate rates when compared to White people).

205. The Cedar Rapids ordinance encouraged evictions without need of a demonstrated criminal conviction. *Landlords Sue City over 'Crime-Free' Ordinance*, AM. APARTMENT OWNERS ASS'N, https://www.american-apartment-owners-association.org/property-management/latest-news/landlords-sue-city-over-crime-free-ordinance/ [https://perma.cc/9L2B-ZUNN]. The Faribault, Minnesota crime-free ordinance likewise explicitly says that "[i]t shall not be necessary that criminal charges be brought in order to support such finding [of disorderly conduct], nor shall the dismissal or acquittal of such a criminal charge operate as a bar to any action under this Section." FARIBAULT, MINN., CODE § 7-43(5) (2017). In fact, landowners in Faribault are encouraged to consider arrests and general contact with police when conducting background checks. Olson, *supra* note 126. Finally, evictions documented in Orlando

sions not only apply when an individual is seeking to move into the community, but will force the evictions of individuals already living there and deter others from applying for housing in that community in the first place. This Part explores the racially exclusionary potential of crime-free ordinances. Through crime-free ordinances, the criminal legal system becomes wrapped around the entire housing process, forcing individuals with criminal legal system contacts—disproportionately Black people—to find housing outside of the communities in which they would otherwise live.

A. *Racially Discriminatory Impact in the Adopting Municipality*

Decisionmaking based on whether a person has involvement with the criminal legal system effectively functions as a racialized criterion. This is because there are racial disparities at every stage of the criminal process.[206] By relying on criteria destined to exclude people of color at disproportionate rates, the ordinances will perpetuate and increase segregation in the communities that adopt them.[207] And, just as bastions of affluence in certain communities concentrate disadvantage elsewhere,[208] concentrating Whiteness in a community will make other communities more segregated. Accordingly, the ordinances will predictably reinforce and perpetuate segregation in surrounding communities by exiling people of color, forcing them to seek housing in already segregated communities, and recreating conditions in those communities that are among the drivers of systemic segregation.[209] As the previous Part analyzed some of the normative concerns raised by crime-

demonstrate that the Orlando crime-free program has been interpreted to not require a conviction in order to allow landlords to take action against residents. *See 9 Investigates*, *supra* note 134 (discussing one Orlando resident who was evicted within one week of being caught smoking marijuana).

206. *See infra* notes 210–244 and accompanying text. *See generally Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT'G PROJECT (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ [https://perma.cc/BLR4-NT73] (documenting the racial disparities in policing, pretrial detention, sentencing, parole, and post-prison experiences).

207. Although this Article uses national statistics to illustrate the potential for crime-free housing ordinances to perpetuate segregation, determining whether a policy or practice has a segregative effect will ultimately be a case-specific inquiry, largely driven by local data. *See, e.g.*, Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1253 (10th Cir. 1995) ("In some cases national statistics may be the appropriate comparable population . . . . However, those cases are the rare exception . . . ." (citation omitted)).

208. *See generally* DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 6, 18 (2007) (discussing the impact of "opportunity hoarding").

209. Specific challenges to crime-free municipal ordinances brought under the segregative effects clause will need to establish the impact that crime-free municipal ordinances have in those specific communities. *See, e.g.*, Boykin v. Gray, 895 F. Supp. 2d 199, 213–14 (D.D.C. 2012) (noting that courts have recognized allegations of a racially segregative effect under the Fair Housing Act "as a form of disparate impact"). However, there are certain principles, realities, and facts that make the impact on segregation probable. *See, e.g.*, *Report to the United Nations*, *supra* note 206.

free ordinances, this Part will analyze the potential of crime-free ordinances to further systemic racial exclusion.

At every stage along the spectrum of contacts with the criminal legal system, Black people are overrepresented. There are more Black people in prison than people of any other racial or ethnic group.[210] There are also disparidisparities in incarceration rates. "Black men are seven times more likely to go to prison than white men; black women are eight times more likely to go than are white women."[211] The disparities are most stark in state prisons. In Iowa, Minnesota, New Jersey, Vermont, and Wisconsin, incarceration rates are more than ten times higher for Black residents than for White residents.[212] "In eleven states, at least 1 in 20 adult black males is in state prison."[213] And, "[o]n any given day, nearly one-third of black men in their twenties are under the supervision of the criminal justice system."[214] As Dorothy Roberts puts it, "African Americans experience a uniquely astronomical rate of imprisonment."[215]

In *Gregory v. Litton Systems, Inc.*,[216] a federal district court observed that Black people are arrested at a disproportionate rate compared to White people and held that "any policy that disqualifies prospective employees because of having been arrested once, or more than once, discriminates in fact against [Black] applicants."[217] The disparities have only gotten more glaring since this 1970 decision. For example, in 2013, Black people were arrested at a rate more than double their proportion to the general population.[218] "Police arrest black Americans for drug crimes at twice the rate of whites, according to federal data, despite the fact that whites use drugs at comparable rates . . . ."[219] For example, from 1995 to 2005, Black people "comprised ap-

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210. *See* JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2017, at 6 (2019); *see also* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004).

211. CLEAR, *supra* note 10, at 63.

212. ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/U9J6-LBK7].

213. *Id.*

214. Roberts, *supra* note 210, at 1272.

215. *Id.* at 1272–73.

216. 316 F. Supp. 401 (C.D. Cal. 1970).

217. *Gregory*, 316 F. Supp. at 403.

218. *See Population, by Race and Ethnicity: 2013*, PEW RES. CTR. (Mar. 11, 2015), https://www.pewhispanic.org/ph_2015-03_statistical-portrait-of-hispanics-in-the-united-states-2013_current-01/ [https://perma.cc/U7MK-PUJH] (12.3 percent of the U.S. population in 2013 was Black); FED. BUREAU OF INVESTIGATION: CRIMINAL JUSTICE INFO. SERVS. DIV., CRIME IN THE UNITED STATES 2013, tbl.43A (2014), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43 [https://perma.cc/4ERT-VZ6V] (28.3 percent of those arrested in 2013 were Black).

219. Andrew Kahn & Chris Kirk, *What It's Like to Be Black in the Criminal Justice System*, SLATE (Aug. 9, 2015, 12:11 PM), https://slate.com/news-and-politics/2015/08/racial-

proximately 13 percent of drug users but . . . 46% of those convicted of drug offenses."[220]

A hallmark of the criminal legal system is targeted policing and criminalization of poor communities of color. There is a general perception that Black people are disproportionately targeted by the police.[221] Empirical evidence supports this perception; numerous studies have confirmed that police stop Black people at a higher rate than White people.[222] Nationally, Black people are more likely to be pulled over by the police[223] and, in one study, are less likely to receive a citation after being pulled over than White people.[224] Moreover, "[p]olice are three times as likely to search the cars of stopped black drivers than stopped white drivers."[225]

The statistics revealed in *Floyd v. City of New York*,[226] a class action challenging New York City's aggressive stop-and-frisk practices, provide a sobering example. The NYPD's aggressive policing under stop and frisk caused the number of police stops to increase from 160,851 in 2003 to a peak of 685,724 in 2011.[227] The majority of stops were of Black and Latinx people.[228] From 2004 to 2012, the New York City Police Department made almost five million stop-and-frisk stops.[229] Black and Latinx people accounted for more than 80% of them; 52% of those stopped were Black and 31% were Latinx.[230] During this period, New York City's population was 23% Black, 29% Latinx, and 33% White.[231] To put these numbers in further perspective, police stops

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disparities-in-the-criminal-justice-system-eight-charts-illustrating-how-its-stacked-against-blacks.html [https://perma.cc/BQM3-MK8Y].

220. NELLIS, supra note 212, at 10.

221. *See, e.g.*, Devon W. Carbado, *Blue-On-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1479 (2016) (listing the variables that contribute to the systemic targeting of Black communities by police).

