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One-Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law

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ABSTRACT

In recent years, local governments across the country have passed crime-free housing ordinances (CHOs) for private-market rental properties. These ordinances increase the risk of eviction for many tenants by requiring or encouraging private-market landlords to evict tenants for low-level criminal activity, sometimes even a single arrest. CHOs are based on a federal law known as the one-strike policy, which has been applied to public housing tenants since 1988 and upheld by the U.S. Supreme Court in 2002. Unlike the one-strike policy, which applies only to federal public housing tenants, CHOs put an unprecedented number of private-market tenants across the country at significant risk of eviction and its attendant consequences, including homelessness, neighborhood instability, and higher incidences of poverty. This Article examines CHOs as an outgrowth of the federal one-strike policy, and it argues that they are significantly more harmful to tenants than the one-strike policy has been. The Article identifies serious legal issues raised by CHOs and suggests that, before adopting or enforcing CHOs, municipalities should consider these legal problems in conjunction with the crime problem that CHOs purport to address and the other problems that CHOs can create. This more complete calculus weakens the case for crime-free housing ordinances in rental housing.

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INTRODUCTION

Larry Tutt, a lifelong resident of the District of Columbia, spends his weekday mornings greeting commuters going in and out of the Metro stop on K Street, just a few blocks away from the White House.[1] Mr. Tutt is a Vietnam veteran, disabled, mentally ill, and formerly incarcerated.[2] While he is fortunate to have stable housing in D.C., he very nearly lost his apartment in 2013 after police smelled marijuana coming from his unit and arrested him.[3] Although the misdemeanor possession charge was dismissed by the prosecutor, the District of Columbia Attorney General's Office sent a letter to Mr. Tutt's landlord informing the landlord that Mr. Tutt was a nuisance, stating, "It is [the landlord's] responsibility to ensure that your property is not used in a manner that is detrimental to the welfare of the surrounding area."[4] While the letter did not require the landlord to evict Mr. Tutt, such letters often include pamphlets on how to initiate and carry out evictions, and landlords are encouraged to evict tenants after receiving a nuisance letter.[5] Mr. Tutt had advocates who intervened on his behalf and stopped the eviction, but other D.C. residents have not been so lucky after run-ins with law enforcement.[6] Between 2013 and 2016, approximately three dozen people "who were charged with misdemeanor marijuana possession or faced no charges at all" were subject to eviction under D.C.'s law.[7]

The situation in the nation's capital is not unique. Across the country, municipalities are passing and enforcing nuisance eviction and "crime-free housing" laws that are ostensibly aimed at preventing and reducing crime, but

1. Petula Dvorak, *Good Morning Man: He's What Our Election-Stressed Nation Needs Right Now*, WASH. POST (Oct. 20, 2016), https://www.washingtonpost.com/local/good-morning-man-hes-what-our-election-stressed-nation-needs-right-now/2016/10/20/9a4f4f12-96e0-11e6-bb29-bf2701dbe0a3_story.html [https://perma.cc/7LFG-XB7X].
2. *See id.*
3. *See* Derek Hawkins & Kate McCormick, *Forced Out of a Home Over a Marijuana Joint*, WASH. POST (Aug. 26, 2016), https://www.washingtonpost.com/investigations/forced-out-of-a-home-over-a-marijuana-joint/2016/08/25/b5b26bde-5e4d-11e6-af8e-54aa2e849447_story.html [https://perma.cc/T3Q8-H2MG]. It should be noted that the quantity of marijuana that Mr. Tutt was charged with would not be illegal today in D.C., which has since legalized marijuana possession in small quantities. D.C. CODE §§ 48-904.01(a), -1103(a)–(b) (2017).
4. Hawkins & McCormick, *supra* note 3.
5. *See id.*
6. *See id.*
7. *Id.*

often result in vulnerable residents being put at risk of losing their housing. These crime-free housing ordinances for rental property—a category of local laws that I have labeled CHOs—are modeled after a federal statute known as the "one-strike policy" that has been in place for federally subsidized public housing tenants since the late 1980s.[8] Both the federal one-strike policy and CHOs authorize, encourage, or require landlords to evict tenants for a single instance of actual or alleged criminal conduct.[9] In federal public housing, the criminal activity may be committed by the tenant, any household member or guest, on or off housing authority property.[10] The federal law imposes strict and vicarious liability on the tenant even if she had no knowledge of the activity and could not have prevented it.[11] This is the same for many CHOs. In public housing, the consequence of violating this policy is the termination of the public housing tenancy, which often leads to eviction.[12] In private-market apartments governed by CHOs, the result of a violation is usually either an eviction action against the tenant or fines levied against the landlord.[13] Significantly, conduct that triggers either a one-strike eviction or a CHO eviction does not need to be proven in court, and even if the person is never convicted of a crime, she can still lose her home.[14]

Since the War on Drugs came into full force in the 1980s and 1990s, policymakers and law enforcement officials have marshalled eviction for use as a crime-control tool. In the 1980s and 1990s, violence and crime in urban public housing were alarmingly high. In Chicago in 1988, the rate of violent crime for public housing residents was four times the average for nonpublic housing residents, and there were an average of nineteen crimes committed on housing authority property every day.[15] Officials struggled with how to deal

8. Sarah Swan, *Home Rules*, 64 DUKE L.J. 824, 846 (2015).
9. *See* 42 U.S.C. § 1437d(*l*)(6) (2012); Swan, *supra* note 8, at 846–47.
10. 42 U.S.C. § 1437d(*l*)(6).
11. *See id.*
12. The decision to bring an eviction action against a public housing tenant is at the discretion of the public housing authority. The rate and frequency of evictions can vary based on the particular public housing authority's practices. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 833–38 (2015).
13. *See* 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 3–4 (2013).
14. Jain, *supra* note 12, at 834–35.
15. Lisa Weil, Note, *Drug Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161, 164 (1991). *See generally* ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE (1992). Kotlowitz, a journalist in Chicago, chronicled the lives of two young brothers growing up in the Henry Horner Homes, one of the most notorious public housing complexes in the city. His descriptions of abject poverty

with these social problems and decided on a strategy of removing the so-called criminals from public housing, leaving in place the law-abiding citizens.

Although eviction continues to be viewed by the civil justice system largely as a civil remedy in an action based on the breach of a lease contract, it has come to be employed in practice as a first-resort method for dealing with the problems of drugs, crime and violence.[16] At first, eviction-as-crime-control was confined mainly to urban public housing and other places that had documented, pervasive crime problems. Over the past thirty years, it has moved beyond this relatively narrow context to become the go-to method for addressing any allegation of criminal activity in rental housing. For many years, policymakers have overlooked the human consequences of eviction, and legislators at the federal and local levels have imposed one-strike rules on their citizens that raise troubling questions about the rights and responsibilities of people living in rental homes.

Despite harsh criticism of the one-strike policy from tenant advocates and some policymakers after it was implemented for public housing tenants,[17] public housing authorities across the country embraced the "one strike and you're out" concept,[18] proceeding with eviction actions against tenants on the basis of events such as a single arrest. In 2002, the U.S. Supreme Court upheld the constitutionality of the strict and vicarious liability application of the one-strike statute in the case of *Department of Housing and Urban Development v. Rucker*,[19] a decision that was grounded in statutory interpretation and administrative law.

In *Rucker*, the Court concluded that the U.S. Congress had intended to allow housing authorities to evict tenants for alleged criminal conduct that they

and rampant violence in public housing opened the eyes of many Americans to the crime and violence that were part of the daily lives of public housing residents.

16. *See, e.g.*, Scott Duffield Levy, Note, *The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 539 (2008).
17. *See, e.g.*, Weil, *supra* note 15, at 169. "Policies relying on eviction as a panacea for the problem of drugs in public housing . . . are doomed to failure." *Id.*
18. The term "one-strike policy" came into use after President Bill Clinton's 1996 State of the Union address, in which he stated, "And I challenge all local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule for residents who commit crime and peddle drugs should be one strike and you're out." H.R. DOC. NO. 104-168, at 7 (1996). *See also* Robert Hornstein, *Litigating Around the Long Shadow of* Department of Housing and Urban Development v. Rucker*: The Availability of Abuse of Discretion and Implied Duty of Good Faith Affirmative Defenses in Public Housing Criminal Activity Evictions*, 43 U. TOL. L. REV. 1, 4–5 (2011).
19. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002).

have no actual knowledge of, thereby eliminating the "innocent" tenant defense to a one-strike eviction.[20] Importantly, however, the Court clarified that one of the reasons that it did not find that the one-strike policy violated tenants' constitutional rights was because eviction is not required under the policy; rather, the statute allows each housing authority, as the landlord of the property, to use its discretion to determine in each one-strike case whether eviction is an appropriate remedy.[21] While this decision did not apply to private-market landlords, it opened the door for the expansion of the one-strike provisions in other types of rental housing, including that which is privately owned and operated.

In the wake of the *Rucker* decision, many local governments across the country have enacted CHOs, which are modeled on the federal one-strike policy, and purport to deter and control crime in private-market rental housing.[22] Currently, nearly two thousand municipalities across the country have enacted some version of CHOs,[23] with a large cluster in the Chicago suburbs.[24] While most CHOs vary in their language and measures, two common features are: (1) the requirement that landlords make tenants sign a crime-free lease addendum as a condition of the tenancy, which contains language similar to federal public housing leases; and (2) the use of nuisance property ordinances that make it easier for the municipalities to remove residential tenants even without the participation of the landlord.[25] Most significantly, CHOs either explicitly require landlords to evict tenants who are accused of criminal conduct, or they contain provisions that enable the municipality to coerce the landlord into instituting eviction actions.[26] Alarmingly, the local ordinances also contain few procedural protections for tenants, which means that many private-market tenants are at risk of losing

20. *Id.* at 130; *see also* Michael A. Cavanagh & M. Jason Williams, *Low-Income Grandparents as the Newest Draftees in the Government's War on Drugs: A Legal and Rhetorical Analysis of* Department of Housing and Urban Development v. Rucker, 10 GEO. J. ON POVERTY L. & POL'Y 157, 161–62 (2003).
21. *See Rucker*, 535 U.S. at 133–34.
22. Swan, *supra* note 8; *see also Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/testimonials.htm [https://perma.cc/5WTE-L9J4].
23. *See 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/EFT8-GECT].
24. *See* WERTH, *supra* note 13, at 1, 26–28.
25. *See id.* at 3–4.
26. *See id.* at 2–3, 16.

their homes without the opportunity to obtain legal counsel or assert legitimate defenses.

This Article argues that local CHOs are more harmful to residential tenants than the federal one-strike policy on which they are based. By expanding the application of the one-strike policy concepts far beyond what Congress intended for federal public housing tenants and what the Supreme Court decided in the *Rucker* case, CHOs put large numbers of tenants at significant risk of eviction and homelessness.

Moreover, as this Article demonstrates, CHOs present serious legal issues for municipalities. First, CHOs transfer discretion about when eviction is an appropriate remedy from the landlord to the local police department, which jeopardizes the traditional landlord-tenant relationship and raises concerns about both police abuse of that discretion and racial justice. Second, CHOs implicate a number of constitutional and civil rights concerns, including due process, equal protection, and fair housing laws. Third, CHOs substantially expand the scope of activities that can result in eviction through the use of vicarious liability to hold tenants responsible for others' activities, even when they do not know about and could not have prevented them.

As a result, local governments, when considering or evaluating CHOs, should ask themselves three questions: First, is the problem of crime in rental housing truly serious enough to require a CHO? Second, are CHOs, which facilitate residential evictions, solutions to the problems they purport to address? Third, can CHOs lead to serious legal concerns for municipalities that could outweigh any benefits to the community?

This Article proceeds as follows: Part I gives an overview of CHOs at the local level. Part II discusses the development of the one-strike policy in federal law and explains the *Rucker* case. Part III develops three arguments for why CHOs put an increased number of vulnerable tenants at risk of eviction and why this is problematic, since eviction can lead to homelessness, increased poverty, neighborhood destabilization, and a number of other social problems. Finally, Part IV discusses how local governments can balance the often competing interests of crime prevention and citizens' rights in a way that reduces the risk of unnecessary evictions and increased homelessness.

I. CHOS: THE ONE-STRIKE POLICY IN LOCAL LAW

During the heyday of the War on Drugs in the 1980s and 1990s, public housing tenants, who were subject to the federal one-strike policy, risked losing their homes because of unsubstantiated allegations of criminal activity made

against them.[27] In recent decades, local governments across the country have begun enacting laws that are substantially similar to the one-strike policy, with one major difference: Instead of applying only to people who received a direct housing subsidy and whose landlord was the government, these local ordinances apply to all private-market tenants, who otherwise would not be covered by the provisions of the federal one-strike policy. These local crime-free housing ordinances, or CHOs, vary in the severity of their sanctions for tenants and landlords. CHOs are a direct outgrowth of the federal one-strike policy, yet they implicate some important legal and policy concerns that the one-strike policy does not.

The first CHO was proposed by a police officer in Mesa, Arizona, in 1992.[28] Modeled largely on the federal one-strike policy, the goal of the ordinance was to develop a program that would effectively reduce crime in rental housing, which law enforcement felt had not been achieved through traditional measures such as neighborhood watch programs.[29] Since 1992, approximately two thousand municipalities in the United States and Canada have implemented some form of CHO.[30] The International Crime Free Association (ICFA), an organization founded by the Arizona police officer who developed the first private-market CHO, has been instrumental in training police departments and landlords[31] and developing materials that are used by many municipalities across the country.[32] Certain areas of the United States, more than others, have embraced CHOs; for example, in Illinois, more than 100 municipalities have some form of a CHO in place.[33] Unlike the federal one-strike policy, which was passed by Congress to apply uniformly to all federal

27. *See infra* Subpart II.A.
28. *See Crime Free Programs: A Brief History*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/history.htm [https://perma.cc/G628-TZDJ].
29. *See id.*; Swan, *supra* note 8.
30. *Crime Free Multi-Housing*, *supra* note 23.
31. *See* CITY OF ELGIN, LANDLORD TRAINING PROGRAM 2, http://www.cityofelgin.org/DocumentCenter/View/60331 [https://perma.cc/UA6N-ZCFY] [hereinafter ELGIN LANDLORD TRAINING PROGRAM]; *accord* Deborah Donovan, *Rolling Meadows Considers Landlord Requirements*, CHI. DAILY HERALD, Nov. 27, 2013, at 4.
32. For example, the International Crime Free Association (ICFA) provides a sample crime-free lease addendum on its website with wording that is substantially similar to many of those available on municipal government websites. *Compare Crime Free Lease Addendum*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/lease_addendums_az_english.htm [https://perma.cc/3F8Z-8S3A], *with Rental Housing Requirements & Applications*, VILLAGE ORLANDO PARK, ILL., http://il-orlandpark2.civicplus.com/index.aspx?NID=893 [https://perma.cc/DMS8-CRRA] (follow "Lease Addendum" hyperlink).
33. WERTH, *supra* note 13, at 1.

public housing tenants across the country, CHOs are passed by local city councils, and each ordinance applies only to the residents of that municipality.

This Part will give an overview of local government authority, exercised through home rule and the police power. It will also explain how CHOs operate in practice, using a representative ordinance from Elgin, Illinois.

A. Local Government Authority: Home Rule, Police Power, and Racial Justice Concerns

Municipalities occupy a unique legal position in the United States. "Politically, American government operates on three levels: federal, state, and local. Local governments are particularly important."[34] The federal Constitution says nothing about the role of local governments, instead delegating authority to the states.[35] A further distinction between the federal and state governments on the one hand and local governments on the other is that local governments rely on delegation from the states for their authority.[36] Moreover, in early American history, cities followed the example of English towns and were structured as corporations.[37] This led to the division in American law between public and private corporations, a distinction that was based on the protection of property.[38] Public corporations—that is, municipalities—remained subject to state power.[39]

34. Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 256 (2004). Local governments assume responsibility for the majority of day-to-day services and regulations As Briffault explains:

> Approximately three-quarters of the total number of state and local employees are actually employed by local governments. So, too, the overwhelming majority of state and local elected officials serve at the local level. The states are formally responsible for the provision of most domestic public services, but local governments play the key role in actually delivering such basic services as policing, fire prevention, education, street and road maintenance, mass transit, and sanitation.

Id.

35. *See id.* at 257.

36. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1065 (1980).

37. Unlike English cities, though, early American cities were not actually corporations in law, though they were treated as such in practice. *See id.* at 1095–96. It was not until the early nineteenth century when American cities began to be structured as public corporations. *Id.* at 1101–02.

38. *See id.* at 1101–05. Frug argues that "[b]oth cities and mercantile corporations served to protect the private investments of individual founders and allowed those active in their governance a large degree of self-determination." *Id.* at 1102.

39. *See id.* at 1105. Some commentators have argued that states maintained legal control over municipalities by "limiting their powers of independent initiative and by asserting

In the late nineteenth century, demographic and social changes in American urban centers prompted new interest in the independent self-governance of cities. Urban reformers wanted to tackle local problems such as rapid population increases and corruption of local officials.[40] This led to efforts establishing what became known as "home rule" for cities, which enabled cities to establish greater autonomy in relation to the states, and to "adopt charters that set forth their own powers and enabled them to appoint their own officers."[41] Home rule also protects many local laws enacted by municipal governments from state preemption and interference.[42] Home rule varies from state to state, and even within states; some states grant home-rule authority through constitutional provisions, while others do so through legislation.[43] Though courts frequently deal with issues related to home rule,[44] many local ordinances, including CHOs, have largely escaped examination in legal scholarship.[45] While the focus of this Article is not to fully explore the racial justice and civil rights implications of CHOs, the connections between criminal law enforcement, policing tactics, and race are so well established that the topic merits acknowledgement and a brief discussion.

It may not be coincidence that many CHOs exist in suburbs and small cities with high rates of homeownership and relatively low supplies of rental housing, while many large urban areas, with higher proportions of residential renters, have not passed such stringent ordinances.[46] The fear of crime has been

state legislative preemptive power." David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2280–81 (2003).

40. *See* Barron, *supra* note 39, at 2289.
41. *Id.* at 2290.
42. *See id.*
43. *See* Briffault, *supra* note 34, at 253.
44. *See id.* at 254–55. Examples of controversial home rule cases in the courts include "local tobacco and firearm regulation, . . . gay and lesbian rights, . . . domestic partnership ordinances, . . . campaign finance reform measures, and 'living wage' laws." *Id.* (footnotes omitted).
45. Swan, *supra* note 8, at 827.
46. While most major cities do not require private-market landlords to obtain licenses and pass inspections before renting property or require tenants to sign crime-free lease addenda, they have implemented the one-strike concepts for private-market tenants in other ways. For example, New York City has revived nineteenth-century nuisance laws in order to allow the District Attorney to evict tenants suspected of drug or other criminal activity, often with little or no notice to the tenant. *See* Sarah Ryley, *The NYPD Is Kicking People Out of Their Homes, Even If They Haven't Committed a Crime: And It's Happening Almost Exclusively in Minority Neighborhoods*, PROPUBLICA (Feb. 4, 2016), https://www.propublica.org/article/nypd-nuisance-abatement-evictions [https://perma.cc/2A8S-VT6M]. *See generally* Levy, *supra* note 16 (arguing that local governments' use of one-strike concepts in drug-related evictions has flown largely under the radar).

tied to the economy of American homeownership since the end of World War II.[47] There was an increase in urban crime rates and corresponding fear of crime in the decades following 1950, which correlated with the push by the federal government to promote suburban homeownership among white middle-class Americans while disincentivizing people of color from moving out of cities and into suburbs.[48] Backlash against the judicial and political victories of the Civil Rights Movement of the 1950s and 1960s contributed to support for Richard Nixon's 1968 law-and-order presidential campaign promises. These promises have been acknowledged for their racist undertones as "a code for saying that civil rights needed to be checked and that white people needed more protection as whites from government."[49] Home rule allowed this to happen in individual municipalities through mechanisms like sundown laws and exclusionary zoning.[50]

Today, racial justice and civil rights concerns about housing segregation are often less about overt restrictions on people of color and more about subtler methods of discrimination.[51] Recently, there has been a tremendous change in public understanding about the connection between race and involvement with the criminal justice system because of the work of scholars such as Michelle Alexander,[52] growing concerns about the social and fiscal impacts of incarcerating millions of people of color,[53] media attention on police shootings

47. *See* Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration Since 1950*, 2010 U. CHI. LEGAL F. 165, 171. "It was in this period that home ownership, as opposed to renting, began to be valorized as a norm for American middle-class families and associated with all manner of public and private virtues." *Id.*

48. *See id.* at 174–86. *See generally* Charles L. Nier III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617 (1999).

49. Simon, *supra* note 47, at 196.

50. *See generally* JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2006).

51. *See* Norrinda Brown Hayat, *Section 8 Is the New N-Word: Policing Integration in the Age of Black Mobility*, 51 WASH. U. J.L. & POL'Y 61, 61–65 (describing a 2008 class action lawsuit by African American residents who were also Section 8 voucher holders "against the city of Antioch [California] for engaging in a concerted campaign to reduce the African-American population and discourage any additional black families from moving to the city").

52. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010). "[Michelle Alexander] has drawn significant media attention to the often ignored phenomenon of mass imprisonment." James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 33 (2012).

53. *See* Alana Semuels, *What Incarceration Costs American Families*, ATLANTIC (Sept. 15, 2015), https://www.theatlantic.com/business/archive/2015/09/the-true-costs-of-mass-incarceration/405412 [https://perma.cc/M2KN-D7AK].

of young black people,[54] and the rise of social resistance movements like Black Lives Matter.[55] There have even been efforts to combat some of the collateral consequences that have resulted from mass incarceration, such as barriers to employment, through measures like "ban the box" laws.[56] Some cities have even passed laws that ban the box for initial housing applications, restricting the questions landlords can ask about criminal history and the length of time they can rely on a criminal conviction to deny housing.[57] For the first time, in 2015, the Supreme Court recognized a right to a claim of racial discrimination based on a theory of disparate impact under the Fair Housing Act in the case of *Texas Department of Housing and Community Affairs v. Inclusive Communities*.[58]

However, more and more municipalities pass CHOs every year. In Illinois, where CHOs have been the most systematically catalogued,[59] many towns with CHOs also have documented histories of racial housing segregation, or have highlighted low crime rates that do not necessarily justify such drastic crime prevention measures.[60] Furthermore, one of the notable

54. *See* Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. TIMES (July 12, 2016, 3:45 PM), http://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html [https://perma.cc/CRP3-EJRC].

55. *See* Brandon E. Patterson, *How the Black Lives Matter Movement Is Mobilizing Against Trump*, MOTHER JONES (Feb. 7, 2017, 11:00 AM), http://www.motherjones.com/politics/2017/02/black-lives-matter-versus-trump [https://perma.cc/NV2T-GH4N].

56. Banning the box, which requires certain employers to not ask about criminal history on initial employment applications, has been implemented at the local, state, and federal levels. *See* Christina O'Connell, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2801 (2015); Beth Cobert, *"Banning the Box" in Federal Hiring*, U.S. OFF. PERSONNEL MGMT.: DIRECTOR'S BLOG (Apr. 29, 2016), https://www.opm.gov/blogs/Director/2016/4/29/Banning-the-Box-in-Federal-Hiring [https://perma.cc/J3EV-KCS5]. There have been criticisms of how helpful ban the box laws actually are to the people they are intended to benefit. *See* Alana Semuels, *When Banning One Kind of Discrimination Results in Another*, ATLANTIC (Aug. 4, 2016), https://www.theatlantic.com/business/archive/2016/08/consequences-of-ban-the-box/494435 [https://perma.cc/KV83-DWES].

57. Newark, San Francisco, and Washington, D.C., are among the cities that have passed "ban the box" laws for housing. *See* Rachel Kurzius, *Council Passes Bills to "Ban the Box" for Housing, Bar Employers From Asking About Credit History*, DCIST (Dec. 21, 2016, 11:13 AM), http://dcist.com/2016/12/council_bans_the_box_in_housing_bar.php [https://perma.cc/DQ7Q-V5EZ]; Haya El Nasser, *Job Applications Put Ex-Offenders in Tight Box*, AL JAZEERA AM. (June 24, 2014), http://america.aljazeera.com/articles/2014/ 6/24/ban-the-box-measures.html [https://perma.cc/47SU-XW32]; *About: Ban the Box Campaign*, BAN THE BOX CAMPAIGN, https://bantheboxcampaign.org/about/#.WpheXpM-eu5 [https://perma.cc/69F2-CRPT].

58. 135 S. Ct. 2507 (2015).

59. *See generally* WERTH, *supra* note 13, at 26–28.

60. *See supra* Subpart I.A.

features of CHOs is that they have spread from town to town in a given geographic area in an almost copycat-like manner. This is a phenomenon seen with other local ordinances, as Richard Briffault states:

> [A] local rule can exclude a particular land use, such as a utility plant, a waste disposal site, or affordable housing, from the locality. Though such a rule does not impose the undesired use on a specific community since there may be multiple alternative sites, such rules typically have ripple effects, with other adjacent communities adopting similar rules, thus ultimately affecting the entire region.[61]

Police power authority allows local governments to pass CHOs. Government exercise of police power to protect public safety and welfare is broad.[62] Municipalities that have passed CHOs justify the provisions of those ordinances on the grounds that they are aimed at preventing and reducing crime in communities.[63] This follows a trend in recent years of local governments taking on greater and greater responsibility with respect to crime control.[64] For example, changes in policing tactics, especially "broken windows" policing, focuses on low-level "visible signs of disorder" in an effort to prevent more serious crimes.[65] Many of the activities targeted by broken windows and other order-maintenance policing tactics are regulated by state or federal criminal law, but also often by municipal law.[66] Most notably, many enforcement techniques involve property regulation, such as demolishing property that is considered blighted, inspecting properties for building code violations, and nuisance declarations.[67] CHOs, which also seek to regulate property at the municipal level, are very much in keeping with this pattern.

However, the police power, while broad, is not unlimited. There have been some cases in which courts have decided that municipal ordinances seeking to deter and prevent crime are unconstitutional overreaches of the

61. Briffault, *supra* note 34, at 261.
62. *See* Berman v. Parker, 348 U.S. 26, 33 (1954).
63. *See, e.g.*, BELLEVILLE, ILL., CODE OF ORDINANCE § 154.40 (2016) (stating that the purpose of the ordinance is "to decrease the incidents of public safety violations and criminal activity in rental properties").
64. *See generally* Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1413–14 (2001) (explaining how local governments have used their home rule and police powers to enact a proliferation of criminal laws).
65. *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 351 (1997).
66. *See* Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 4 (2004).
67. *See id.* at 11–21. Garnett states that one of the reasons that property regulation is such a popular "weapon[] in the order-maintenance arsenal" is because "government choices about the uses of property . . . dramatically affect an urban environment without raising the same constitutional concerns about police discretion." *Id.* at 12.

government's police power. In 1999, in the case of *City of Chicago v. Morales*, the Supreme Court overturned an ordinance passed by Chicago's City Council which made it illegal for suspected gang members to congregate in public places.[68] The ordinance at issue was passed by the City Council in 1992 in response to increasing crime and murder rates in Chicago.[69] It criminalized loitering by gang members, but left the determination of who was a gang member entirely to the discretion of the police.[70] The Supreme Court held that the ordinance was unconstitutionally vague because it did not adequately define the conduct that would constitute a violation,[71] and also because it did not "provide sufficiently specific limits on the enforcement discretion of the police 'to meet constitutional standards for definiteness and clarity.'"[72]

B. CHOs in Operation: The Elgin Ordinance

The specifics of CHOs can vary from town to town, yet there are basic structures and common features among almost all of them. This Subpart will describe in detail one such ordinance from Elgin, Illinois, chosen because it is representative of CHOs across the country and promoted by the International Crime Free Association. Elgin's ordinance, like many others, has four main aspects that are relevant here: a landlord licensing requirement; a strong encouragement that landlords perform criminal background checks on prospective tenants; a crime-free lease addendum requirement; and nuisance property provisions.