222. Matthew Bloch et al., *Stop, Question and Frisk in New York Neighborhoods*, N.Y. TIMES (July 11, 2010), https://archive.nytimes.com/www.nytimes.com/interactive/2010/07/11/nyregion/20100711-stop-and-frisk.html?action [https://perma.cc/PT8D-QWDT] (presenting statistics that show the disproportionate rates at which Black and Latinx people were stopped under the NYPD's stop and frisk policy); Fagan et al., *supra* note 192, at 560 (collecting studies); Tatiana Pina, *New Study Shows Racial Disparities in Rhode Island Traffic Stops*, PROVIDENCE J. (Jan. 16, 2014, 9:49 PM), https://www.providencejournal.com/article/20140116/NEWS/301169879 [https://perma.cc/96PQ-NEM2] (presenting evidence showing that police in Rhode Island stopped drivers of color at a disproportionate rate).

223. Kahn & Kirk, *supra* note 219.

224. Pina, *supra* note 222.

225. Kahn & Kirk, *supra* note 219.

226. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

227. *Stop-and-Frisk Data*, NYCLU, https://www.nyclu.org/en/stop-and-frisk-data [https://perma.cc/T6JL-QTJ5].

228. *See id.*

229. *Floyd*, 959 F. Supp. 2d at 556.

230. *Id.* at 556, 558–59

231. *Id.* at 559.

of White people were 2.6% of the White population of New York City.[232] In contrast, stops of Black people were 21.1% of the Black population of New York City.[233] One study estimated that the probability of being stopped by police for Black men ages eighteen to nineteen residing in New York City in 2006 was as high as 80%.[234] Police rarely recover evidence of crimes during these stops, and, in 88% of the stops, they do not even make an arrest.[235]

New York City is not alone. From 2012 to 2014, Black people made up 67% of the population in Ferguson, Missouri.[236] Yet, they "account[ed] for 85% of vehicle stops, 90% of citations, and 93% of arrests."[237] Black people were twice as likely to be searched during a vehicle stop, but were found in possession of contraband 26% less often than White people.[238] Indeed, studies have found similar disparities around the country.[239]

During the Obama Administration, several federal agencies initiated programs designed to increase awareness of the potential disparate impact of relying on criminal records in important housing and employment decisions, and sought to mitigate the collateral consequences of a criminal record. The Department of Housing and Urban Development (HUD), the Equal Employment Opportunity Commission (EEOC), and the Department of Labor (DOL) each issued guidance on the potential for racial discrimination based on use of an individual's criminal record.

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232. Press Release, ACLU, Analysis of New NYPD Stop-and-Frisk Data Reveals Dramatic Impact on Black New Yorkers (Nov. 26, 2007), http://aclu.org/racialjustice/racialprofiling/33095prs20071126.html [https://perma.cc/KH89-YVUR].

233. *Id.*

234. Jeffrey Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, *in* RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 336 (Stephen K. Rice & Michael D. White eds., 2009).

235. *Floyd*, 959 F. Supp. 2d at 558–59.

236. U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/TF7W-F96R].

237. *Id.*

238. *Id.*

239. *See, e.g.*, Plaintiff's Fifth Report to Court and Monitor of Stop and Frisk Practices at 13, Bailey v. City of Philadelphia, No. 10-5952 (E.D. Pa. Feb. 24, 2015) (finding that 80.23 percent of the stops in Philadelphia were of minorities); IAN AYRES & JONATHAN BOROWSKY, ACLU OF S. CAL., A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT 27 (2008), https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf [https://perma.cc/4ZSJ-2WR2] (finding that the stop rate was 3,400 stops higher per 10,000 residents for Black people than for White people, and almost 360 stops higher for Latinx people than for White people); ACLU, BLACK, BROWN AND TARGETED: A REPORT ON BOSTON POLICE DEPARTMENT STREET ENCOUNTERS FROM 2007–2010 1 (2014) https://www.issuelab.org/resources/25157/25157.pdf [https://perma.cc/BWH9-BDTZ] (analyzing more than 200,000 Boston Police Department records of police–citizen encounters and concluding that Black people were subjected to 63 percent of these encounters while they were just 24 percent of the population).

In 2016, HUD issued guidance detailing the extent to which reliance on an individual's criminal record could constitute racial discrimination under the Fair Housing Act because of its disparate impact based on race or ethnicity.[240] The guidance first acknowledged that "many formerly incarcerated individuals, as well as individuals who were convicted but not incarcerated, encounter significant barriers to securing housing, including public and other federally-subsidized housing."[241] Furthermore, the guidance noted that "even individuals who were arrested but not convicted face difficulty in securing housing based on their prior arrest."[242] In addressing the potential for racially disparate impact in the use of conviction and arrest records, the guidance noted that Black and Latinx people "are arrested, convicted and incarcerated at rates disproportionate to their share of the general population."[243] As a result, HUD warned, barriers to housing based on criminal records are likely to have a disproportionate impact on Black and Latinx people seeking housing.[244]

In 2012, the EEOC released guidance clarifying how actions taken against applicants or employees with criminal records could constitute disparate treatment and disparate impact under Title VII of the Civil Rights Act of 1964.[245] After recounting a sampling of the data regarding racial disparities in the rates of arrests and convictions across the United States, the guidance concluded that "[n]ational data . . . supports a finding that criminal record exclusions have a disparate impact based on race and national origin."[246] Indeed, numerous studies have confirmed the racially disparate impact of reliance on criminal records in the employment context.[247] Fol-

240. U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 1 (2016).

241. *Id.*

242. *Id.* at 2.

243. *Id.*

244. *Id.* The guidance also noted that "intentional discrimination in violation of the Act occurs if a housing provider treats individuals with comparable criminal history differently because of their race, national origin or other protected characteristic." *Id.*

245. *See* EEOC, ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012). Note that the analysis under Title VII is similar to the analysis under the FHA. *See* U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 240, at 5–6.

246. EEOC, *supra* note 245, at 10.

247. *E.g.*, Pager, *supra* note 179, at 958 (discussing a study where Black college students posing as high school graduates were found to be less likely to receive a job callback than Whites with a recent felony criminal conviction); Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 198 (2014) (noting that employers have increasingly been conducting background checks on applicants, and that Black and Latinx people are more likely to have criminal records than their White counterparts); *see also* Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1295 (8th Cir. 1975) (finding that the plaintiffs established a prima facie showing of discrimination by revealing that a policy of denying employment to any-

lowing the lead of the EEOC, in 2012, the DOL issued an advisory addressing the use of criminal records in employment decisions.[248] The DOL guidance clarified what the agency would consider a violation of Title VII's nondiscrimination for job postings, screenings, and referrals based on criminal conviction records.[249]

B. *The Perpetuation of Systemic Segregation in Surrounding Communities*

It is axiomatic that housing policy in one community will have a ripple effect in surrounding communities.[250] Concentrating Whiteness in one community will make nearby communities more racially segregated.[251] Accordingly, while making White communities Whiter, crime-free ordinances will also make nearby communities of color more segregated and marginalized. Evictions and exclusions based on criminal legal system contacts will force the exiled people—most likely people of color—and their families to seek housing in those surrounding communities. Given the realities of housing patterns in the United States and deeply entrenched systems of segregation, people of color excluded by crime-free ordinances will likely be squeezed into predominantly minority communities, reinforcing racial segregation. 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,[252] a fear likely reinforced by their experience seeking housing in or being evicted from communities with crime-free ordinances.

By spatially concentrating people with criminal convictions or other criminal legal system contacts into fewer communities, crime-free ordinances risk stigmatizing those communities, further perpetuating the negative impacts of racial segregation. The stigma that follows formerly incarcerated

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one with a criminal record "[disqualifies] black applicants or potential black applicants for employment at a substantially higher rate than whites").

248. U.S. DEP'T OF LABOR, ADVISORY: TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 31-11, at 1 (2012).

249. *Id.* at 5–7.