Elgin, which calls itself "the City in the Suburbs," is a community of approximately 108,000 residents located about 35 miles northwest of Chicago.[73] Nearly 44 percent of Elgin's population identifies as Hispanic or Latino, while only 7 percent identifies as Black or African American.[74] According to the 2010 census, 70 percent of Elgin residents live in owner-occupied housing.[75]

68. City of Chicago v. Morales, 527 U.S. 41, 41 (1999).
69. *Id.* at 45–46 (stating that "[t]he council found that a continuing increase in criminal street gang activity was largely responsible for the city's rising murder rate, as well as an escalation of violent and drug related crimes").
70. *See id.* at 47–49.
71. *See id.* at 56–60. "[T]he city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member . . . ." *Id.* at 57.
72. *Id.* at 64 (quoting City of Chicago. v. Morales, 687 N.E.2d 53, 64 (Ill. 1997)).
73. *Community*, CITY ELGIN, ILL., *http://il-elgin3.civicplus.com/index.aspx?NID=31* [https://perma.cc/ U8EM-WZSU].
74. *Census Data*, CITY ELGIN, ILL., http://www.cityofelgin.org/index.aspx?NID=103 [https://perma.cc/UU8K-4K23].
75. *See id.*

Elgin was among the first municipalities in the Chicago area to implement a CHO, and its ordinance went into effect in 2006.[76] However, the city already had in place some of the framework that CHOs typically employ, including a landlord licensing requirement that went into effect in 1995.[77] One of the changes that took place leading up to the passage of the 2006 ordinance was the introduction of a special policing unit, called the Crime-Free Housing Unit, created to focus exclusively on 13,000 rental units in Elgin.[78]

1. Landlord Licensing Requirement

Elgin's CHO, like those in many other municipalities, requires that all landlords who want to rent out residential property in the city apply for a business license.[79] In order to obtain the license, landlords must pay a fee on a graduated scale based on the number of dwelling units in the property.[80] The property must also pass a city inspection.[81] Finally, landlords must attend a landlord training seminar, which is conducted by the police department, utilizing materials developed by the International Crime Free Association.[82] Landlords must renew their rental licenses each year;[83] if the landlord fails to renew the license or has the license revoked for failing the city inspection, the tenants living in the property must vacate within 60 days.[84]

While it is unclear whether or how frequently landlords are losing their licenses, the licensing provision increases the risk of eviction for tenants. It is unlikely that tenants would have any knowledge or control over the landlord's decision to maintain a current license, yet a tenant could suffer the drastic consequence of losing a home because of the landlord's failure to maintain the

76. Christine Byers, *Elgin Landlords Face Crackdown*, CHI. DAILY HERALD, May 23, 2006, at 1.
77. *Id.*
78. Tom O'Konowitz, *Elgin Police Plan to Focus on Crime in Rental Units*, CHI. DAILY HERALD, Aug. 26, 2004, at 1.
79. ELGIN, ILL., MUN. CODE, §§ 6.37.040–6.37.050 (2017).
80. *Id.* Per § 6.37.050(B), the fee ranges from $71.00 for 1–5 dwelling units to $748.00 for 96–100 dwelling units.
81. *Id.* § 6.37.060.
82. *Id.* § 6.27.100(E); ELGIN LANDLORD TRAINING PROGRAM, *supra* note 31. Elgin's Landlord Training Program manual states that its materials are adapted from those developed by Timothy Zehring in Mesa, Arizona. *Id.* Timothy Zehring is the founder and executive director emeritus of the International Crime Free Association. *Crime Free Programs: A Brief History*, *supra* note 28. It should also be noted that Elgin's Landlord Training Program manual includes a copy of the *Rucker* decision, under the heading "The Supreme Court Decision." ELGIN LANDLORD TRAINING PROGRAM, *supra* note 31, at 31–36.
83. ELGIN, ILL., MUN. CODE § 6.37.050(B) (2017).
84. *Id.* § 6.37.090(J)–(K).

license. In fact, although Elgin has required landlords to be licensed since 1995, a specific purpose of the city's 2006 CHO was increased punishment for the suspension or revocation of landlord licenses.[85] While the punishment of vacating the property may be aimed at increasing landlord compliance, tenants suffer the drastic consequence of losing their personal residences.

2. Criminal Background Check Requirement and Tenant Record Sharing

While it is not explicitly required in the city code, Elgin also strongly encourages landlords in its Landlord Training Program manual to conduct a thorough background check on all prospective tenants, a process that includes a credit check and a criminal history check.[86] Elgin's training manual encourages landlords to immediately reject any tenants with certain types of criminal records without giving the tenant the opportunity to explain the circumstances.[87] Although the Elgin ordinances do not require that landlords share the results of tenant criminal background checks with the police, they do require that landlords "maintain a record for each property with the full legal names of every tenant or occupant residing in each dwelling unit or rooming unit,"[88] and that landlords make that information available to the city upon request.[89]

By encouraging landlords to reject prospective tenants outright for certain types of criminal history,[90] Elgin's crime-free housing program reduces the amount of available rental units for a population that already struggles to find safe and affordable housing.[91] Nearly seventy million Americans have a

85. Byers, *supra* note 76.
86. ELGIN LANDLORD TRAINING PROGRAM, *supra* note 31, at 10–12.
87. *Id.* The manual states in bold, italicized letters, "The worst time to screen your residents is during the eviction process!!!" *Id.* at 11.
88. MUN. § 6.37.100(A).
89. *Id.* § 6.37.100(D). The provision states, "The owner of a residential property shall make available to the code official, upon request, the tenant and occupant records required to be maintained under this section." *Id.*
90. Elgin's landlord training manual instructs landlords, "When looking at the criminal history of prospective residents, ask yourself, 'Is this a crime that poses a threat to my residents'? [sic] A felony embezzlement charge may not be a threat, but a misdemeanor charge for assault may constitute a threat." ELGIN LANDLORD TRAINING PROGRAM, *supra* note 31, at 10–11. The phrasing of this instruction also implies that prospective tenants should be rejected because of criminal *charges*, which may be unproven, and not just criminal *convictions*.
91. *See* WERTH, *supra* note 13, at 5–7. "Over the past three decades . . . significant legal and policy changes have made landlords liable for some criminal activity on their properties, and this newfound liability effectively established a new risk that landlords must

criminal record.[92] Furthermore, the city's access to private landlords' tenant records encourages increased cooperation between landlords and law enforcement under the guise of crime control.[93] The result of these policies and practices is greater difficulty for people with criminal histories to find housing and greater incentives for landlords to reject or evict tenants because of their criminal histories in order to avoid liability or increased scrutiny from the city government and police department.

3. Crime-Free Lease Addendum

Elgin's CHO requires a crime-free lease addendum, which is similar to those in many other communities that utilize materials from the International Crime Free Association.[94] Example text for Elgin's crime-free lease addendum is laid out in its city code, and landlords are required to have tenants sign an addendum that includes either this exact language or "a clause in [the] lease substantially utilizing the language in the crime free lease addendum" when a residential lease is executed.[95] Like the federal one-strike policy, the lease addendum applies to the "resident, any member of the resident's household or a guest or other person under the resident's control."[96] The addendum also lays out specific behaviors that can constitute a lease violation, including "engag[ing] in criminal activity," "engag[ing] in any act intended to facilitate criminal activity," and "permit[ting] the dwelling unit to be used for, or to facilitate criminal activity," among other prohibitions.[97]

The lease addendum contemplates any "criminal activity" as a lease violation, but again, similar to the federal one-strike policy, it specifically lists "drug-related criminal activity," along with a few other illegal acts such as

consider when screening tenants." David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5, 13–14 (2008).

92. Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST., (Nov. 17 2015), https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas [https://perma.cc/95BW-A3GW].

93. Some CHOs, such as the one in Hesperia, California, which was challenged by the ACLU, actually require landlords to provide the results of criminal background checks on tenants to the police department. HESPERIA, CAL., CODE § 8.20.050 (2015).

94. The ICFA has a sample crime-free lease addendum available on its website. *Crime Free Lease Addendum*, *supra* note 32. According to the ICFA, "[t]he heart and soul of the [crime-free multi-housing] program is in the correct implementation and use of the Crime Free Lease Addendum." *Crime Free Multi-Housing*, *supra* note 23.

95. *See* ELGIN, ILL., MUN. CODE § 6.37.100(F) (2017).

96. *Id.*

97. *Id.*

prostitution, criminal street gang activity, assault, and the unlawful discharge of firearms.[98] However, it also includes a catch-all provision that a lease violation can be "any breach of the lease agreement that otherwise jeopardizes the health, safety and welfare of the landlord, the landlord's agent or other tenant or involving imminent or actual serious property damage."[99] It is also notable that, like the federal one-strike policy, the behavior that can lead to eviction does not necessarily need to happen in the dwelling unit; rather, the lease addendum prohibits such activity "on or near the said premises."[100] Finally, the crime-free lease addendum notifies the tenant that "[a] single violation of any of the provisions of this added addendum shall be deemed a serious violation and a material and irreparable non-compliance. It is understood that a single violation shall be good cause for immediate termination of the lease."[101]

One notable aspect of the crime-free lease addendum is that it does not necessarily create new grounds for eviction that do not already exist in traditional landlord-tenant law. Most, if not all, of the activities that it prohibits are already grounds for eviction under existing landlord-tenant law, if the activity was committed by the tenant or perhaps even a household member.[102] This raises a question as to the actual purpose of the lease addendum. Like the federal one-strike policy, the lease addendum goes beyond holding the tenant herself responsible for behavior that could be grounds for eviction, and it imputes liability to her for the behavior of other people. While it is unclear how frequently the lease addendum is enforced against tenants in Elgin or elsewhere, or for what types of alleged criminal activity, the lease addendum creates the possibility that a private-market tenant could be evicted for the behavior of another person that she did not know about and had no control over.

4. Nuisance Property Ordinance

As part of the CHO schema, Elgin and other municipalities have passed nuisance property ordinances. As with its other CHO provisions, Elgin's nuisance property ordinance is typical of those found in many municipalities around the country. It is important to understand the differences in how the

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *See* ANDREW SCHERER & FERN FISHER, RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK §§ 8.98–9:46 (2016–2017 ed. 2017).

crime-free lease addendum provisions work with and in relation to the nuisance property ordinance. As described in the Subpart above, crime-free lease addenda operate to put tenants on notice of behavior that can lead to eviction, expand the number of people whose behavior could constitute grounds for eviction, and give the landlord the right to terminate the lease after a single incident. Nuisance property ordinances are not focused on conferring greater rights on the landlord. Rather, they give the municipal government the right to address the allegedly illegal behavior by tenants and gives the power to punish landlords who do not deal with problem tenants. "Nuisance property ordinances identify conduct or conditions that lead to the property being deemed a nuisance [by the local government] and then establish an abatement procedure that will result in penalties if not followed by the landlord."[103]

In Elgin, a chronic nuisance property is defined as a property where there have been three or more instances of documented criminal behavior within a twelve-month period.[104] Unlike other municipalities, which do not always identify a specific geographic area, Elgin deems the criminal behavior to count towards a nuisance property designation if "illegal activity occur[red] at the property, or within one block or one thousand feet . . . of the property."[105] There is a range of activities that can constitute a nuisance, including violent felony offenses, drug and gang activity, and a number of local ordinance violations, including loitering, noise, and overcrowding in an apartment.[106] It is notable that Elgin's ordinance, unlike many others, does not list multiple emergency service calls as a basis for a nuisance property designation.[107]

As is common with nuisance property ordinances, the branch of the municipal government responsible for enforcing Elgin's ordinance is the police department.[108] Additionally, enforcement does not begin when a property

103. WERTH, *supra* note 13, at 4.
104. ELGIN, ILL., MUN. CODE § 10.44.020 (2017).
105. *Id.*
106. *See id.*
107. See *infra* Subpart III.C.1 for a discussion about the ways that nuisance property ordinances have had a detrimental impact on domestic violence victims and have chilled the reporting of incidents of domestic violence. Even in the face of high-profile lawsuits and public advocacy from groups such as the ACLU, many municipalities still designate properties as nuisances when there are multiple 911 calls within a certain time frame. The abatement of the nuisance often results in the removal of the tenants, a consequence that falls disproportionately on low-income women of color. *See* Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 132 (2012).
108. *See* ELGIN, ILL., MUN. CODE § 10.44.040 (2017). "Whenever the chief of police receives reports and/or documentation of enforcement actions documenting . . . occurrences of activities, behaviors or conduct potentially constituting nuisance activity . . . the chief of police

reaches the three incidents required to trigger the nuisance property designation. Rather, after two qualifying incidents, the police department can send a written letter to the landlord notifying her that her property is at risk of becoming a nuisance, and giving her "an opportunity to propose a course of action that the chief of police agrees will abate the nuisance activities giving rise to the violation."[109] Frequently, the preferred way for the landlord to abate the nuisance activities is to evict the tenants.[110]

If a property does reach the three-incident threshold and the police department determines that it is a chronic nuisance property, it must notify the landlord of the determination and give the landlord the opportunity to "propose a course of action that the chief of police agrees will abate the nuisance activities giving rise to the violation."[111] If there is an agreement between the landlord and the police department as to the abatement strategy, legal action against the landlord can be postponed for a period of ten to thirty days to give the landlord the opportunity to implement the abatement strategy.[112] If, after thirty days, the nuisance has not been abated, the police department can refer the matter to the corporation counsel for commencement of legal proceedings.[113]

If the municipality does elect to bring a legal proceeding against the landlord, either in court or an administrative forum, the judge or hearing officer can order the property to "be closed and secured against all use and occupancy for a period" for 30 to 180 days.[114] Penalties against the landlord can include monetary fines of $100 to $1000 per day "for each day that the violation is found to have existed or continued."[115] This creates a significant monetary incentive for landlords to abate nuisances quickly. The city may further penalize a landlord who maintains a nuisance property by revoking her rental

shall independently review such reports . . . to determine whether they describe offenses constituting nuisance activities. . . ." *Id.*

109. *Id.* § 10.44.040(A)(2).
110. Desmond & Valdez, *supra* note 107, at 131. In a study of nuisance property abatement strategies in Milwaukee, 78 percent of landlords who received nuisance property citations "relied on a method involving a landlord-initiated forced move: formal and informal evictions as well as threats to evict if the nuisance continues." *Id.*
111. MUN. § 10.44.040(B)(1)(c).
112. *Id.* § 10.44.040(B)(2).
113. *Id.*
114. *Id.* § 10.44.050(A).
115. *Id.* § 10.44.050(B).

license for that property,[116] which, as explained above, can lead to tenant displacement and, for the landlord, loss of rental income.[117]

Finally, Elgin's nuisance property ordinance contains a mechanism for emergency closing procedures, in which the city, in coordination with the police department, can ask a judge or administrative hearing officer for "interim relief," without needing to comply with the normal notification procedures.[118] While interim relief is not defined, it presumably means one of the remedies that would be available to the city after full presentation of the evidence, which could include closure of the property to the landlord and tenants or a "temporary restraining order or preliminary injunction to enjoin any defendant[s] from maintaining such nuisance."[119] This is similar to what the New York City District Attorney is authorized to do under its Narcotics Eviction Program, and which can result in tenants being locked out of their homes immediately, without warning, and for an indefinite period of time.[120] It is unclear how frequently or to what extent Elgin employs this measure, but a plain reading of the ordinance shows that it is a possibility.

II. THE ONE-STRIKE POLICY IN FEDERAL LAW

The one-strike policy in federal law, the precursor to CHOs at the local level, was developed in response to the "reign of terror" that "drug dealers 'increasingly impos[ed]'" on public housing in the 1980s and 1990s.[121] While the problems of drugs and crime in public housing were "universally acknowledged," the best ways to deal with them were not.[122] Despite some calls for community investment and drug treatment programs in public housing,[123] in the early 1980s, the Reagan Administration significantly ramped up its efforts to combat illicit drug use in the United States through a number of measures that became known as the War on Drugs.[124] The laws and policies that constituted the War on Drugs included harsh criminal penalties for drug crimes, including lengthy mandatory minimum sentences, along with a bevy of

116. *Id.* § 10.44.050(D).
117. *See supra* Subpart I.B.1.
118. MUN. § 10.44.070(A).
119. *Id.* § 10.44.050(A).
120. *See* Levy, *supra* note 16, at 549–50.; *see also* Ryley, *supra* note 46.
121. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 127 (2002).
122. Weil, *supra* note 15, at 161.
123. *See id.* at 185–87.
124. *See* Christopher D. Sullivan, "*User-Accountability*" *Provisions in the Anti-Drug Abuse Act of 1988: Assaulting Civil Liberties in the War on Drugs*, 40 HASTINGS L.J. 1223, 1226–27 (1989).

civil penalties aimed at deterring and punishing drug users and traffickers beyond the reach of the criminal justice system.[125] Scholars later began to refer to these civil penalties as collateral consequences, and the one-strike policy became one of the most discussed and debated collateral consequences in the realm of housing.[126]

A. Public Housing, Crime, and the War on Drugs

The one-strike policy is an outgrowth of the problems that have plagued the administration of public housing since its beginning. The ideas underpinning the modern public housing program were first brought to fruition during the Great Depression, as part of President Franklin D. Roosevelt's New Deal agenda.[127] The 1937 Housing Act, spearheaded by Senator Robert Wagner of New York, provided the legal structure and federal funding for the construction of housing that was intended for working-class families who suffered from high housing prices and slum conditions during the 1930s.[128] The 1937 Housing Act established a "federal-local implementation partnership, with deference to local officials on important decisions such as site selection and tenant selection."[129] However, the leeway given to local governments often resulted in the furtherance of racially segregated neighborhoods.[130]

Despite the racially concentrated nature of public housing developments in many cities, at first, the program was considered by many policymakers to be a great success. Many cities, including Chicago, took the opportunities of federal funding and logistical support to engage in large-scale slum clearance

125. ALEXANDER, *supra* note 52, at 48–49. For an example of how Reagan used exaggerated rhetoric to justify increased civil penalties for drug crimes, see generally Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009).