250. *See* Vicki Been et al., Supply Skepticism: Housing Supply and Affordability 4 (Oct. 26, 2017) (unpublished manuscript) (on file with the *Michigan Law Review*) (arguing that changes in housing demand and supply push people either out of a jurisdiction or force them to turn to less expensive housing in the same city and that the "failure of supply to respond to increased demand at the higher end will ripple through other submarkets as demand spills into these markets and increases their prices and rents").

251. *Cf.* Maria Krysan et al., *Does Race Matter in Neighborhood Preferences? Results from a Video Experiment*, 115 AM. J. SOC. 527, 527 (2009) ("The authors find that net of social class, the race of a neighborhood's residents significantly influenced how it was rated. Whites said the all-white neighborhoods were most desirable.").

252. *Id.* at 533–34 ("An important factor shaping African-Americans' racial residential preferences is concern about possible discrimination in predominantly white neighborhoods, as suggested by qualitative interview data and open-ended survey questions.").

people can attach to the communities in which they live.[253] Those communities in turn experience decline—social, economic, and political.[254] Racially segregated housing patterns interact with socioeconomic status to produce extreme spatial concentrations of incarceration in communities of color, with Black communities feeling the brunt of this.[255] Moreover, formerly incarcerated people are more likely to live in communities of color already suffering from high levels of social and economic disadvantage and deprivation.[256] Further concentrating people with criminal convictions and others with criminal legal system contacts[257] by excluding these individuals from neighboring communities will only exacerbate both the impact of concentrated incarceration on communities of color and, ultimately, racial segregation.

Communities that must absorb large numbers of people with criminal convictions or individuals with other forms of criminal legal system involvement face a range of political, social, and economic challenges.[258] Crime-free ordinances exacerbate the obstacles these segregated communities face. For example, concentrated incarceration in predominantly poor and minority neighborhoods erodes economic strength and increases crime.[259] Research has shown that a high concentration of formerly incarcerated residents destabilizes the community and reproduces the underlying forces that foster crime.[260]

Spatially concentrated incarceration also constrains minority communities' participation in the labor market and deepens the dearth of "social con-

253. Lyles-Chockley, *supra* note 173, at 270.

254. *Id.* at 271; *see also* CLEAR, *supra* note 10, at 70–90 (discussing how communities are affected by reentry); Cammett, *supra* note 1, at 1137–38; *see also* Jennifer Gonnerman, *Million-Dollar Blocks*, VILLAGE VOICE (Nov. 9, 2004), https://www.villagevoice.com/2004/11/09/million-dollar-blocks/ [https://perma.cc/2LMT-L665].

255. CLEAR, *supra* note 10, at 64; Lyles-Chockley, *supra* note 173, at 263 ("Because black Americans tend to live in racially and economically segregated neighborhoods, their communities feel the brunt of these staggering incarceration figures.").

256. TRAVIS ET AL., *supra* note 174, at 1 ("And this cycle of removal and return of large numbers of individuals, mostly men, is increasingly concentrated in a relatively small number of communities that already encounter enormous social and economic disadvantages."); Lyles-Chockley, *supra* note 173, at 263.

257. This phenomenon is referred to as the "concentration of incarceration." *See, e.g.*, Lyles-Chockley, *supra* note 173, at 278.

258. *See* Roberts, *supra* note 210, at 1281 ("Mass imprisonment damages social networks, distorts social norms, and destroys social citizenship."); Thompson, *supra* note 171, at 283–85 (discussing the disproportionate impact that barriers to reentry have on families when the individual reentering society is a woman).

259. CLEAR, *supra* note 10, at 5, 10.

260. *Id.* at 64–65; Todd R. Clear, *The Problem with "Addition by Subtraction": The Prison-Crime Relationship in Low-Income Communities*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 181, 193 (Marc Mauer & Meda Chesney-Lind eds., 2002).

nections to legal work within [a] neighborhood[].”[261] Employment discrimination against people with criminal records may also have a “spillover effect” by generating employment discrimination against entire neighborhoods associated with high crime or incarceration rates”[262] and also making businesses reluctant to locate in those communities.[263] The stigma that Black people with criminal convictions carry with them feeds a “devastating cycle in which ex-offenders are unable to successfully integrate into their communities; their communities experience social, economic, and political decline; and that decline contributes to the conditions that foster stigma-inducing crime in the first place.”[264]

Black communities, in particular, suffer from the stigma of concentrated incarceration and the belief that “a community’s high incarceration rate is proof that it is not a good place to live or conduct business.”[265] The result not only is harmful for individual residents of those communities but also encourages further White flight and White self-segregation. Research has shown that White population loss is “strongly associated with the socioeconomic decline of neighborhoods.”[266] It should not be a surprise that most people with other options—disproportionately, White people—would avoid or flee neighborhoods of concentrated poverty and instability that lack access to stable jobs, essential government services, and private investment. Racial discrimination is also a factor reinforcing the general inclination that White people may have to live in predominantly White communities. This inclination is driven by anti-Black sentiments and stereotypes as well as the real or perceived differences in the level of crime and quality of homes, schools, services, and amenities between predominantly White and predominantly minority neighborhoods.[267]

V. THE POTENTIAL OF THE FAIR HOUSING ACT OF 1968 AND THE SEGREGATIVE EFFECTS CAUSE OF ACTION

Communities have a right to be safe. But they must pursue that goal in a way that does not unnecessarily increase or perpetuate racial segregation. Although the ostensible benefits of crime-free ordinances are significant, the tenant-screening and eviction requirements common to these ordinances are

261. Roberts, *supra* note 210, at 1294.

262. *Id.* (quoting Bruce Western et al., *Black Economic Progress in the Era of Mass Imprisonment*, *in* INVISIBLE PUNISHMENT, *supra* note 260, at 165, 178).

263. Lyles-Chockley, *supra* note 173, at 274–75.

264. *Id.* at 271.

265. *Id.* at 270.

266. Samuel H. Kye, *The Persistence of White Flight in Middle-Class Suburbia*, SOC. SCI. RES., May 2018, at 38, 39–40 (citing William H. Frey, *Black In-Migration, White Flight, and the Changing Economic Base of the Central City*, 85 AM. J. SOC. 1396 (1980)).

267. Krysan et al., *supra* note 251, at 543–44 (finding data to support the theory that “whites who endorse negative stereotypes about African-Americans will, more than those who do not endorse stereotypes, be influenced by neighborhood racial composition”).

not sufficiently related to the goal of creating safe communities. These ordinances erect a racially exclusionary barrier too vast to justify the role they will play in perpetuating racial segregation. It is becoming increasingly difficult to use the law to challenge racial inequality, in large part because proving a constitutional violation requires a showing of intentional discrimination.[268] This is not, however, true with respect to the Fair Housing Act of 1968. This Part will explore the potential to raise segregative effects claims under the Fair Housing Act to challenge the racially exclusionary impact of crime-free housing ordinances.

A. *The FHA's Segregative Effects Provision*

The Fair Housing Act of 1968 (FHA or the Act) can be a powerful tool to address the racial segregation wrought by systemic exclusion through local laws. Although municipalities are traditionally afforded wide discretion in zoning and setting other housing policies,[269] the Act is a check on that wide discretion.[270] Indeed, it was designed to promote "open, integrated residential housing patterns and to prevent the increase of segregation . . . of racial groups."[271] The Act was passed pursuant to congressional authority under the Thirteenth Amendment in order "to eliminate the badges and incidents of slavery" brought by housing discrimination.[272] In ruling on the reach of the Civil Rights Act of 1866—also passed pursuant to Congress's authority under the Thirteenth Amendment—the Supreme Court said that "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."[273]

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268. Washington v. Davis, 426 U.S. 229, 239–40 (1976) (holding that a showing of intentional discrimination is required to establish a violation of the Equal Protection Clause).

269. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 2, 7–9 (1974) (upholding an ordinance limiting the number of unrelated people who may live together in a home).

270. United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974) ("The discretion of local zoning officials . . . must be curbed where 'the clear result of such discretion is the segregation of low-income Blacks from all White neighborhoods.' " (quoting Banks v. Perk, 341 F. Supp. 1175, 1180 (N.D. Ohio 1972))); *id.* at 1185 ("[W]hatever the law was once . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." (quoting Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967))).

271. Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1133–34 (2d Cir. 1973); *see also* Metro. Hous. Dev. Corp. v. Village of Arlington Heights (*Arlington Heights II*), 558 F.2d 1283, 1289 (7th Cir. 1977) (quoting *Otero*, 484 F.2d at 1134).

272. Mitchell v. Cellone, 389 F.3d 86, 87–88 (3d Cir. 2004) (reaffirming that the Fair Housing Act, 42 U.S.C. § 3601–3619 to be a "valid exercise of congressional power under the Thirteenth Amendment to eliminate [the] badges and incidents of slavery"); *Black Jack*, 508 F.2d at 1184 ("The Act was passed pursuant to congressional power under the Thirteenth Amendment to eliminate the badges and incidents of slavery.").

273. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437–43 (1968).

The FHA has been most frequently used to combat traditional acts of intentional discrimination. But the Act also provides for two distinct types of claims that challenge practices that have a disproportionately adverse effect on minorities: disparate impact and segregative effects.[274] The segregative effects cause of action prohibits policies or practices that harm communities by "creat[ing], increas[ing], reinforc[ing], or perpetuat[ing] segregated housing patterns" without any requirement to establish intentional discrimination.[275] In focusing on the community-based impact of housing policies and practices, the segregative effects provision presents a mechanism to prevent predominantly White communities from fencing out integration and shines a light on the perpetrators of exclusionary practices. The Act recognizes that "conduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment" to replace segregation with integrated living patterns.[276]

The Supreme Court's decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*[277] partially lifted the cloud of uncertainty that once hung over discriminatory effects theories of liability under the FHA.[278] In affirming that disparate impact theories are cognizable under the FHA, the Court found that such claims were consistent with the central purpose of the Act.[279] The Court stated that the FHA mandates the "removal of artificial, arbitrary, and unnecessary barriers" and that this mandate could not be fulfilled if policies and practices that arbitrarily create discriminatory effects or perpetuate segregation continue unchecked.[280] Challenging "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification" is "at the heartland of disparate-impact liability."[281] The Court also concluded that discriminatory effects theories play a critical role

274. Schwemm, *supra* note 28, at 710; *see also* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2525 (2015).

275. 24 C.F.R. § 100.500(a) (2018).

276. *Arlington Heights II*, 558 F.2d at 1289; *see also* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (stating that the Fair Housing Act not only protects those against whom "discrimination is directed but also those whose complaint is that the manner of managing a housing project affects 'the very quality of their daily lives' " (quoting Shannon v. U.S. Dep't of Hous. & Urban Dev., 436 F.2d 809, 818 (3d Cir. 1970))).

277. 135 S. Ct. 2507.

278. Before the Supreme Court's decision in *Inclusive Communities*, every circuit court to address the question concluded that practices with a discriminatory effect were prohibited under the FHA without establishing proof of discriminatory intent. ROBERT G. SCHWEMM & SARA K. PRATT, NAT'L FAIR HOUS. ALL., DISPARATE IMPACT UNDER THE FAIR HOUSING ACT: A PROPOSED APPROACH 3, 6–7 (2009). However, the Supreme Court had never directly addressed the question. *Id.* at 4.

279. *Inclusive Communities*, 135 S. Ct. at 2521.

280. *Id.* at 2522 (internal quotation marks omitted) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

281. *Id.* at 2521–22.

in unearthing discriminatory intent: they "permit[] plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."[282] Now, with the Court's ratification, advocates should explore the full potential of the Act to challenge exclusionary local laws, such as crime-free housing ordinances.[283]

In 2013, HUD promulgated regulations establishing[284] uniform standards for evaluating both types of FHA effects claims, with both types of claims assessed using a single burden-shifting test.[285] Generally, under the first step, the plaintiff bears the initial burden of establishing a prima facie case that "a challenged practice caused or predictably will cause a discriminatory effect."[286] If the plaintiff establishes a prima facie case, the defendant bears the burden to prove that its "challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[287] If the defendant meets this burden, the final step shifts the burden back to the plaintiff to establish that the defendant's interest "could be served by another practice that has a less discriminatory effect."[288]

In a segregative effects case, establishing a prima facie case under the first step of the burden-shifting analysis requires three distinct elements—the plaintiff must: (1) challenge a distinct practice or policy of the defendant; (2) use statistical evidence to show that the identified practice creates, increases, reinforces, or perpetuates segregated housing patterns in the rele-

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282. *Id.* at 2522.

283. Despite the Court's decision in *Inclusive Communities*, the current makeup of the Supreme Court and the uncertainty of future appointments may indicate that now is not the time to explore the limits of disparate impact under the FHA. In light of the conservative turn of the Supreme Court, progressive advocates face a dilemma similar to the one faced by social justice advocates in the 1990s. *See* Deborah N. Archer, *Political Lawyering for the 21st Century*, DENV. L. REV. (forthcoming 2019) (manuscript at 15–16) (on file with the *Michigan Law Review*). Social justice advocates may also use the threat of litigation to persuade local jurisdictions to change their housing policies without the need to actually file a lawsuit. *See id.* (manuscript at 27). For example, after the threat of litigation, Hesperia, California, removed provisions requiring mandatory evictions by police or landlords for tenants in violation of the crime-free ordinance. De La Cruz, *supra* note 93.

284. HUD is the federal agency tasked with enforcing and administering the Fair Housing Act; therefore, HUD's regulations are entitled to substantial deference. Meyer v. Holley, 537 U.S. 280, 287–88 (2003). Moreover, the regulations are virtually identical to the test the Supreme Court adopted for disparate impact claims in *Inclusive Communities*. However, it is important to note that HUD under the Trump Administration is currently reconsidering its implementation of the disparate impact standard under the FHA. *See* Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 28560 (proposed June 20, 2018) (to be codified at 24 C.F.R. pt. 100).

285. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013); 24 C.F.R. § 100.500(c) (2013).

286. 24 C.F.R. § 100.500(c)(1).

287. *Id.* § 100.500(c)(2).

288. *Id.* § 100.500(c)(3).

vant community; and (3) establish that the challenged practice is the cause of the segregative effect.[289] The precise requirements under each stage of this analysis are less well defined for segregative effects claims than they are for disparate impact claims. In part, this is because segregative effects claims are brought less frequently, and when they are brought, they have generally been limited to zoning decisions or other local government actions that prevent the development of a housing project in a predominantly White area.[290] Understanding the full reach of the segregative effects theory is further complicated because, unlike the disparate impact theory, segregative effects claims are not analogous to Title VII disparate impact claims.[291] However, the limited case law on segregative effects claims and HUD guidance shed some light on the ways the segregative effects theory can be used to prevent predominantly White communities from taking actions to shield their neighborhoods from integration, and also address the impact those actions have on surrounding neighborhoods.[292]

While crime-free housing ordinances are vulnerable to both types of discriminatory effects causes of action, there are important distinctions between disparate impact claims and segregative effects claims that suggest the latter may be better suited to challenge the predictable segregative effects of crime-free housing ordinances in the housing market.[293] While disparate impact claims focus on a particular policy, segregative effects claims may be brought to challenge individual housing actions or decisions, in addition to

289. 78 Fed. Reg. at 11,468–69; Schwemm, *supra* note 28, at 712–13; *see also* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2523–24 (2015) (discussing the requirements a plaintiff must meet to make out a prima facie showing of disparate impact).

290. Schwemm, *supra* note 28, at 715, 737 (discussing the first cases brought as segregative effects claims and how they shaped the body of case law regarding this claim).

291. *Id.* at 711.