126. For a discussion of collateral consequences, see generally Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301 (2015). For a discussion of collateral consequences specifically for innocent tenants affected by the one-strike policy, see generally Barbara Mule & Michael Yavinsky, *Saving One's Home: Collateral Consequences for Innocent Family Members*, 30 N.Y.U. REV. L. & SOC. CHANGE 689 (2006).

127. D. BRADFORD HUNT, BLUEPRINT FOR DISASTER: THE UNRAVELING OF CHICAGO PUBLIC HOUSING 15 (2009).

128. For an overview of the legislative history of the 1937 Housing Act, see *id.* at 15–34.

129. *Id.* at 33.

130. MARGERY AUSTIN TURNER, SUSAN J. POPKIN & LYNETTE RAWLINGS, URBAN INST., PUBLIC HOUSING AND THE LEGACY OF SEGREGATION 4 (2009).

and new building construction designed to foster community among the residents in place of formerly dilapidated and unsafe housing.[131]

However, within twenty years, many white families and more prosperous African American families had left public housing.[132] White residents were encouraged by racially discriminatory mortgage incentives from the Federal Housing Administration, not available to other races, to move to single-family homes in the suburbs.[133] African American families who were more economically prosperous either chose to leave public housing when they could afford other residences, or were made to leave once they exceeded the income threshold required for public housing residents.[134] As a result, the people who remained in public housing were largely African American and largely poor.[135] "By the 1960s, after little more than twenty years in existence, public housing in the nation's largest cities had become the housing of last resort to an increasingly impoverished and economically marginalized African American population."[136]

By the 1980s, public housing was perceived as "a hellish way of life,"[137] steeped in violence and drugs. As "the storyline of public housing became conflated with a growing moral panic about violent crime and drug use in the nation's urban ghettoes," news articles and public officials tended to emphasize the worst stories that emerged from public housing, even though the majority of public housing developments across the country did not suffer from the extreme crime levels depicted in the media.[138] These horror stories highlighted in the news media helped further the War on Drugs agenda of the Reagan administration and prompted Congress to authorize a number of laws and policies that significantly increased penalties for drug crimes in both the criminal and civil justice systems.[139] For public housing tenants, one of the most significant pieces of the War on Drugs legislation was the 1988 Anti-Drug Abuse Act, which introduced the one-strike policy.

131. *See* HUNT, *supra* note 127, at 54–79.
132. *See* EDWARD G. GOETZ, NEW DEAL RUINS: RACE, ECONOMIC JUSTICE, AND PUBLIC HOUSING POLICY 7 (2013).
133. *See* HUNT, *supra* note 127, at 206.
134. *See* HUNT, *supra* note 127, at 187–89.
135. *See* GOETZ, *supra* note 132, at 7.
136. *Id.* at 7. "Housing of last resort" is a phrase that is commonly employed to describe public housing, both as a justification for avoiding eviction and also as a way to show that it is undesirable option even for its own residents.
137. *Id.* at 40.
138. *Id.* at 40–42.
139. *See* Sullivan, *supra* note 124, at 1225–42.

B. The Advent of the One-Strike Policy

The core mission of the public housing program is to provide safe and affordable housing to low-income Americans.[140] In furtherance of this mission, housing authorities must be able to carry out evictions against tenants when necessary.[141] However, eviction is a drastic remedy, and housing authorities also have the obligation to take steps to avoid it whenever possible. The New York City Housing Authority (NYCHA) states in its management manual, "the Authority's primary function is to *house* families. Accordingly, it is the Housing Manager's responsibility, within his/her area of control, to prevent, correct or alleviate problem situations before they develop to a point where there is no alternative but to terminate tenancy."[142] This contemplates a thoughtful and deliberative process in most situations, with eviction being the last resort option for any problem with a tenant. However, the advent of the one-strike policy made it more difficult to avoid eviction, even for housing authorities that wanted to save it for only the worst situations.

1. Development of the One-Strike Policy

The one-strike policy was first enacted by Congress as part of the Anti-Drug Abuse Act of 1988.[143] That legislation amended the 1937 Housing Act to require that public housing leases include the following language:

> [A] public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in

140. *See About NYCHA*, N.Y.C. HOUSING AUTHORITY, https://www1.nyc.gov/site/nycha/about/about-nycha.page [https://perma.cc/8YFE-CHUD]. "The New York City Housing Authority's mission is to increase opportunities for low- and moderate-income New Yorkers by providing safe, affordable housing and facilitating access to social and community services." *Id. See also Mission & Vision*, CHI. HOUSING AUTHORITY, http://www.thecha.org/about/mission-vision [https://perma.cc/2GZG-XR8R]. The Chicago Housing Authority's mission is "[t]o leverage the power of affordable, decent, safe, and stable housing to help communities thrive and low-income families increase their potential for long-term economic success and a sustained high quality of life." *Id.*

141. "Eviction is an essential tool for any landlord—and every PHA. Although public housing is often the housing of last resort for many individuals, continued residence is not, and should not be, guaranteed regardless of a tenant's behavior." Weil, *supra* note 15, at 169.

142. N.Y.C. HOUS. AUTH., MANAGEMENT MANUAL, ch. 4, app. B at 9 (2013) [hereinafter NYCHA MANAGEMENT MANUAL].

143. Weil, *supra* note 15, at 161.

> public housing, and such criminal activity shall be cause for termination of tenancy.[144]

The law was codified as 42 U.S.C. § 1437d(l)(5) and renumbered to 42 U.S.C. § 1437d(l)(6) in 1996 as part of the Housing Opportunity Program Extension Act of 1996, known as HOPE IV.[145] Although public housing authorities had been able to evict people for criminal activity prior to the enactment of this law, this was the first time that Congress also contemplated holding tenants responsible for the criminal activity of other people.[146] In 1990, as part of the Cranston-Gonzalez National Affordable Housing Act, Congress modified the lease language requirement to provide that:

> [*A*]*ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants* or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy . . . .[147]

The U.S. Department of Housing and Urban Development (HUD) also promulgated a regulation requiring housing authorities to include this language in tenant leases.[148]

However, the most significant modifications to the one-strike policy came in 1996 as part of the HOPE IV legislation. After President Clinton's 1996 State of the Union address, Congress acted immediately, substituting the words "on or near such premises" for "on or off such premises" in 42 U.S.C. § 1437d(l)(6), which broadened the scope of activities that could be considered grounds for eviction under the one-strike policy.[149] Additionally, President Clinton issued an executive order that, for the first time, linked funding allocations for public housing authorities to the number of one-strike evictions they carried out each

144. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300 (codified as amended in scattered sections of the U.S. Code).
145. Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9, 110 Stat. 834, 836–38 (codified as amended in scattered sections of the U.S. Code).
146. *See* Weil, *supra* note 15, at 166.
147. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 504, 104 Stat. 4079, 4185 (codified as amended at 42 U.S.C. §§ 1437d(1)(5) (1990)) (emphasis added).
148. *See* 24 C.F.R. § 966.4(f)(12)(i) (2012).
149. Housing Opportunity Program Extension Act § 9(a)(2).

year, which incentivized housing authorities to act on allegations of criminal activity swiftly and harshly.[150]

2. Application of the One-Strike Policy

In the early years of one-strike terminations in public housing, housing authorities and courts across the country applied the policy with differing levels of severity. Some large urban housing authorities, which had seen some of the worst instances of crime and violence, used funding authorized by Congress to form partnerships with the police to perform law enforcement sweeps of hallways and stairwells in an effort to drive out drug dealers and gang members.[151] With regard to terminations of tenancy, some housing authorities developed a graduated system of sanctions for residents who were implicated, or whose family members were implicated, in criminal activity.

One of the most common practices was for a housing authority to initiate a one-strike termination case against the tenant and then offer the tenant a probationary period as a settlement. In such an arrangement, the tenant agrees that she or her family member will not engage in the alleged activity, but if she is found to have done so or to have violated any other provision of her lease, her tenancy can be terminated.[152] Another intermediary arrangement, in lieu of immediate termination, is known as permanent exclusion. If a tenant's household member or guest is alleged to have committed a crime, the tenant can avoid termination and eviction if she agrees to exclude the person from her apartment, either permanently or for a certain period of years. She also agrees to random inspections of her apartment without notice, and, if the excluded person is found in her apartment, her tenancy can be terminated.[153] This can be a particularly difficult choice for a tenant who may have to choose between keeping her home or putting her son or grandson on the street knowing that he has nowhere else to live.

During the 1990s, courts reached different decisions about how the one-strike policy should be applied. Much of the confusion lay in varied court

150. *See* John F. Harris, *Clinton Links Housing Aid to Eviction of Crime Suspects; Civil Libertarians Attack 'One-Strike Policy' That Affects Defendants Not Yet Convicted*, WASH. POST, Mar. 29, 1996, at A14.

151. *See* Jeffrey Fagan, Garth Davies & Jan Holland, *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 GEO. J. ON POVERTY L. & POL'Y 415, 417 (2006).

152. *See* Jain, *supra* note 12, at 850–52.

153. *See* Megan Stuart, *Housing Is Harm Reduction: The Case for the Creation of Harm Reduction Based Termination of Tenancy Procedures for the New York City Housing Authority*, 13 N.Y.C. L. REV. 73, 95 n.140 (2009).

determinations about whether Congress had intended housing authorities to be able to use their discretion to evict tenants who had no knowledge of, or participation in, criminal activity.[154] The divergent results reached by a number of lower courts, hinging on how much discretion Congress had intended to give housing authorities to evict "innocent tenants," led the Supreme Court to grant certiorari in the *Rucker* case to resolve the issue.[155]

C. The Rucker Case and Its Aftermath

In 2002, the Supreme Court decided *Department of Housing and Urban Development v. Rucker*.[156] The facts of the case were as follows: In 1998, four elderly public housing tenants in Oakland, California had their tenancies terminated by the Oakland Housing Authority (OHA) because of criminal drug activity committed by their family members or guests.[157] One of the tenants, 63-year-old Pearlie Rucker, was terminated because her mentally disabled adult daughter who lived with her was arrested for cocaine possession three blocks away.[158] Another tenant, 75-year-old Herman Walker, was being evicted because his home health aide who did not reside with him possessed cocaine in his apartment.[159] Finally, 71-year-old Willie Lee and 63-year-old Barbara Hill had their tenancies terminated because their teenage grandsons were caught smoking marijuana together in the parking lot of the housing development.[160] It was undisputed that none of the tenants were aware of the criminal activity by their family members and guests, could not have prevented it, and even warned their families not to engage in drug activity

154. *See, e.g.*, Allegheny Cty. Hous. Auth. v. Liddell, 722 A.2d 750, 752–55 (Pa. Commw. Ct. 1998) (holding that the trial court, which had ruled in favor of the tenant, had "improperly substituted its judgment for that of the Authority"). *But see* Charlotte Hous. Auth. v. Patterson, 464 S.E.2d 68, 72 (N.C. Ct. App. 1995) ("[L]egislative history reveals a clearly expressed legislative intent that eviction is appropriate only if the tenant is personally at fault for a breach of the lease, i.e., if the tenant had knowledge of the criminal activities, or if the tenant had taken no reasonable steps under the circumstances to prevent the activity."); Diversified Realty Group, Inc. v. Davis, 628 N.E.2d 1081, 1085 (Ill. App. Ct. 1993) (holding that the tenant "[must] have some minimum connection with the unlawful conduct before there can be said to be 'good cause' to evict her").

155. *See* Caroline Castle, *You Call That a Strike?: A Post-*Rucker *Examination of Eviction From Public Housing Due to Drug-Related Criminal Activity of a Third Party*, 37 GA. L. REV. 1435, 1454–56 (2003).

156. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002).

157. Rucker v. Davis, No. C 98-00781 CRB, 1998 WL 345403, at *2 (N.D. Cal. June 19, 1998).

158. *Id.*

159. *Id.*

160. *Id.*

because it could result in eviction.[161] Nonetheless, the OHA sought to evict them all under the one-strike policy.

The OHA based their eviction actions on the wording contained in paragraph 9(m) of the tenants' public housing leases, which had been included pursuant to 42 U.S.C. § 1437d(l)(6) and 24 C.F.R. § 966.4(f)(12)(i).[162] The leases required that a tenant must:

> [A]ssure that tenant, any member of the household, or another person under the tenant's control shall not engage in . . . [a]ny criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other public housing residents or threatens the health or safety of the housing authority employees . . . , or . . . [a]ny drug-related criminal activity on or near the premises (e.g., manufacture, sale[,] distribution, use, or possession of illegal drugs or drug paraphernalia, etc.).[163]

The four tenants challenged the OHA's eviction actions, alleging among other things that HUD's regulation implementing 42 U.S.C. § 1437d(l)(6) was unconstitutional because it was unreasonable and a violation of due process to permit the eviction of innocent tenants who had no knowledge or control over the alleged criminal activity.[164] The District Court ruled in favor of the tenants, as did the en banc Ninth Circuit Court of Appeals.[165] Both courts held that Congress, when it passed § 1437d(l)(6), could not have intended the statute to allow the eviction of innocent tenants.[166] Ultimately, the Supreme Court overturned the lower courts, holding that Congress did in fact intend to allow housing authorities to evict innocent tenants if they believed it was appropriate.[167]

At each of the three judicial levels, the court's decision was grounded in administrative law and statutory interpretation. Because one of the tenants' initial claims was that HUD had violated the federal Administrative Procedures Act (APA) by interpreting § 1437d(l)(6) to allow for the eviction of innocent tenants, each court employed the *Chevron* standard of statutory interpretation.[168] The *Chevron* standard requires a court that is reviewing a regulation to first determine "whether Congress has spoken directly on the

161. *Id.*
162. *Id.* at *1.
163. *Id.*
164. *Id.* at *3.
165. *Id.*; Rucker v. Davis, 237 F.3d 1113 (9th Cir. 2001) (en banc).
166. *Rucker*, 1998 WL 345403, at *13; *Rucker*, 237 F.3d at 1126.
167. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002).
168. *Rucker*, 1998 WL 345403, at *4.

issue"[169] at hand, and, if not, whether HUD's interpretation of the statute was "reasonable or permissible."[170] The District Court and the Ninth Circuit both determined that Congress had clearly intended the statute not to authorize the eviction of innocent tenants, but the Supreme Court reversed, concluding that Congress clearly had intended the opposite.[171]

Of the three *Rucker* decisions, the Ninth Circuit decision was particularly notable because of the strong rhetoric that the court employed to explain its rationale that the statute was unconstitutional. It stated, "HUD's construction of [§ 1437d(l)(6)] would allow . . . irrational evictions, and thus would require [public housing authorities (PHAs)] to include an unreasonable term in their leases and permit eviction without good cause."[172] The court went on to say that if PHAs were permitted to evict "innocent" tenants, it would lead to "absurd results" of tenants losing their homes for activities they did not participate in and had no knowledge of.[173]

The Supreme Court disagreed. In its decision, the Court held that § 1437d(l)(6) "unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related criminal activity of household members and guests whether or not the tenant knew, or should have known, about the activity."[174] This holding effectively eliminated the "innocent tenant" defense for public housing residents.[175] However, the Court also directly addressed the Ninth Circuit's concerns about "absurd results," stating that the statute would not have that consequence because the law does not require eviction; it only authorizes eviction, and the decision to evict a tenant should be left to the discretion of the housing authority in its role as landlord of the property.[176] The Court did not address any issues beyond congressional intent, such as the wisdom or effectiveness of the underlying policy, and it did not indicate that its holding would apply to any situation beyond the federal one-strike policy for public housing residents.

Following *Rucker*, there was more consistency in the application of the one-strike policy by housing authorities and courts than there had been previously, but jurisdictions still adopted different practices with regard to

169. *Rucker*, 237 F.3d at 1119.
170. *Id.*
171. *Rucker*, 535 U.S. at 136; *Rucker*, 237 F.3d at 1126; *Rucker*, 1998 WL 345403, at *13.
172. *Rucker*, 237 F.3d at 1121.
173. *Id.* at 1124.
174. *Rucker*, 535 U.S. at 130.
175. *See* Hornstein, *supra* note 18, at 21–22.
176. *Rucker*, 535 U.S. at 133–34.

certain aspects of one-strike evictions and the strict and vicarious liability aspect of the policy that was upheld by the Supreme Court. Some housing authorities were very strict about the vicarious liability aspects of the one-strike policy; for example, between 2005 and 2010, most of the 1390 one-strike eviction actions that were brought against tenants by the Chicago Housing Authority were on the basis of conduct committed by someone other than the head of household.[177] Many housing authorities have adopted policies whereby certain family members or guests whom the housing authority considers to be problematic are banned from the premises temporarily or permanently.[178]

Many lower courts, applying *Rucker*, have followed the Supreme Court and upheld the evictions of innocent tenants, even when they agree that the tenants did not know about and could not have prevented the underlying criminal activity.[179] Recently, however, courts have begun to shift away from a strict application of the Supreme Court's ruling. For example, state courts in Pennsylvania and North Carolina have overturned housing authorities' terminations of of innocent tenants' leases, relying on state statutes to justify their decisions.[180] Some courts have also overturned housing authority terminations on the grounds that the agencies are abusing their discretion when they decide to evict certain tenants, particularly vulnerable or sympathetic tenants.[181] In New York City, courts reviewing terminations of public housing tenancies have overturned housing authority decisions to evict on the basis that evictions are a disproportionately harsh punishment.[182] While many courts have followed the

177. Angela Caputo, *One and Done*, CHI. REP. (Sept. 1, 2011), http://chicagoreporter.com/one-and-done [https://perma.cc/5DQ5-BBW6].

178. Mule & Yavinsky, *supra* note 126, at 695 n.28; *see also* Jain, *supra* note 12, at 838. In many public housing authorities, this type of "permanent exclusion" is often offered to tenants as a settlement agreement in lieu of immediate termination in one-strike cases, but can result in the later eviction of the tenant if she or he violates the terms of the permanent exclusion agreement. *Id.*

179. *See, e.g.*, Hous. Auth. of Joliet v. Chapman, 780 N.E.2d 1106 (Ill. App. Ct. 2002) (holding that the *Rucker* decision meant that the housing authority could proceed with the tenant's eviction despite lack of knowledge of criminal activity); *see also* Hornstein, *supra* note 18, at 11–21 (discussing how various state courts have applied *Rucker*).

180. For a full discussion of these cases, see generally Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO. J. ON POVERTY L. & POL'Y 1 (2015).

181. *See* Hornstein, *supra* note 18, at 13–15 (discussing a Vermont case that "offers support for an abuse of discretion defense [and] illustrates the importance and role of judicial discretion in drug-related criminal activity evictions").

182. *See, e.g.*, Duryea v. N.Y.C. Hous. Auth., 926 N.Y.S.2d 477 (App. Div. 2011) (vacating the N.Y.C. Housing Authority's decision to permanently exclude tenant's 18-year-old grandson from the apartment for a single instance of weapons possession because the possession was an "isolated" incident and the penalty "shocks our sense of fairness to the extent that it requires the exclusion of petitioner's grandson from her public housing unit"); Vasquez v. N.Y.C. Hous. Auth., 871 N.Y.S.2d 10 (App. Div. 2008) (holding that

Supreme Court's directive in *Rucker* to defer to the discretion of the housing authority, others have found ways to justify overturning housing authority terminations that seem patently unfair, even when that means substituting the court's judgment for that of the housing authority.

III. THE PERILS OF EXPANDING ONE-STRIKE PROVISIONS INTO THE PRIVATE MARKET THROUGH CHOS

When the one-strike policy was incorporated into federal law for public housing tenants, the effect was immediate and harmful.[183] Following *Rucker*, in which the Supreme Court ruled against a group of elderly and disabled tenants who had no knowledge or control over others' behavior that led to the terminations of their tenancies, there was a huge outcry by tenants' advocates against the decision. Several legal scholars analyzed why the decision was legally and morally indefensible.[184] Despite this, the *Rucker* decision stands, and the one-strike policy remains in effect for public housing tenants.[185]

The silver lining in the cloud of the federal one-strike policy is that, as devastating as it can be for the public housing tenants who are subject to it, it actually applies to a relatively small percentage of the American public. There are approximately two million public housing tenants across the country, more than half of whom are elderly or disabled.[186] However, public housing has room for only 30 percent of those who are eligible for it, meaning that the vast

N.Y.C. Housing Authority's termination of tenancy was "disproportionate to the offense" for a disabled tenant who pled guilty to grand larceny). "Where the offending conduct is an isolated incident which does not indicate a pattern of behavior, [New York] courts have been loath to impose the most severe sanction." SCHERER & FISHER, *supra* note 102, § 5.95.

183. *See* Weil, *supra* note 15, at 161–62. After the passage of the first version of the one-strike policy in 1988, David Echols, who was then the director of the New Haven (Connecticut) Public Housing Authority, stated, "All I hear from HUD is 'evict, evict, evict.' But eviction without any treatment or services means the tenants will be homeless, and they'll go to a shelter. If the shelter costs more, then the state will be right back here, asking me to house them." *Id.* at 172.

184. *See, e.g.*, Cavanagh & Williams, *supra* note 20; Sarah Clinton, Note, *Evicting the Innocent: Can the Innocent Tenant Defense Survive a* Rucker *Preemption Challenge?*, 85 B.U. L. REV. 293 (2005); Hornstein, *supra* note 18; Jim Moye, *Can't Stop the Hustle: The Department of Housing and Urban Development's "One Strike" Eviction Policy Fails to Get Drugs Out of America's Projects*, 23 B.C. THIRD WORLD L.J. 275 (2003); Peter J. Saghir, *Home Is Where the No-Fault Eviction Is: The Impact of the Drug War on Families in Public Housing*, 12 J.L. & POL'Y 369 (2003).

185. *But see infra* note 278 (describing former president Obama's rollback of one-strike provisions through HUD memos).

186. *Policy Basics: Public Housing*, CTR. ON BUDGET AND POL'Y PRIORITIES (Nov. 15, 2017), *http://www.cbpp.org/research/policy-basics-public-housing* [https://perma.cc/CX39-FRT5].

majority of residential tenants in the United States rent their homes on the private market.[187] For this reason, the tremendous expansion of one-strike provisions into private rental housing by means of CHOs is extremely problematic from a social perspective. It puts an unprecedented number of people, many of whom are low-income people of color, at risk of eviction and homelessness. Moreover, there are substantial bases for legal objection to the extension of one-strike policies into private rental housing through CHOs.

This Part begins with a short description of eviction as a legal remedy and its social consequences. It then sets forth three arguments for why the one-strike provisions as incorporated into CHOs are legally problematic: First, they give discretion to local police departments to decide when eviction is an appropriate measure; second, they raise a number of concerns about protection of tenants' constitutional rights, including the right to due process and equal protection; and third, they significantly expand the grounds for eviction under traditional landlord-tenant law by holding tenants and landlords vicariously liable for the actions of others, thereby undermining notions of fundamental fairness.

A. Eviction: Legal Remedy, Social Ill

Modern American landlord-tenant law is mostly a "hybrid" of property law and contract law.[188] A landlord owner and a tenant lessee enter into an agreement, often in the form of a written lease contract, in which the landlord allows the tenant to possess and use a piece of real property for a certain period of time. In exchange, the tenant agrees to fulfill certain obligations, which usually include paying rent and not using the property for illegal purposes, among others.[189] If the tenant does not meet her obligations, the landlord can

187. *See* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 302–03 (2016).

188. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 505 (1982). *But see* SCHERER & FISHER, *supra* note 102, § 1.4 ("Federal, state, and local laws and regulations govern landlord-tenant relations, as does case law at the federal and state level. While most administration of landlord-tenant relations is handled by state and local agencies, some is handled at the federal level as well."). Sources of substantive landlord-tenant law include real property statutes; laws against housing discrimination at the federal, state, and local levels; and laws and regulations relating to subsidized housing. *Id.* §§ 1.4–.14.

189. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT §§ 1.1-.4, 12.1-.5 (AM. LAW INST. 1977). Until well into the twentieth century, landlords had few obligations towards tenants other than delivering possession of the property in whatever condition it was in. "[T]he landlord's principal obligations related to possession and the tenant's to rent. . . . The landlord had no obligation to deliver the premises in any particular physical

attempt to regain possession of the premises through a summary eviction process.[190] In this conception of the landlord-tenant relationship, eviction is a remedy to breach of contract, intended to restore the parties to their original positions. In the context of eviction, however, the contract-based analysis can sometimes overlook the real and severe social consequences of eviction for individual tenants, their families, and communities. For a long time, eviction has been viewed as a consequence of poverty, but only recently have social scientists begun to consider eviction as a driver of poverty.[191] This research has documented that eviction leads to a number of social problems, including negative health outcomes, homelessness, deeper poverty, and neighborhood destabilization.[192]

To some extent, the adverse social consequences of eviction have led to procedural protections, however minimal, that are afforded to tenants under traditional landlord-tenant law.[193] In the eviction process, these protections include written notice to the tenant of an alleged breach of the lease,[194] prohibitions on landlords against self-help eviction,[195] and the opportunity for a hearing on the issue of the breach and the right to raise defenses in response to the landlord's allegations.[196] As described below, CHOs erode many of these

condition or state of repair, and . . . no duty to maintain or repair them during the [lease] term." Glendon, *supra* note 188, at 510–11. In the 1960s and 1970s, a "revolution" occurred in landlord-tenant law. Edward H. Rabin, *The Revolution in Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 521 (1984). Through judicial decisions and legislative action, a number of tenants' rights were codified, including the implied warranty of habitability, prohibitions on retaliatory evictions, and protections for tenants against landlord discrimination. *See generally id.*

190. The summary eviction process developed in the U.S. as a "convenient, safe, and relatively speedy alternative to self-help." Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 158–59 (2000).

191. *See* Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 91 (2012).

192. *See id.*

193. For example, the Uniform Residential Landlord-Tenant Act of 1972 contains a prohibition against unconscionable clauses in lease contracts. UNIF. RESIDENTIAL LANDLORD-TENANT ACT § 1.303 (1972) (UNIF. LAW. COMM'N, amended 2015). If a court determines a clause is unconscionable, it can refuse to enforce the clause or even the entire agreement. *Id.* § 1.303(a)(1).

194. *Id.* § 4.201(a).

195. *Id.* § 4.207. Self-help eviction could include actual removal of the tenant from the premises before initiating a court process, or it could also include "willful diminution of services to the tenant by interrupting or causing the interruption of heat, running water, hot water, electric, gas, or other essential services to the tenant." *Id.*

196. *See* SCHERER & FISHER, *supra* note 102, §§ 1.25–1.40 (giving an overview of the summary eviction process in New York).

protections for tenants and thereby increase the risk of eviction for a large number of residential tenants across the country.

B. Transfer of Discretion to Evict From Landlords to Police Under CHOs

One of the most striking aspects of CHOs is the way in which they insert the local police department directly into the private landlord-tenant relationship, to the detriment of both landlords and tenants. When CHOs require or encourage landlords to evict tenants on the basis of their interactions with the criminal justice system—without differentiating between arrests, criminal charges, and convictions—the police department effectively controls the most fundamental aspects of the landlord-tenant relationship: the right of possession of the premises.[197] This represents a revolutionary departure from the norms and standards that have traditionally governed this area of law.

Throughout history, the landlord-tenant relationship has been fraught, particularly when the tenants are poor.[198] There are myriad examples of landlords seeking to evict tenants on flimsy, sometimes unlawful, grounds.[199] However, our legal system does allow for eviction as a landlord's remedy, and landlords have always been able to exercise their discretion to evict tenants who violate their lease obligations in certain circumstances and to do so within certain norms of process, including notice, right to a hearing, and other procedural and substantive protections.[200] In public housing, as demonstrated in the *Rucker* case, the calculus is somewhat different; the government is the landlord, conferring possession of a physical residence on the tenant as well as the benefit of a subsidized rent.

In the *Rucker* decision, the Supreme Court noted one of the reasons that its ruling would not lead to "irrational evictions"[201]:

> The statute does not *require* the eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local public housing authorities, who are in the best position to take

197. See *supra* Subparts I.B.3–4 for an explanation of how crime-free lease addendums and nuisance property ordinances confer the determination of the right of the possession onto the police department.
198. *See* DESMOND, *supra* note 187, at 306–14.
199. Many low-income tenants find that it is particularly difficult to access and maintain rental housing when they have children, because although it is illegal to discriminate against families with children, many landlords do so anyway. *Id.* at 302–03.
200. *See supra* Subpart III.A.
201. Rucker v. Davis, 237 F.3d 1113, 1121 (9th Cir. 2001).

> account of, among other things, the degree to which the housing project suffers from "rampant drug-related or violent crime," "the seriousness of the offending action," and "the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action."[202]

With this statement, the Court made clear that the landlord of the property—that is, the housing authority—should decide in each case whether eviction is warranted under the circumstances.