292. *See generally, e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 940–41 (2d Cir. 1988) ("[W]e conclude that the strong showing of discriminatory effect resulting from the Town's adherence to its R-3M zoning category and its refusal to rezone the Matinecock Court site far outweigh the Town's weak justifications."); Metro. Hous. Dev. Corp. v. Village of Arlington Heights (*Arlington Heights II*), 558 F.2d 1283, 1283 (7th Cir. 1977) (holding that the Village of Arlington Heights "had [a] statutory obligation under the Fair Housing Act to refrain from zoning policies that effectively foreclosed construction of any low-cost housing within its corporate boundaries"); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974) (striking down an ordinance prohibiting construction of new multifamily dwellings); Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526 (N.D. Tex. 2000) (finding town zoning ordinances to have discriminatory effect and to have been maintained with discriminatory intent); Summerchase Ltd. P'ship I v. City of Gonzales, 970 F. Supp. 522, 541 (M.D. La. 1997) (denying defendant's motion for summary judgment on the claim that the city's refusal to grant a permit "has a discriminatory effect on minorities because it has a segregative effect").

293. Under the Obama Administration, HUD defended the important role of recognizing segregative effects claims in addition to disparate impact claims. HUD noted that the elimination of segregation was central to the enactment of the Fair Housing Act. 78 Fed. Reg. at 11,469.

broad policies.[294] This distinction can be critical in challenging ostensibly individual housing determinations—such as a landlord's decision to evict a tenant or not rent to a prospective tenant—that cumulatively further racially segregated housing patterns, particularly where those individual decisions are in furtherance of an explicit community-based goal. In an example used by the Supreme Court in *Inclusive Communities*, "a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all."[295] Under a regime of crime-free ordinances, a municipality may argue that an individual property owner's decision whether to rent to a particular tenant cannot be deemed a policy because of the unique factors that may attend each individual decision. But under a segregative effects cause of action, a plaintiff can challenge the collective impact of a series of isolated decisions (here, the seemingly individual decisions by a landlord) that converge to undermine the goal of combating segregation.[296]

Disparate impact claims focus on how the challenged policy has affected a specific group.[297] However, the reach and harms of segregation are not limited to one group of individuals. Significantly, segregative effects claims focus on the harm done to "the whole community,"[298] with the goal of "achiev[ing] racial integration for the benefit of all people in the United States."[299] In focusing on the impact to "the whole community," segregative

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294. *See Inclusive Cmtys.*, 135 S. Ct. at 2523 (indicating that a disparate impact claim can only challenge a defendant's policy, not a one-time decision); 24 C.F.R. § 100.500 (2018); Schwemm, *supra* note 28, at 713; Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After* Inclusive Communities, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 685, 691 (2016) ("Unlike disparate-impact claims, segregative-effect claims may challenge a particular action or decision of the defendant as well as an across-the-board policy or practice."). For examples of cases where the plaintiffs challenged individual housing decisions, see, for example, *Huntington Branch*, 844 F.2d at 937–941; *Arlington Heights II*, 558 F.2d 1283; *Black Jack*, 508 F.2d 1179.

295. *Inclusive Cmtys.*, 135 S. Ct. at 2523.

296. Because the exclusions and evictions ultimately are made in order to comply with a housing ordinance, they are arguably a single, general policy. *See* Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 619 (2d Cir. 2016) (finding a zoning *policy* at issue, rather than " 'one-off' zoning 'decision[s],' " where individual zoning decision was linked to a required change in local law to facilitate the construction).

297. *See* 24 C.F.R. § 100.500(a) ("A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.").

298. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 2706 (1968) (statement of Sen. Javits)); *see also Huntington Branch*, 844 F.2d at 937; *Arlington Heights II*, 558 F.2d at 1290; Schwemm, *supra* note 28, at 714; Schwemm & Bradford, *supra* note 294, at 691 ("Historically, most perpetuation-of-segregation claims have been made against municipal defendants accused of blocking integrated housing developments in predominantly white areas.").

299. H.R. Res. 1095, 110th Cong., 154 CONG. REC. H2280–01 (daily ed. Apr. 15, 2008).

effects claims also have the potential to recognize not only the impact on racial segregation in the communities that adopt racially exclusionary policies or practices, but also the ripple effects that adoption has in surrounding communities.[300]

In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, the Seventh Circuit explained the distinction:

> There are two kinds of racially discriminatory effects which a facially neutral decision about housing can produce. The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.[301]

In *Arlington Heights II*, the court found a segregative effects claim viable where a disparate impact claim failed because of the nature of the impact of the challenged housing decision. In *Arlington Heights II*, plaintiffs sought to compel the Village of Arlington Heights to rezone property to allow the construction of federally subsidized housing.[302] The plaintiff raised a disparate impact and a segregative effects claim.[303] The court found the disparate impact argument to be "relatively weak" because although the village's zoning decision affected a significantly *disproportionate percentage* of minorities, the decision also theoretically disadvantaged a *greater number* of White people "because sixty percent of the people in the Chicago area eligible for federal housing subsidization [at the time] were white."[304] The court concluded that "[t]he argument for *racial* discrimination [under a disparate impact theory] is therefore not as strong as it would be if all or most of the group adversely affected was nonwhite."[305] However, relying on similar decisions in *United*

300. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1183 (8th Cir. 1974) (recognizing a segregative effects claim where the exclusion of Black people from the targeted community resulted in the "confinement of a disproportionate number of them in overcrowded or substandard accommodations" in the city (quoting United States v. City of Black Jack, 372 F. Supp. 319, 325 (E.D. Mo. 1974))).

301. *Arlington Heights II*, 558 F.2d at 1290; *see also Trafficante*, 409 U.S. at 209–10 ("While members of minority groups were damaged the most from discrimination in housing practices, the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered.").

302. *Arlington Heights II*, 558 F.2d at 1285.

303. *See id.* at 1283. The plaintiffs also alleged that the village's actions violated their rights under the Equal Protection Clause. *Id.* at 1286.

304. *Id.* at 1291.

305. *Id.* The court did not note, however, that a housing policy with an impact on both white people and minorities is not automatically immune from challenge under a disparate impact theory. *Id.* In *United States v. City of Black Jack*, 508 F.2d 1179, and *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), the courts found a disparate impact claim despite an impact that was not limited to minorities.

States v. Black Jack[306] and *Kennedy Park*,[307] the *Arlington Heights II* court noted that this type of effect would not preclude a segregative effects cause of action from proceeding:

> What was present in *Black Jack* and *Kennedy Park* was a strong argument supporting racially discriminatory impact in the second sense [involving the perpetuation of segregation]. In each case the municipality or section of the municipality in which the proposed project was to be built was overwhelmingly white. Moreover, in each case construction of low-cost housing was effectively precluded throughout the municipality or section of the municipality which was rigidly segregated. Thus, the effect of the municipal action in both cases was to foreclose the possibility of ending racial segregation in housing within those municipalities.[308]

Finally, the impact on segregation need not be substantial,[309] nor must the challenged prohibition be the sole factor contributing to racial segregation in the community.[310] A segregative effects claim could be pursued where the challenged action is moving a community from 80 percent White to 90 percent White, or where the challenged action blocks a move that would have modestly decreased the percentage of White residents in a predominantly White community, because it "increases" or "reinforces" segregated housing patterns.[311]

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306. In *Black Jack*, the city enacted a zoning ordinance prohibiting the construction of new multiple-family dwellings. 508 F.2d at 1183.

307. In *Kennedy Park*, the city imposed a moratorium on the construction of new subdivisions, a category into which the proposed project fell. 436 F.2d at 111.

308. *Arlington Heights II*, 558 F.2d at 1291.

309. *See* Schwemm, *supra* note 28, at 740 ("Still, most courts have followed a similar analysis; that is, so long as the plaintiff can show that a proposed housing development is likely to include a sizeable portion of minorities, e.g., because it is subsidized in a racially diverse metropolitan area, a heavily white municipality that blocks such a project is perpetuating segregation.").

310. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937 (2d Cir. 1988) (finding a violation of segregative effects where a housing development with the goal of achieving a 25 percent minority population "would begin desegregating" a predominantly White neighborhood and a discriminatory effect where a disproportionately large percentage of minority households would be affected); *Black Jack*, 508 F.2d at 1186 ("Black Jack's action is but one more factor confining blacks to low-income housing in the center city, confirming the inexorable process whereby the St. Louis metropolitan area becomes one that 'has the racial shape of a donut, with the Negroes in the hole and with mostly Whites occupying the ring.' " (quoting Mahaley v. Cuyahoga Metro. Hous. Auth., 355 F. Supp. 1257, 1260 (N.D. Ohio 1973))). *But see* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2514 (2015) ("If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case . . . .").

311. Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 620 (2d Cir. 2016) (finding that a restriction on multifamily housing "perpetuates segregation generally because it decreases the availability of housing to minorities in a municipality where minorities constitute" a small percentage of the population (quoting Mhany Mgmt., Inc. v. County of Nassau, 843 F. Supp. 2d 287, 329 (E.D.N.Y. 2012))); *Huntington Branch*, 844 F.2d at 937–38 (finding that an ordinance restricting construction of low-income housing with a disproportionate percentage

B. *Applying the FHA to Crime-Free Ordinances*

Plaintiffs challenging a crime-free ordinance using a segregative effects cause of action will likely be able to establish a prima facie case. As discussed earlier, a policy that melds the criminal legal system and private housing market creates an all-encompassing web that will squeeze people of color out of communities and predictably further segregation. Crime-free ordinances increase, reinforce, and perpetuate segregated housing patterns because of their overbreadth. The exclusion and eviction of tenants based on contact with the criminal legal system imports the racial impacts of that system into an already segregated housing system. These ordinances may deter people with criminal legal contacts from ever looking for housing in the community, because they know they are not wanted, believe they will not make it through the background check, or fear the harassment, surveillance, and invasion of privacy that will come with living in a "crime-free" community. The potential impact is exacerbated by the racial realities of who is likely to rent their home compared to who is likely to own their home in the communities in which these ordinances are adopted.[312]

If a plaintiff is able to make out a prima facie case, the defendant will bear the burden to prove that its "challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[313] In determining whether the asserted interest rises to the level of a compelling governmental interest, a court must examine whether the public interest served by the ordinance is constitutionally permissible and whether the ordinance in fact furthers the governmental interest asserted.[314]

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of minority residents to an "urban renewal area" that was already 52 percent minority "significantly perpetuated segregation in the Town"); *id.* at 937 (finding a segregative effects violation where a housing development with a goal of a 25 percent minority population "would begin desegregating" a predominantly white neighborhood); *id.* (finding a discriminatory effect where a disproportionately large percentage of minority households would be affected); *Black Jack*, 508 F.2d at 1186 (finding a violation of the segregative effects cause of action where a housing development that would meet the housing needs of a class of people that were 32 percent Black was excluded because "[t]here was ample proof that many blacks would live in the development, and that the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent white").

312. *See Demographic Characteristics for Occupied Housing Units*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_5YR_S2502&prodType=table (on file with the *Michigan Law Review*) (indicating that Whites make up 76.8 percent of owner-occupied housing units). Crime-free ordinances also have the ability to exacerbate racial segregation by reducing the supply of rental housing in a community. *See* WERTH, *supra* note 1, at 5. If a landlord does not comply with orders to evict a tenant, the landlord's license can be revoked. *Id.* An unlicensed landlord cannot rent their property. *Id.* Rental revocations can decrease the availability of rental housing in a community, and decreases in rental housing disproportionately impact minorities, who make up just over 23 percent of owner-occupied housing units. *Id.* This aspect of crime-free ordinances is not addressed in this Article.

313. 24 C.F.R. § 100.500(c)(2) (2018).

314. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any

Generally, communities that adopt crime-free ordinances assert that enforcement of the ordinance will result in a reduction of crime, increased property values, improved quality of life, and safer rental properties.[315] While improving safety on rental properties—and all of the residual benefits asserted to come with that safety—is a legitimate community interest,[316] crime-free housing ordinances are not "necessary" to municipalities' interest in reducing crime. In light of the widespread racial bias and disparities in the criminal legal system, criminal legal system contacts will always be a problematic measure for access to housing. Moreover, because crime-free ordinances rely solely on arrests, penalize individuals for the conduct of friends or family members, and rely on an unconstrained range of previous convictions as indicators of future dangerousness, plaintiffs can argue that these ordinances will have a marginal impact on reducing crime at best, but have profound potential to deepen racial segregation.

First, crime-free ordinances are not necessary to improve safety to the extent that they rely on arrests or police suspicion to justify evictions or refusals to rent.[317] Neither an arrest nor police suspicion is proof that an individual has engaged in any criminal conduct, much less proof of their propensity to do so in the future. Indeed, the U.S. Supreme Court has recognized that "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense."[318] Lower federal courts have similarly found arrests to be of little probative value in determining whether a person engaged in any criminal conduct.[319] Moreover, in the specific context of landlord reli-

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classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.").

315. *See, e.g.*, *Crime Free Multi-Housing*, *supra* note 4 (warning that "drug criminals and other destructive tenants" operating out of rental units cause property damage, a decline in property value, and fires, in addition to presenting threats to other tenants' safety); *Crime Free Multi-Housing Program*, DUBLIN, CAL., http://www.ci.dublin.ca.us/118/Crime-Free-Multi-Housing-Program [https://perma.cc/EG55-6YRW] ("[P]roperty managers will reap the benefits of reduced crime, better community awareness, increased property values, more attractive neighborhoods, advertisement of participation, and improved quality of life.").

316. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2524 (2015) (warning against a broad interpretation of disparate-impact liability that would prevent government entities and private parties from, among other things, "ensuring compliance with health and safety codes").

317. As discussed *supra* Section II.B.3, under ICFA's model and municipal ordinances adopted around the country, a tenant risks eviction if he or she has engaged in or facilitated an act of criminal activity—which could potentially be understood broadly enough to include an arrest, or a stop resulting in neither arrest nor conviction.

318. Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 241 (1957).

319. *See, e.g.*, United States v. Berry, 553 F.3d 273, 284 (3d Cir. 2009) ("We therefore follow . . . the majority of our sister appellate courts and hold that a bare arrest record—without more—does not justify an assumption that a defendant has committed other crimes and it therefore can not support increasing his/her sentence in the absence of adequate proof of criminal activity."); United States v. Zapete-Garcia, 447 F.3d 57, 60 (1st Cir. 2006) ("[A] mere ar-

ance on arrest records in assessing whether a potential tenant or tenant creates a safety risk to other tenants, HUD has cautioned that

> [b]ecause arrest records do not constitute proof of past unlawful conduct and are often incomplete (*e.g.*, by failing to indicate whether the individual was prosecuted, convicted, or acquitted), the fact of an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual. For that reason, *a housing provider who denies housing to persons on the basis of arrests not resulting in conviction cannot prove that the exclusion actually assists in protecting resident safety and/or property*.[320]

In a parallel context, the EEOC has advised that rejecting employment applicants on the basis of arrest records is inconsistent with the business necessity defense under Title VII of the Civil Rights Act of 1964, again because an arrest alone does not establish that the individual has engaged in any criminal conduct.[321] Courts considering the legality of using arrest records to make hiring decisions have reached a similar conclusion. For example, in *Gregory v. Litton Systems, Inc*., the California district court held that an employer's policy of excluding people with arrests, but no convictions, from employment discriminated against Black applicants in violation of Title VII because there was "no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees."[322] The court went on to say that a "record of arrests without convictions, is irrelevant to [a person's] suitability or qualification for employment."[323]

In communities around the country, Black and Latinx people are arrested at astronomical rates, disproportionate to their rate in the general population and compared to White people.[324] While arrests do not establish any involvement in criminal activity, their use in crime-free housing ordinances

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rest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct."); *see also* U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 240, at 5 (noting the Supreme Court's decision in *Schware*); Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987 (2019) (examining how the general, incorrect fusion of arrest and guilt spells out the need for different kinds of criminal justice reform). *But see* Paul v. Davis, 424 U.S. 693, 713 (1976) (rejecting the claim that there is a constitutional right to privacy in arrest information).

320. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 240, at 5 (emphasis added).

321. EEOC, *supra* note 245, at 12, 40 n.103 ("The mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct." (quoting *Schware*, 353 U.S. at 241)).

322. 316 F. Supp. 401, 402 (C.D. Cal. 1970).

323. *Gregory*, 316 F. Supp. at 403.

324. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 240, at 2; HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 84 (2004), https://www.hrw.org/sites/default/files/reports/usa1104.pdf [https://perma.cc/Z8FD-2SPU] ("Racial disparities among those arrested, sentenced, and incarcerated for criminal offenses in the United States are immense . . . .").

contributes substantially to the disproportionate impact on Black and Latinx tenants and housing applicants and to the potential for segregative impact.[325]

Making housing actions based on stops or police suspicion is even more flimsy than those based on arrests, and even more likely to contribute to the perpetuation of racial segregation.[326] Because the Court has set the legal bar justifying a stop so low[327] and virtually removed it for police suspicion, these provisions create the opportunity for broad abuse.[328] Essentially, many crime-free housing ordinances allow police officers to pick and choose who may live in their community simply by making the unreviewable assertion that an applicant or tenant is under suspicion of illegal activity.[329]

Unguided and unrestrained reliance on criminal history records also contributes to racial exclusion. Criminal records have become widely available and easily accessible.[330] In light of the relative ease in obtaining criminal

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325. *See* Aleksandar Tomic & Jahn K. Hakes, *Case Dismissed: Police Discretion and Racial Differences in Dismissals of Felony Charges*, 10 AM. L. & ECON. REV. 110 (2008) (finding evidence that Blacks are erroneously arrested on certain felony charges at a higher rate than Whites); *see also* HUMAN RIGHTS WATCH, *supra* note 324, at 83 ("African Americans are also disproportionately represented among those who have criminal records, and as such are much more likely to be rejected for public housing on this basis."); *supra* notes 187–202 and accompanying text.

326. *See supra* Part IV.

327. *See* Terry v. Ohio, 392 U.S. 1 (1968) (permitting a police officer to conduct a stop and frisk on the basis of reasonable suspicion as opposed to the probable cause standard required for arrests); *see also* Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of* Terry v. Ohio, 34 HOW. L.J. 567 (1991) (detailing the ways in which cases following *Terry* have increased police's ability to stop and frisk suspects on the basis of a number of factors, including race).

328. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820 (2015) ("Recent litigation over New York City's stop-and-frisk policy highlights the racial impact that order-maintenance policing can have. . . . While the vast majority of those subject to *Terry* stops were not arrested, blacks were thirty percent more likely to be arrested for the same alleged crime than similarly situated whites."); Roberts, *supra* note 319, at 6–7; Williams, *supra* note 327, at 569 (detailing the author's father's experience of being arrested by a police officer who told the father, "I'm arresting you on suspicion of burglary, and the law says I can keep your black ass in jail for seven days before I charge you").

329. *See* WERTH *supra* note 1, at 4. Most tenants do not challenge their evictions, making the decision to evict effectively the final decision. *See* Been & Bozorg, *supra* note 64, at 1432 (noting that tenants "face considerable challenges in housing court" and have a high rate of default judgments against them). The eviction itself also leads to future problems. "The mark of eviction on one's record often prevents tenants from securing affordable housing in a decent neighborhood, and it disqualifies them from many housing programs." Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 137 (2013); *see also* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2017) (describing the ways in which eviction can affect people's lives).

330. *See* James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177 (2008); *see also* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 395 (2006) ("At least ten (open-records) states treat criminal conviction records as public documents; at least three states provide that any member of the public may, for a fee, obtain any person's rap

records, landlords and other housing providers have embraced them as tools to assess the suitability of potential tenants.[331] The result is an increased likelihood that an individual will be rejected for housing because of his or her criminal record.[332] Although a criminal conviction is evidence that an individual engaged in criminal conduct, municipalities that employ broad or blanket policies requiring or encouraging exclusion or evictions will have difficulty establishing that the ordinance is necessary to achieve its interest in safety.

It is, arguably, understandable that a landlord might have concerns about renting to certain people with criminal convictions; a landlord might worry, for example, that a recently released arsonist may present a future danger to other tenants and his property.[333] But there is an important distinction between landlords making individual determinations about specific applicants and municipalities mandating exclusion through ordinances. The law should not paint all people with criminal convictions with the same brush.[334] Plaintiffs could argue that crime-free housing ordinances are overbroad to the extent that they require landlords to consider prospective tenants' criminal histories without considering the nature of the conviction, when it took place, or its relevance to the other tenants' safety. Crime-free ordinances that exclude people with a conviction regardless of how old the

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sheet."); Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 511 (2013) ("Indeed, federal law has arguably made criminal records more accessible.").

331. Jacobs & Crepet, *supra* note 330, at 177–78.

332. *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 145–48 (2009) (discussing the obstacles that public housing law and practice present for applicants with criminal records).

333. There is evidence that recidivism rates are declining. Adam Gelb & Tracy Velázquez, *The Changing State of Recidivism: Fewer People Going Back to Prison*, PEW (Aug. 1, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/08/01/the-changing-state-of-recidivism-fewer-people-going-back-to-prison [https://perma.cc/263N-ZMAH] (reporting that "[t]he share of people who return to state prison three years after being released . . . dropped by nearly a quarter" between 2005 and 2012). Ironically, the lack of access to safe, affordable housing is among the key contributors to high recidivism rates. *See* CLEAR, *supra* note 10, at 58–60 (discussing the cyclical effects of policies targeting people who have been released from prison); Archer & Williams, *supra* note 171, at 539 ("Denial of subsistence benefits and subsidized housing makes it harder for ex-offenders both to meet the basic needs of their families and to exercise the economic and personal autonomy that many take for granted."); Favors, *supra* note 171, at 62–63 (discussing reasons why housing poses a problem for individuals reentering their communities after being incarcerated); Thompson, *supra* note 171, at 278 ("Housing has always presented a problem for individuals returning to their communities following a period of incarceration.").

334. Regardless of whether a landlord may have a legitimate concern about renting to a specific person, as a general matter people with criminal convictions must be able to find a place to live upon returning home. Communities should not be able to ban them from living in private rental housing, especially not without provision of comparable housing elsewhere in the community.

conviction is,[335] the nature of the underlying conduct, or the individual's postconviction record cannot meet defendants' heavy burden under the segregative effects clause of serving a "substantial, legitimate, nondiscriminatory interest[]" of improving safety.[336]

Here, an analysis under Title VII offers instructive guidance. In *Green v. Missouri Pacific Railroad Co.*, the Eighth Circuit held that a blanket ban on hiring people with a criminal record violated Title VII. The court could "not conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed."[337] Similarly, no court can justify a rule that places any individual convicted of any offense in the permanent ranks of the homeless. Municipalities and landlords should be required to show that their crime-free ordinances effectively and accurately "distinguish[] between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not."[338] Crime-free ordinances make no such distinction. Rather, ordinances encourage landlords to cast an exceedingly wide net in considering convictions and other criminal legal system contacts.

Reliance on criminal history records is also problematic because of the degree of inaccuracy in commercial databases. These databases and services, particularly those that rely on name-based searches, are often riddled with errors.[339] Specifically, many of these commercial databases report outdated convictions that have been reversed or expunged, report as felonies convictions that were ultimately downgraded to misdemeanors, include criminal records wrongly attributed to innocent individuals (including victims of identity theft), and incorrectly report multiple instances of what was actually a single criminal act.[340] Significantly, "there is no mechanism for correcting

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335. Passage of time is a particularly important factor given research that shows that "over time, the likelihood that a person with a prior criminal record will engage in additional criminal conduct decreases until it approximates the likelihood that a person with no criminal history will commit an offense." U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 240, at 7; *see also* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 332–33 (2009) (claiming that, as time passes after a person's last criminal act, there is a point at which the risk of their reoffending subsides to the level of the general population).

336. 24 C.F.R. § 100.500(c)(2) (2018).

337. Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1298 (8th Cir. 1975).

338. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 240, at 6 (citing El v. Se. Pa. Transp. Auth., 479 F.3d 232, 244–45 (3d Cir. 2007) (stating that "Title VII . . . require[s] that the [criminal conviction] policy under review accurately distinguish between applicants that pose an unacceptable level of risk and those that do not")).

339. *See* CRAIG N. WINSTON, NAT'L ASS'N OF PROF'L BACKGROUND SCREENERS, THE NATIONAL CRIME INFORMATION CENTER: A REVIEW AND EVALUATION 14–15 (2005) (finding that "[s]erious problems remain in the process to link dispositional information to the proper case and charge").

340. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 240, at 6 n.29 (noting that databases may be outdated and contain errors); PERSIS S. YU & SHARON M. DIETRICH, NAT'L CONSUMER

or altering" incorrect information reported by online providers.[341] And crime-free housing ordinances fail to require safeguards against erroneous reporting that many employers, licensing bureaus, and financial institutions use when checking criminal history information.[342]

In rebuttal, there is a strong likelihood that a plaintiff could establish that a municipality's interest in improving safety and reducing crime in rental properties can be served through less discriminatory means.[343] To truly minimize the potential for advancing or perpetuating segregation, municipal housing ordinances should not rely on contacts with the criminal legal system as a measure of the danger a tenant poses to his neighbors. At a minimum, the segregative effects of these ordinances could be reduced by significantly narrowing their reach.

First, exclusions and evictions based on arrests and suspicions do little to target actual crime, but their inclusion is a significant driver of racial exclusion. The majority of stops and arrests of people of color are for relatively minor infractions that evince no signs of future dangerousness, and the discretion inherent in a decision to arrest is often employed in racially discriminatory ways.[344] If contacts with the criminal legal system must be a factor, municipalities should require a criminal conviction—arrests and accusations

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LAW CTR., BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES 26 (2012), https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf [https://perma.cc/R6A8-YE8A] ("Background screening agencies are also known to report single arrests or incidents multiple times."); Sharon M. Dietrich, *Preventing Background Screeners from Reporting Expunged Criminal Cases*, SARGENT SHRIVER NAT'L CTR. ON POVERTY L. (Apr. 2015), http://povertylaw.org/clearinghouse/stories/dietrich [https://perma.cc/8JTN-YHZL] ("But around the country the commercial background-screening industry, which runs the lion's share of the background checks obtained by employers and landlords, sometimes reports these expunged cases long after they have been removed from the public record."); Michael Liedtke, *This Woman Learned the Hard Way that Background Checks May Contain Huge Errors*, BUS. INSIDER (Dec. 17, 2011, 7:46 AM), https://www.businessinsider.com/this-woman-learned-the-hard-way-that-background-checks-may-contain-huge-errors-2011-12 [https://perma.cc/ST2Q-37KE] (telling the stories of multiple people who lost job offers or suffered other injuries due to erroneous reporting by background check companies).

341. Shawn Bushway et al., *Private Providers of Criminal History Records: Do You Get What You Pay For?*, *in* BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 174, 192 (Shawn Bushway et al. eds., 2007) ("An individual who wants to correct an error in the private system would have to deal with each and every company who provides information on background checks, a nearly impossible task.").

342. *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. § 1681(b) (2012) (requiring "that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information").

343. First, it is important to note that in many municipalities there is strong evidence of intentional racial discrimination surrounding the adoption of crime-free housing ordinances. So there may be open questions as to actual motivation.

344. *See* K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 280–92 (2009).

should not form the basis to deny a housing application or trigger eviction proceedings.

Municipalities could also stop encouraging or requiring landlords to penalize tenants without regard to their knowledge of or responsibility for the alleged crime at issue. Many crime-free lease addenda seek to hold tenants responsible for crimes or actions they did not commit by virtue of their familial or social relationships.[345] Evicting people without regard to their knowledge of or responsibility for the crime is not a reasonable measure to assess the suitability of a tenant, but will further racial exclusion.

Where convictions are considered, municipalities can require landlords to limit segregative impact by precluding unrestrained reliance on criminal history records. Ordinances could require landlords to focus on convictions for the types of crimes that may be harmful to the community, as supported by empirical evidence.[346] Municipalities that insist on using criminal history should be required to employ reasonable look-back periods and conduct an individualized assessment of relevant mitigating information beyond that contained in an individual's criminal background check. Relevant factors might include the individual's postconviction rental history, the nature of the underlying conduct, the age of the conviction, the age of the individual at the time of conviction, and the individual's postconviction record generally.[347] These measures are analogous to the guidelines the EEOC has endorsed when potential employers choose to rely on criminal history.[348] Finally, municipalities could limit the points at which criminal history may be consid-

345. *E.g.*, SCHAUMBURG, ILL., CODE § 99.10.05(F)(3)–(4) (2015) (establishing liability for the tenant whether or not the guest is under their control); FARIBAULT, MINN., CODE § 7-43(1) (2017) ("It shall be the responsibility of the licensee to prevent disorderly conduct by tenants and their guests on the licensed premises."); *see also Landlords Sue City*, *supra* note 205 (discussing the Cedar Rapids, Iowa lease addendum that held tenants responsible for acts committed by guests).

346. Many categories of institutions must pass a high burden when they seek to increase diversity and take measures to make their institutions more diverse and inclusive. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (applying strict scrutiny and finding that the law school had a compelling interest in taking race into account in order to improve diversity given the school's highly individualized and comprehensive review of each applicant). Municipalities seeking to exclude or evict individuals using racialized criteria should be required to meet a similar burden and rely on empirical evidence rather than instinct, stereotypes, misperceptions, and bias.

347. *See* U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 240, at 7 (suggesting certain factors that may be used to screen applicants, because "individualized assessment of relevant mitigating information beyond that contained in an individual's criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account").

348. EEOC, *supra* note 245, at 2 (advising employers who wish to use criminal history to engage in "a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job" and "then provide[] an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity").

ered; for example, only allowing consideration of criminal history after the tenant has otherwise been deemed qualified.[349]

CONCLUSION

Communities across the United States are beginning to acknowledge the racially disparate impact and far-reaching harms caused by exclusions based on criminal legal system contacts. As a result, there has been progressive movement toward inclusion in areas including employment and political participation. But, for the most part, we have not paid sufficient attention to the ways contact with the criminal legal system affects people's access to housing. My goal in this Article was to highlight this problem by engaging with the proliferation of crime-free ordinances. These ordinances trade on criminal legal system contacts and effectively expel people of color, especially Black people. This expulsion is having the effect of "Whitening" some communities and "Blackening" others, facilitating racial segregation. That, without more, is worrisome. But segregation carries with it additional harms, including inferior education, increased crime, and under- and unemployment. Understood in this way, crime-free ordinances are an engine for racial and economic inequality.

Failure to challenge the proliferation of crime-free housing ordinances and adopt the proposals this Article propounds will exacerbate people of color's exposure to poverty, crime, over-policing, and incarceration. Ensuring the safety of all communities is critically important and should be a priority. Everyone has a right to feel safe in his or her home or community. But crime-free housing ordinances will not make communities safer. They will continue to divide us, further entrenching racial bias and segregation.

349. For example, New York City's Fair Chance Act (FCA) restricts most employers' use of criminal history in the hiring process. N.Y.C. COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON THE FAIR CHANCE ACT (2016), https://www1.nyc.gov/assets/cchr/downloads/pdf/FCA-InterpretiveGuide-112015.pdf [https://perma.cc/VT3C-ZYZW] (outlining the requirements of the FCA). The law imposes affirmative obligations on covered employers who want to conduct criminal background checks on job applicants and a process that must be followed before making an adverse decision on the basis of the applicant's criminal history. *Id.* at 6. Among the restrictions is the prohibition of any statement or inquiry relating to a pending arrest or criminal conviction during an interview or at any point prior to a conditional offer being made. *Id.* at 3, 5.