This is not to say that public housing authorities will always use the discretion they are entrusted with to make decisions that are fair to tenants. There are numerous cases in which housing authorities, under the one-strike policy, have terminated the tenancies of people whose conduct was never proven in court or who clearly had no knowledge or control over the criminal activity of the offending actors, and who arguably were never threats to the safety of other tenants or the property.[203] However, despite the *Rucker* decision, there have also been several instances where courts have overturned public housing authorities' discretionary evictions under state law or as an abuse of discretion.[204] For example, state courts in Pennsylvania and North Carolina have recently reversed decisions by local public housing authorities to evict tenants who had no knowledge of or involvement in the criminal activity that was the basis for the eviction.[205] In other states, courts have overturned housing authorities' decisions to evict under the one-strike policy on an abuse of discretion standard.[206]

As in federal public housing, private-market landlords have always been allowed to evict tenants for criminal behavior, even prior to the rise of CHOs, as long as they could prove a breach of the lease by a preponderance of the evidence.[207] However, the legal dynamic is significantly different in the situation of private-market landlords who own properties in towns where CHOs are in effect. Unlike the public housing authority that was the landlord in the *Rucker* case, private-market landlords in municipalities with CHOs often do not even have the opportunity to make decisions that conform with the Supreme Court's contemplation of how the one-strike policy should be applied: that is, an assessment of how "rampant" crime is at the property, how "serious"

202. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 133–34 (2002) (citations omitted).
203. *See, e.g.*, Allegheny Cty. Hous. Auth. v. Liddell, 722 A.2d 750 (Pa. Commw. Ct. 1998); Bishop v. Hous. Auth. of South Bend, 920 N.E.2d 772 (Ind. Ct. App. 2010).
204. *See generally* Dickinson, *supra* note 180; Hornstein, *supra* note 18, at 21–22.
205. *See* Dickinson, *supra* note 180, at 43–50.
206. *See* Hornstein, *supra* note 18, at 28–39.
207. *See* Weil, *supra* note 15, at 166; *see also* SCHERER & FISHER, *supra* note 102, § 1.32.

the alleged criminal behavior is, whether the tenant has taken any preventative or mitigating steps, and whether the totality of the circumstances justifies eviction.[208] Instead, through the use of both crime-free lease addenda and nuisance property ordinances, municipalities tie landlords' hands and interfere with the landlord-tenant relationship by requiring or coercing landlords into removing tenants, at the discretion of the local police department, as a *first step* to address an allegation of criminal behavior. This transfer of discretion to decide when it is appropriate to evict a tenant from the landlord to the police is deeply troubling for both tenants and landlords, and some landlords have voiced opposition to CHOs on this basis.[209]

In some municipalities, like Hesperia, California, whose CHO was revised in July 2017 after being challenged in federal court by the American Civil Liberties Union (ACLU), the transfer of discretion to the police can be particularly extreme. Under Hesperia's original ordinance from 2015, the landlord was required to initiate an eviction action against the tenant within ten days of being notified by the police department that an alleged violation of the CHO has occurred, and the landlord could be required to submit proof of the eviction proceeding to the police department.[210] After the lawsuit by the ACLU, Hesperia amended its Crime Free Rental Housing Program, "essentially making [it] voluntary."[211] Hesperia's crime-free lease addendum, which all tenants were required to sign under the first version of the ordinance and is now required only for landlords who choose to participate in the Crime Free Rental Housing Program, explicitly requires the tenant to vacate the premises within three days of being served with a Notice to Quit by the landlord for an alleged lease violation based on criminal activity.[212]

Hesperia's CHO was particularly striking in how explicitly it required eviction as a first-resort remedy, but many other CHOs also require landlords to take this drastic step. For example, in Country Club Hills, Illinois, the required crime-free lease addendum prohibits any "criminal activity" by the tenant, any

208. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 133–34 (2002).
209. *See* Ashley Rhodebeck, *Landlords Upset as Cities Work Toward Crime-Free Housing Ordinances*, KANE COUNTY CHRON. (Aug. 2, 2011), http://www.kcchronicle.com/2011/ 08/02/ landlords-upset-as-cities-work-toward-crime-free-housing-ordinances/ ai0w0q1/?page=3 [https://perma.cc/LY56-GG3Q] (quoting a landlord in St. Charles, Illinois, as complaining that "[the CHO] seems to be singling out landlords and blaming them for crime problems in certain areas").
210. *See* HESPERIA, CAL., CODE § 8.20.050(C)(1) (2015).
211. Rene Ray de la Cruz, *Hesperia Amends Crime Free Housing Program*, VICTOR VALLEY DAILY PRESS (Jul. 31, 2017), http://www.vvdailypress.com/news/20170728/hesperia-amends-crime-free-housing-program [https://perma.cc/6ZYT-485K].
212. *See* HESPERIA, CAL., CODE § 8.20.050(C)(1)(a)(vii) (2018).

household members, or "a guest of any person affiliated with" the tenant, "at or near the leased premises."[213] What exactly constitutes "quasi-criminal activity" is unclear and may be based on a subjective determination on the part of the police. A separate ordinance provision then states, "It shall be unlawful for any [landlord] to permit any tenant to occupy any residential unit in violation of any provisions of the 'Crime-Free Lease Addendum' required by this Article."[214]

Other municipalities impose a scheme of graduated fines on landlords who allow tenants to remain in occupancy of rental units in violation of crime-free lease addenda or nuisance property ordinances. In Aurora, Illinois, landlords who do not "abate" nuisances at properties so-designated by the police department can be subject to fines that range from $200 to $1000 per day.[215] It is not a stretch to imagine that a rational landlord, acting in her own economic interests, faced with the choice of either paying steep fines while attempting to persuade the police that a tenant is not a nuisance or simply evicting the tenant, would act as quickly as possible to remove a tenant in order to avoid such steep monetary penalties. In Elgin, Illinois, in order to comply with nuisance abatement requirements, the police department must approve the landlord's proposed course of action for addressing a police-designated nuisance property.[216] A study of a similar ordinance in Milwaukee, Wisconsin, shows that the preferred abatement strategy is almost always eviction.[217]

Most CHOs provide no check on the ability of the police to decide when to evict tenants. There are no standards that govern the discretion of the police to require eviction.[218] The potential for the police to exercise such discretion abusively, arbitrarily, or capriciously is illustrated by the facts of a

213. COUNTRY CLUB HILLS, ILL., CODE § 13.37.11 (2016). *Crime Free Housing*, CITY COUNTRY CLUB HILLS, ILL., http://countryclubhills.org/departments-services/police-department/crime-free-housing [https://perma.cc/V2KT-4JTY].

214. COUNTRY CLUB HILLS, ILL., CODE § 13.37.13 (2016).

215. AURORA, ILL., CODE § 29-129(e)(1) (2018).

216. ELGIN, ILL., CODE § 10.44.040(A)–(B) (2017); *see supra* Subpart I.B.4.

217. *See* Desmond & Valdez, *supra* note 107, at 131.

218. It is notoriously difficult to regulate police discretion. As Jaros explains:

> [T]he nature of police work, and the political and social context in which police officers function, make it difficult to ensure that [their discretion] is not abused. Striking an appropriate balance between civil liberty interests and pressing public safety concerns is particularly difficult because a great deal of questionable police activity exists in the legal shadows—unregulated practices that do not violate defined legal limits because they have generally eluded both judicial and legislative scrutiny.

David M. Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149, 1149–50 (2014).

Sixth Circuit case from Ohio.[219] The plaintiff, Rachael Cox, alleged that a police officer in the city of Deer Park had coerced her landlord into evicting her under the city's nuisance property ordinance even though the landlord wanted Ms. Cox to remain as her tenant.[220] Ms. Cox argued that the police officer, "under color of law, used his position to cause [Ms. Cox's landlord] to declare a violation of the lease in order to effect her eviction."[221]

The factual allegations in the case illustrate the dangers of allowing the police to determine when eviction is appropriate. The case was dismissed because Ms. Cox had left the premises of her own accord before her landlord filed an eviction case in court, and the court held that she had therefore not suffered a "deprivation" of her property that would give rise to an actionable claim.[222] But the court stated in dicta that there could be situations "where an officer's mere psychological coercion of a tenant to vacate or a landlord to evict a tenant from the premises may constitute a deprivation of property."[223] While the case indicates that courts could provide relief to tenants in this manner, it also shows the difficult choice that many tenants face: vacate the property under pressure and relinquish the right to challenge the situation in court, or wait for an eviction case to be filed and risk the adverse consequences that follow.

CHOs also raise troubling questions about racial justice, especially when eviction decisions by the police department can be based only on an arrest.[224] It is well-documented that the police are more likely to arrest people of color than white people.[225] People of color are also more likely to rent their homes.[226] If

219. Cox v. Drake, 241 F. App'x 237 (6th Cir. 2007).
220. *Id.* at 237–40.
221. *Id.* at 237.
222. *Id.* at 243.
223. *Id.*
224. *See* Jain, *supra* note 12 (discussing the use of arrests in public housing evictions). "Arrests give public housing authorities a credible basis for threatening eviction. They also provide leverage in obtaining concessions from households, such as an agreement that the tenant will bar the arrested individual from entry." *Id.* at 838. It is entirely feasible that police departments, using CHOs, could engage in the same types of negotiations with private-market tenants, which could result in an erosion of tenants' rights in their homes.
225. *See* Brad Heath, *Racial Gap in U.S. Arrest Rates:'Staggering Disparity,'* USA TODAY (Nov. 19, 2014, 11:24 PM), https://www.usatoday.com/story/news/nation/2014/ 11/18/ ferguson-black-arrest-rates/19043207 [https://perma.cc/M6DT-6MYP]. In cities across the country, black people are three to ten times more likely to be arrested than people of other races . *Id.*
226. *See* Richard Florida, *The Steady Rise of Renting*, CITYLAB (Feb. 16, 2016), https://www.citylab.com/equity/2016/02/the-rise-of-renting-in-the-us/462948 [https://perma.cc/XL9T-6WTL]. Florida writes:

> As of 2014, 66.1 percent of Hispanics and 61 percent of African Americans were renters, compared to just 34.4 percent of whites. While all racial groups saw a shift

arrests are used as a basis for a police decision about eviction, it follows that people of color will be at higher risk of eviction than their white counterparts. Furthermore, the police, who have no direct economic interest in the landlord-tenant relationship, may be less likely than the landlord to take any mitigating factors into account when deciding whether eviction is appropriate. These factors could include the circumstances surrounding the arrest or the effect of eviction on any other household members. The potential for abuse of discretion by police is a serious concern for municipalities with CHOs.

C. Constitutional and Civil Rights Concerns About CHOs

The extension of one-strike provisions to private-market tenants through CHOs also raises concerns about the protection of tenants' constitutional rights, particularly procedural and substantive due process, equal protection, and discrimination under the Fair Housing Act. To date, there have been relatively few court challenges to CHOs, especially considering the number of ordinances that exist in municipalities across the country. However, the cases that have been filed provide some insight into how courts would view these constitutional issues.

1. Procedural Due Process

The Fourteenth Amendment to the Constitution protects the right to procedural due process, which, at heart, is the right to notice and an opportunity to be heard.[227] While the Supreme Court has ruled that summary eviction proceedings are sufficient to meet the constitutional requirements,[228] CHOs raise new procedural due process concerns for both tenants and landlords.

There have been two cases in which courts, at the behest of landlords, have struck down CHOs on the basis of procedural due process violations: one in

> from owning to renting between 2006 and 2014 [because of the 2008 financial crisis], Hispanics experienced the largest rise—an 8.7 percentage point increase (from 57.4 to 66.1 percent)—compared to a 5 percentage point increase (from 56 to 61 percent) among black households and a similar increase (from 29.5 to 34.4 percent) among white households.

Id.

227. U.S. CONST. amend. XIV; *see also* Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970) (holding that welfare recipients have the right to be notified and have a hearing prior to the termination of their benefits designated as property).

228. *See generally* Lindsey v. Normet, 405 U.S. 56 (1972).

California in 2005,[229] and one in Minnesota in 2011.[230] In the California case, *Cook v. City of Buena Park*, a landlord was ordered by the city to evict both residents of an apartment when one roommate was cited for a drug offense, despite his having completed a diversion program.[231] The landlord challenged the ordinance on the basis of violations of Fourteenth Amendment substantive and procedural due process.[232] The court ruled that the ordinance violated the landlord's procedural due process rights for three reasons: First, the notice the city had provided to the landlord "fail[ed] to require sufficient specificity to aid the landlord in the [eviction] action"; second, the requirement that the landlord commence an eviction proceeding against the tenants within ten days of receiving the notice from the city was "onerous" because it did not give the landlord enough time to "bolster his evidence . . . or to otherwise investigate the matter and develop his case"; and third, the ordinance "*requires* the landlord to prevail in the [eviction] action."[233]

In the Minnesota case, *Javinsky-Wenzek v. City of St. Louis Park*, two landlords challenged the city's requirement that they evict any tenant who violated the local CHO.[234] In this case, the tenants were a couple whose adult son, who did not reside with them, had allegedly stolen drugs from a drug dealer and hidden them in his parents' house, where they were discovered by the police executing a search warrant.[235] The landlords did not wish to evict the tenants and claimed, among other things, that the ordinance violated their Fourteenth Amendment substantive and procedural due process rights.[236] The court agreed that the ordinance violated procedural due process because the city did not provide the landlords a hearing to "challenge the determination that [the landlords] must terminate [the tenants'] lease."[237] Even if a hearing had been available, the city did not adequately notify the landlords of it, and any

229. *See* Cook v. City of Buena Park, 23 Cal. Rptr. 3d 700 (Ct. App. 2005).
230. Javinsky-Wenzek v. City of St. Louis Park, 829 F. Supp. 2d 787 (D. Minn. 2011). *But see* City of Peoria v. Danz, 2011 IL App (3d) 100819-U ¶ 1(holding that a city "ordinance requiring property owner to evict tenants engaged in drug activities or to abate the illegal action does not unconstitutionally deprive property owner of due process").
231. *Cook*, 23 Cal. Rptr. 3d at 701–02.
232. *Id.* at 703.
233. *Id.* at 705–06.
234. *Javinsky-Wenzek*, 829 F. Supp. 2d at 790.
235. *Id.*
236. *Id.* at 796.
237. *Id.* at 798.

hearing provided would have been insufficient because the landlords had already suffered harm.[238]

Additionally, there have been several cases that have specifically challenged nuisance property ordinances on procedural due process grounds on behalf of domestic violence victims who were put at risk of eviction for calling 911 to report abuse.[239] In one case that received significant media attention when it was filed by the ACLU in 2013, a woman named Lakisha Briggs was evicted from her apartment in Norristown, Pennsylvania, after she and her neighbors called 911 several times to report that she was being harmed by her abusive ex-boyfriend.[240] Although the case settled before trial, the complaint alleged that Norristown's ordinance failed to provide adequate due process protections because it allowed the city to revoke the landlord's residential rental license after three instances of what the chief of police determined to be "disorderly behavior."[241] The ordinance did not give tenants any notice of the revocation of the landlord's license or opportunity to contest the determination that the revocation was based on.[242] Ultimately, Norristown agreed to repeal its ordinance as part of the settlement agreement,[243] and some cities and states, including Pennsylvania and Illinois, have passed laws

238. *Id.* at 798–99. It is notable that in the *Cook* and *Javinsky-Wenzek* cases, the successful plaintiffs were landlords. One practical problem for tenants to bring claims challenging CHOs is that relatively few of them are formally evicted by courts under the ordinances. *See* Desmond & Valdez, *supra* note 107, at 131 (stating that only forty-nine percent of landlords who evicted tenants under a nuisance property ordinance in Milwaukee did so through a formal process). Often, as was the case for the tenants in *Javinsky-Wenzek*, they elect to leave the premises before a court process is initiated in order to avoid an eviction on their records. *Javinsky-Wenzek*, 829 F. Supp. 2d at 791 (2011). While understandable from a self-preservation perspective, this means that a tenant may relinquish the right to bring a claim challenging a CHO on her own behalf because she may not have the standing to do so. This was the situation in *Cox v. Drake*, where the court determined that the plaintiff had not been "deprived" of her protected property interest in a way that would support a procedural due process claim against the city because she had moved out of her apartment before her landlord initiated a formal eviction action. Cox v. Drake, 241 F. App'x 237, 242–43 (2007).

239. *See, e.g.*, Verified First Amended Complaint, Briggs v. Borough of Norristown, No. 2:13-cv-02191-ER (E.D. Pa. Apr. 29, 2013); *see also* 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/C492-4H3D].

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

241. *See* Verified First Amended Complaint, *supra* note 239, at ¶¶ 39, 174–180.

242. *See id.* ¶ 179.

243. Release & Settlement Agreement, Briggs v. Borough of Norristown (Sept. 8, 2014), https://www.clearinghouse.net/chDocs/public/FH-PA-0007-0004.pdf [https://perma.cc/3EDU-2ARL].

exempting domestic violence victims from nuisance property provisions when they are calling 911 to report abuse.[244] Many CHOs that allow the police to determine what tenant behavior should result in eviction may be vulnerable to similar court challenges.

The latest action to challenge a CHO on due process and other constitutional grounds was filed in May 2016 by the ACLU against the city of Hesperia, California. The ACLU brought its case on behalf of the Victor Valley Family Resource Center (VVFRC), a nonprofit organization based in Hesperia that provides "safe, stable, permanent housing as a primary strategy for eradicating homelessness" in San Bernardino County.[245] Hesperia's CHO, originally passed in 2015,[246] requires landlords, among other things, to provide tenants' background information to the Hesperia Police Department to be maintained in a "crime free data base" and for the police to notify landlords of any "violation of a crime free lease agreement or rules at previous locations."[247]

244. S.B. 1547, 99th Gen. Assemb., Reg. Sess. (Ill. 2015); H.B. 1796, 2014 Gen. Assemb., Reg. Sess., 2013–14 (Pa. 2014).

245. *Community on the Move*, VICTOR VALLEY FAM. RESOURCE CTR., www.vvfrc.org [https://perma.cc/2R5V-H8P9]. Most of VVFRC's clients have experienced substance abuse, mental illness, chronic physical illness, or some combination of those. *See* Complaint for Injunctive & Declaratory Relief & Damages at ¶ 43, Victor Valley Family Res. Ctr. v. City of Hesperia, No. 5:16-CV-00903 (C.D. Cal. May 4, 2016), 2016 WL 2626009 [hereinafter VVFRC Complaint]. Many also have criminal records. *See id.* ¶¶ 12–30 (describing the individually-named plaintiffs, residents of VVFRC's transitional and supportive housing programs for people who are on parole or probation).

246. In the same case, the ACLU also challenged another Hesperia ordinance, a group home ordinance passed by Hesperia in 2007, prohibiting any two unrelated people who are on parole or probation from living together. HESPERIA, CAL., CODE § 16.16.072(C) (2007). The ACLU's complaint alleges that "[t]he Group Home Ordinance rests on unsubstantiated fears and irrational prejudice" about people who have criminal records, and that the municipality selectively enforces the ordinance because of "negative attitudes of City officials and some Hesperia residents regarding individuals in reentry and the presumed residents of 'group homes.'" VVFRC Complaint, *supra* note 245, ¶¶ 66–67. The claims related to the group home ordinance are: (1) violation of Fourteenth Amendment Equal Protection and the California Constitution because the group home ordinance "unconstitutionally distinguishes between people who are related by blood or marriage, and those who are not," *Id.* ¶ 115; (2) violations of the Fourteenth Amendment and California Constitution because the group home ordinance restricts the right of people on probation from "traveling to and establishing residence in Hesperia," *Id.* ¶¶ 120–124; (3) violations of the Fourteenth Amendment and California Constitution rights to privacy and free association because the group home ordinance restricts the ability of people on probation to co-habit with companions of their choosing, *Id.* ¶¶ 125–129; and (4) that the group home ordinance is preempted by the California Constitution because it "impos[es] a blanket housing restriction on all persons on probation, whereas state law calls for an individualized, case-by-case determination," *Id.* ¶¶ 130–134.

247. HESPERIA, CAL., CODE § 8.20.050(B) (2015).

The first version also required landlords to initiate eviction proceedings against tenants within ten days of being notified by the police department that "a tenant has engaged in criminal activity that would violate any federal, state or local law, on or near the residential property leased to tenant."[248] In response to the ACLU's complaint, Hesperia changed its ordinance in July 2017 to address some of the most egregious issues raised by the ACLU.[249]

The language of Hesperia's original 2015 ordinance, like other CHOs, is substantially similar to the wording of the federal one-strike policy, yet it was even harsher than the federal law and many other CHOs because it explicitly required the landlord to commence eviction proceedings against a tenant within such a short time frame that the tenant may not even be able to gather sufficient evidence to mount a defense. In its complaint, the ACLU cited numerous examples of Hesperia City Council members and government officials making statements that bolstered its allegation that "[t]he City's intent in passing the Rental Housing Ordinance was to uproot and exclude groups the City Council deems undesirable, in order to restore and preserve the demographic profile preferred by City officials."[250]

The procedural due process claim in the Hesperia complaint alleged that the CHO "threatens to deprive Plaintiffs of their interest in their leasehold by subjecting landlords to potential fines or revocation of their rental license and by requiring and incentivizing their landlords to initiate eviction proceedings against them without adequate procedural protections."[251] Although this case did not result in a judicial ruling, this is similar to some of the cases that have succeeded in striking down CHOs.

2. Substantive Due Process

The Fourteenth Amendment also protects substantive due process, the concept that certain rights "are founded . . . upon 'deeply rooted notions of fundamental personal interests derived from the Constitution.'"[252] Often, "substantive due process is invoked to challenge arbitrary deprivations of life, liberty, and property by officials, such as police officers, jail guards, public-

248. *Id.* § 8.20.050(C)(1).
249. Rene Ray de la Cruz, *supra* note 211.
250. VVFRC Complaint, *supra* note 245, at ¶ 73.
251. *Id.* ¶¶ 140–147.
252. Nunez v. Pachman, 578 F.3d 228, 233 (3d Cir. 2009) (quoting Nilson v. Layton City, 45 F.3d 369, 372 (10th Cir. 1995)).

school educators, public employers, and members of zoning boards."[253] In order to establish a substantive due process violation, plaintiffs must establish that "(1) they were deprived of a protected property interest and (2) the state chose an irrational means to deprive them of that interest."[254] Legal challenges to CHOs have raised issues of substantive due process violations, though no court has struck them down on this basis to date.

In *Javinsky-Wenzek*, the Minnesota landlords who filed the case raised a substantive due process claim, alleging that the city deprived them of their property interest in an irrational manner.[255] The court determined, however, that because the eviction action ordered by the city was based on illegal marijuana that the police found inside the tenants' apartment, "[t]he application of the Ordinance in this case does not appear sufficiently irrational or outrageous to violate substantive due process."[256] In *Cook*, the court did not rule on the substantive due process claim, but a concurring judge wrote briefly that there could be a host of "other, more fundamental constitutional infirmities than procedural due process" afflicting the CHO, including "the Damoclean substantive due process issue."[257] The *Norristown* case also included a substantive due process claim, alleging that the city had "created a danger to Ms. Briggs because she was effectively prohibited from calling the police during an emergency without risking . . . eviction under the . . . Ordinance."[258] Because the case settled, there was no ruling on this issue.

3. Equal Protection

CHOs also implicate equal protection concerns. The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person . . . the equal protection of the laws."[259] While none of the court decisions about CHOs have ruled on equal protection, the ACLU raised the issue in its complaint against Hesperia, California. The complaint alleges the CHO violates the Fourteenth

253. Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 307 (2010). One of the most well-known recent substantive due process cases is *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the U.S. Supreme Court struck down a Texas statute prohibiting same-sex intimate sexual conduct. *Roe v. Wade*, which upheld the right to abortion, was also a substantive due process case. Roe v. Wade, 410 U.S. 113 (1973).
254. Javinsky-Wenzek v. City of St. Louis Park, 829 F. Supp. 2d 787, 800 (D. Minn. 2011).
255. *Id.*
256. *Id.* at 801.
257. Cook v. City of Buena Park, 23 Cal. Rptr. 3d 700, 707 (Ct. App. 2005) (Bedsworth, J., concurring).
258. Verified First Amended Complaint, *supra* note 239, ¶ 185.
259. U.S. CONST. amend. XIV, § 1.

Amendment Equal Protection Clause because it "discriminates against residential renters and their families" by imposing its requirements on them but not on people who own their homes.[260] The *Norristown* complaint also alleges an equal protection violation specifically related to domestic violence victims. The allegation was that Norristown's ordinance "provided less protection to victims of domestic violence than to other victims of violence, because 'domestic disturbances' were specifically targeted as 'disorderly behavior' that can result in the eviction of the victim."[261] Moreover, the concurring judge in *Cook v. City of Buena Park* also wrote that one of the "constitutional infirmities" that the CHO presented in that case was that it resulted in "disparate treatment of property owners and renters" because there was no evidence that the city attempted to abate nuisances in owner-occupied homes in the same way it did in rental properties.[262]

Equal protection claims have been successfully used in the past to challenge local ordinances that attempt to keep undesirable populations from living in municipalities. One of the most famous cases challenging exclusionary zoning was the 1975 case of *South Burlington County N.A.A.C.P. v. Mount Laurel Township*, in which the New Jersey Supreme Court addressed a local zoning ordinance that prohibited any residential housing construction except for single-family homes, effectively barring any low-income people from moving into the municipality.[263] The court held that "every . . . municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. . . . [I]t cannot foreclose the opportunity of classes of people mentioned for low and moderate income housing."[264] On the issue of equal protection, the court stated, "It is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws."[265] Although it was a state court decision, *Mount Laurel* has come to stand for the principle that a municipal government cannot enact zoning laws that effectively prevent low-income people from living in towns because each municipality has "an affirmative

260. VVFRC Complaint, *supra* note 245, ¶¶ 135–139.
261. Verified First Amended Complaint, *supra* note 239, ¶ 196.
262. *Cook*, 23 Cal. Rptr. 3d at 707 (Bedsworth, J., concurring).
263. *See* S. Burlington Cty. NAACP v. Township of Mount Laurel, 336 A.2d 713, 719 (N.J. 1975).
264. *Id.* at 724.
265. *Id.* at 725.

obligation . . . to provide a 'realistic opportunity' for a fair share of the state's need for affordable housing."[266]

4. Fair Housing Act

CHOs may also give rise to claims of discrimination under the Fair Housing Act.[267] While people with criminal records or who interact with the criminal justice system are not themselves a protected class under the Fair Housing Act, there may still be valid issues of discrimination if criminal history is used as a proxy for race or another protected class.[268] In 2016, a property developer in Zion, Illinois, a city of about 25,000 people located 40 miles north of Chicago near the Wisconsin border,[269] filed a suit against the city in federal district court, alleging that the city's nuisance property ordinance violated the Fair Housing Act.[270] The developer, TBS Group, alleged that Zion's CHO "target[s] African-American and Latino renters, who comprise a large percentage of all renters in Zion . . . . It impermissibly targets those renters based on race and national origin."[271] It also stated that "the ordinance . . . has a disparate impact on African-American and Latino renters,"[272] but failed to state

266. Robert C. Holmes, *The Clash of Home Rule and Affordable Housing: The Mount Laurel Story Continues*, 12 CONN. PUB. INT. L.J. 325, 325 (2013) (citing *Mount Laurel*, 336 A.2d at 724–25). There was a second *Mount Laurel* case, decided in 1983, in which the New Jersey Supreme Court applied its holding in the first case to all municipalities in the state. *See* S. Burlington Cty. NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983); Holmes, *supra*, at 326–27.

267. *See* WERTH, *supra* note 13, at 5. CHOs "can disproportionately harm groups that are protected by fair housing laws—such as racial and ethnic minorities, female-headed households, and disabled households." *Id.*

268. *See id.* at 6–7. The Landlord Training Program manual for Elgin, Illinois, is quick to point out that a criminal record may be a valid reason for a landlord to deny a rental application from a prospective tenant. ELGIN LANDLORD TRAINING PROGRAM, *supra* note 31, at 10–11. It also encourages landlords not to ask questions about the circumstances of an applicant's criminal record, because it could open the door to a discrimination claim. *Id.* at 11. The manual states, "The bottom line is to plan your words [when denying an application] very carefully. Discrimination suits are brought forward when managers say too much and deny the person, not the application!" *Id.*

269. *Department of Planning and Urban Development: Demographics*, CITY ZION, ILL., http://www.cityofzion.com/economic-development/demographics [https://perma.cc/Z6AL-F8AU].

270. Complaint & Request for Injunctive Relief at 4, TBS Grp., LLC v. City of Zion, No. 16-CV-05855 (N.D. Ill. 2016), 2017 WL 319201.

271. *Id.* at 1.

272. *Id.*

the basis on which that allegation was premised.[273] Therefore, the court dismissed the complaint in January 2017 for failure to state a claim.[274]

Although the Zion claim was unsuccessful, the theory of disparate impact under the Fair Housing Act may prove to be a successful strategy for challenging CHOs. In 2015, the Supreme Court ruled in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* that it is not necessary for a plaintiff to show discriminatory intent when alleging a violation of the Fair Housing Act; rather, it is sufficient to show that there is a disparate impact on a protected class based on statistics.[275] While people who are targeted for eviction by CHOs—that is, people who are involved with the criminal justice system or have criminal records—are not a protected class under federal or most state and local civil rights laws, there has been movement by policymakers and courts towards recognizing that criminal history can be a proxy for race.[276] Therefore, civil rights litigators may be able to use the precedent from *Inclusive Communities* to challenge local CHOs.[277]

273. TBS Grp. v. City of Zion, 2017 WL 319201, No. 16-CV-5855 (N.D. Ill. Jan. 23, 2017).

274. *Id.*

275. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015). The Fair Housing Act prohibits discrimination in the sale or rental of housing on the basis of "race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (2012).

276. *See* Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 238–40 (2015) (detailing the history of the association of criminal dangerousness with race). In 2015, President Obama's HUD issued a directive stating that arrest records alone could not be used as a basis for denying or evicting people from public housing because of the high correlation between arrest rates and race. U.S. DEP'T OF HOUS. & URBAN DEV.: OFFICE OF PUB. & INDIAN HOUS., GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS (2015), https://www.hud.gov/sites/documents/PIH2015-19.pdf.

277. After *Inclusive Communities*, an impact-based claim under the Fair Housing Act "requires not only a showing of negative impact on a protected class but also that the defendant lacked either a legitimate interest in taking its action or could have achieved that interest with a less discriminatory alternative." Robert G. Schwemm, *Fair Housing Litigation After* Inclusive Communities*: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106, 119 (2015). A claim against a landlord with a blanket ban on renting to people with criminal records may prevail because a landlord should know that such a rule would not only "have a large negative impact on racial minorities, but whose legitimate safety interests might just as well be served by a less restrictive alternative (for example, banning only those people with convictions for serious crimes or that are less than five years old)." *Id.* (footnote omitted).

D. Third-Party Policing and Expanded Grounds for Eviction Under CHOs

When the Supreme Court decided the *Rucker* case in 2002, it upheld the provision of the one-strike policy that allows a public housing authority to terminate a tenancy for criminal activity even if the tenant had no knowledge of the activity and could not have prevented it.[278] To many, including the lower courts, imposing vicarious liability on a public housing tenant in this manner seemed to contravene notions of fundamental fairness.[279] However, in many ways, the Supreme Court's decision was very much in keeping with a legal trend in the latter decades of the twentieth century, which blurred the divide between civil and criminal law and adopted the use of civil law measures to accomplish what had traditionally been criminal law objectives.[280] One common method of implementing this was the use of vicarious liability in civil and criminal laws to hold a wider circle of people responsible for antisocial behavior, a practice that has been termed "third-party policing" by legal scholars and social scientists.[281] The federal one-strike policy and its local corollary—CHOs—are very much in keeping with this trend, and have resulted in an unprecedented expansion of the types of activities—and the people who commit them and the places where they happen—that can lead to eviction.

Third-party policing has been defined as "police efforts to persuade or coerce organizations or non-offending persons, such as public housing agencies, property owners, parents, health and building inspectors, and

278. *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 135–36 (2002).

279. The Ninth Circuit *Rucker* opinion refers to the "absurdity and unjustness of the potential results in this case." Rucker v. Davis, 237 F.3d 1113, 1124 (9th Cir. 2001) (en banc).

280. For example, in the 1980s and 1990s, there was a trend towards so-called civil commitments for people convicted of sex offenses, in which offenders, after serving out their prison sentences, are held involuntarily in treatment facilities because they are still considered dangerous to society. *Cf.* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001).

281. *See* Swan, *supra* note 8, at 825. Third-party policing is:

> [A]n increasingly important form of regulation and law enforcement that is now often deployed to address social problems. In third-party policing, the state requires private parties—who neither participate in nor benefit from the misconduct they are compelled to address—to enforce laws and prevent misconduct by enacting some method of control over a primary wrongdoer. Failure to perform these assigned duties results in civil or criminal sanctions.

Id. (footnotes omitted). *See also* Desmond & Valdez, *supra* note 107.

business owners to take some responsibility for preventing crime or reducing crime problems."[282] The private-market rental housing realm, though, is distinguishable from federal public housing in an important way. As the Supreme Court pointed out in *Rucker*, in public housing the government is already the landlord of the property.[283] In private-market rental housing, CHOs force landlords and tenants to assume responsibility for behavior that has traditionally been considered under the purview of the police, implicating important privacy and police power considerations.[284]

Through crime-free lease addenda and nuisance property ordinances, local governments have placed the responsibility on landlords and tenants to ensure crime prevention in rental properties, yet local governments retain the authority to punish landlords and tenants if they fail in this endeavor. This explosion in the types of things that can serve as grounds for a tenant's eviction, from the landlord losing her operating license to a tenant's guest being arrested off-property, has served to increase the risk of eviction for many tenants across the country and to perpetuate housing instability.

IV. BALANCING THE INTERESTS

CHOs purport to prevent and reduce crime, which is one of the basic functions of government at every level.[285] However, this function must be balanced with protecting the rights of citizens and ensuring that necessary and

282. LORRAINE MAZEROLLE & JANET RANSLEY, THIRD PARTY POLICING 2–3 (2005). For an in-depth discussion of how local governments have used their legislative power to impose third-party policing regimes on their citizens in a variety of ways, see Swan, *supra* note 8, at 827. This intrusion of third-party policing responsibilities is in line with the type of hypercriminalization of mainly low-income people of color that has contributed to mass incarceration. *See generally* ALEXANDER, *supra* note 53. It also leads to the breakdown of community ties and relationships of trust that have historically worked to strengthen communities and reduce crime. Levy, *supra* note 16, at 569–70; Swan, *supra* note 8, at 894–95.

283. *Rucker*, 535 U.S. at 135.

284. Swan, *supra* note 8, at 833 ("Civil [local] ordinances provide the criminal law with an even greater sphere of impact and are able to access areas of private life that were once unavailable to it.").

285. *See* Berman v. Parker, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs."). Many CHOs include statements of this purpose in the wherefore clause of the ordinance. *See, e.g.*, ADDISON, ILL., ORDINANCE 0-09-02 (Feb. 2, 2009) ("Whereas, the exchange of information between landlords and the Police Department assists in reduction of the level of crime in rental units; and whereas, the Mayor and Board of Trustees believe and hereby declare that it is in the best interests of the Village to amend the Village Code as follows in order to reduce the level of crime in rental units.").

important interests, such as property rights, privacy rights, and constitutional principles, are maintained. CHOs arguably tip the scale too far towards interfering with these citizen rights and interests, especially when evidence of corresponding crime reduction is tenuous at best.

The tough-on-crime era of the past forty years, which was the breeding ground for the one-strike policy, has been the subject of much debate and discussion.[286] Since their peak in the 1980s and 1990s, crime rates have fallen across the country including in public housing, and the tough-on-crime policies have also given rise to other serious social challenges, including mass incarceration and the continuing need to advance racial and economic justice.[287] These are important issues that merit debate and advocacy. However, the expansion through CHOs of the one-strike policy into the lives of residential tenants across the country, many of whom are low-income people of color, needs to be recognized as an equally serious issue. "[Eviction] is one of the most urgent and pressing issues facing America today, and acknowledging the breadth and depth of the problem changes the way we look at poverty."[288]

Municipalities considering CHOs, as well as those with them already in place, should prioritize not only crime prevention, but also the value of the rights of their citizens. In order to do this, they should consider several questions: first, how serious the problem of crime in rental housing actually is; second, if facilitating eviction from rental housing is the best way to deal with this problem; and third, whether the ordinance that is under consideration or already in place compromises the legal rights of landlords and tenants in the ways this Article has shown.

First, there is the question of the seriousness of the crime problem that municipalities face in rental housing. When the federal one-strike policy was put into place for public housing tenants in the 1980s, it was undisputed that crime was rampant.[289] The one-strike policy was an imperfect solution to this problem, but it was designed to address what many public housing tenants,

286. *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

287. *See supra* text accompanying notes 122–127.

288. DESMOND, *supra* note 189, at 5.

289. *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 127 (2002). In the opening sentence of the opinion, Chief Justice Rehnquist quoted from the Anti-Drug Abuse Act of 1988, stating, "With drug dealers 'increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants,' Congress passed the Anti-Drug Abuse Act of 1988." *Id.*

public housing authorities, and policymakers considered to be a crisis.[290] But in many of the towns that have expanded one-strike provisions into the private rental market through CHOs, the situation is not nearly so dire, and private-market rental housing is not facing nearly the same challenges of public safety that public housing did thirty years ago. In fact, there is evidence to suggest that many municipalities are implementing CHOs preemptively without high crime rates in rental housing.[291] For example, a police spokesman in Fort Pierce, Florida, acknowledged that most of the evidence that crime in rental housing was a particular public safety problem was anecdotal.[292] Therefore, cities should consider whether the actual crime problem, not just the fear of crime, really necessitates CHOs.

Second, cities and towns should consider whether making it easier to evict residential tenants is really a solution to the problems such ordinances purport to address.[293] The history of the federal one-strike policy does not shed light on this question. Crime rates have fallen in public housing since the one-strike policy went into effect, but the reduction in crime cannot necessarily be attributed to evictions of alleged criminal actors.[294] There is also no conclusive evidence to show that CHOs are doing the job of reducing crime in private-market housing in cities where they exist. Many cities cite the reduction in 911 calls as evidence that CHOs are reducing crime, but this does not necessarily correspond to less crime.[295] The reduction could also be a result of a chilling effect of CHOs on crime reporting when citizens fear the consequence of

290. Weil, *supra* note 15, at 161–62.

291. *See e.g.*, Swan, *supra* note 8, at 892 (quoting the mayor of Orland Park, Illinois, who stated, "It's not so much that there's major problems, but there are some problems, and we want to avoid problems in the future").

292. Lidia Dinkova, *One Strike and You're Homeless*, VERO BEACH PRESS J., Oct. 23, 2016, at A19.

293. *See* Swan, *supra* note 8, at 893 ("Because much of the anecdotal evidence does not separate out the strands of a multipronged approach [to crime reduction], it is very difficult to say which portion of any decrease in crime rates is attributable to the eviction policy and which portion is attributable other interventions.").

294. *See* Kathleen F. Donovan, *No Hope for Redemption: The False Choice Between Safety and Justice in Hope VI Ex-Offender Admissions Policies*, 3 DEPAUL J. FOR SOC. JUST. 173, 197–98 (2010).

295. *See e.g.*, Swan, *supra* note 8, at 893 (discussing the city of Collinsville, Illinois, which reported a reduction in 911 calls, but an overall increase in the crime rate). Additionally, a landlord in Batavia, Illinois, reported that her experience was that most calls for emergency services in her property were for issues like "well-being checks, vandalism and domestic disturbances," not serious threats to tenants' safety. Rhodebeck, *supra* note 209.

eviction—a dangerous situation for victims of domestic violence and other crimes.[296]

A corollary to this second question that municipalities should also consider is the effect of CHO evictions on community and neighborhood stability. Social policies of expulsion and exclusion often create different problems without solving the ones they were intended to. For example, under the federal one-strike policy, many housing authorities encourage public housing tenants to avoid eviction by signing agreements excluding allegedly bad-acting family members—often a partner or a child—from the apartment.[297] This can contribute to the breakdown of the very family ties that could strengthen low-income neighborhoods.[298] Eviction from private housing can have the same adverse consequences for both individuals and communities. People who are evicted do not just disappear; they still have the need for shelter, yet eviction often makes it even more difficult for people, especially those without many financial resources, to find decent and affordable housing.[299] This fallout due to eviction should be something that local governments take under careful consideration when passing or revising CHOs.

Third, there is the question of the legal problems CHOs can create for municipalities. The federal government and public housing authorities have already taken some steps to modify the application of the federal one-strike policy in order to address some of these issues, including limiting the use of arrests to deny or evict someone from public housing.[300] There have been some efforts to modify ordinances at the local and state levels to mitigate some of these concerns as well. In response to concerns about domestic violence victims, some states and cities have carved out exceptions for 911 calls made by victims or others to report crimes.[301] Whether these measures are providing meaningful protections for tenants is unclear. Many domestic violence victims

296. *See* Desmond & Valdez, *supra* note 107, at 137. "The nuisance property ordinance [in Milwaukee] has the effect of forcing abused women to choose between calling the police on their abusers (only to risk eviction) or staying in their apartments (only to risk more abuse)." *Id.* (emphasis omitted).

297. *See* Madeline Howard, *Subsidized Housing Policy: Defining the Family*, 22 BERKELEY J. GENDER, L. & JUST. 97, 119 (2007).

298. *See id.* at 120–21.

299. *See* DESMOND, *supra* note 189, at 5.

300. *See* DEP'T OF HOUS. & URBAN DEV.: OFFICE OF PUB. & INDIAN HOUS., *supra* note 278.

301. *See* Spector, *supra* note 241; *see also* S.B. 1547, 99th Gen. Assemb., Reg. Sess. (Il. 2015); H.B. 1796, 2014 Gen. Assemb., Reg. Sess, 2013–14 (Pa. 2014).

are arrested along with the perpetrators,[302] and it is possible that this sort of incident could still lead to eviction.

In addition to carving out exceptions for domestic violence victims, some municipalities have taken the approach that CHOs should include in the language of the ordinance more meaningful protections for tenants. For example, a recently passed ordinance in Evanston, Illinois, includes important provisions that address some of these concerns.[303] First, in terms of where the alleged criminal activity needs to occur to give rise to eviction, Evanston's ordinance is narrower than other CHOs because it is limited it to "criminal activity on the premises or on landlord's property,"[304] instead of "on or near" the property.[305] Furthermore, Evanston's ordinance specifically prohibits the use of arrests alone to form the basis of a violation of the CHO, requiring instead that an arrest or citation be "supported by admissible corroborating evidence that activity in violation [of the ordinance] . . . has occurred."[306] This type of limiting language can help to prevent abuse of discretion by the police department as well as some of the constitutional concerns that CHOs implicate.[307]

Given the serious and numerous problems that CHOs present for tenants, landlords, and communities, municipalities that do not yet have CHOs in place should seriously consider whether their benefits would outweigh the detriments. Communities that do have them should consider either repealing them or significantly modifying them to address legal and social concerns. For communities seeking to reduce and prevent crime, the best solution may be investing in social programs that strengthen neighborhoods, rather than penalizing and expelling residents whose behavior is deemed undesirable.[308]

CONCLUSION

For the nearly seventy million Americans who have a criminal record, there are many challenges to living and maintaining a stable and productive life, including finding a job, accessing education, and exercising political rights.[309]

302. For example, Lakisha Briggs, the plaintiff in the Norristown case, was cited at least once during a domestic incident with her abusive ex-boyfriend. Verified First Amended Complaint, *supra* note 239, ¶ 74.
303. EVANSTON, ILL., CODE § 5-3-4-5 (2018).
304. EVANSTON, ILL., CODE § 5-3-4-5(A) (2018).
305. *See, e.g.*, ELGIN, ILL., CODE § 6.37.100(F)(1) (2017).
306. EVANSTON, ILL., CODE § 5-3-4-5(E) (2018).
307. *See supra* Parts III.B–C.
308. *See* Swan, *supra* note 8, at 894–96.
309. *See* Friedman, *supra* note 92.

In 1988, in a War-on-Drugs effort to deal with crime in public housing, the federal government added the risk of eviction from public housing to the challenges these Americans face when it implemented the eviction program that became known as the one-strike policy. The one-strike policy imposes strict and vicarious liability on public housing tenants for any instance of alleged criminal activity by the tenant, her family members, or guests, on or off the public housing premises.[310] When the Supreme Court upheld the vicarious liability aspect of the one-strike policy in the case of *Department of Housing and Urban Development v. Rucker* in 2002, it validated the ability of public housing authorities to evict an entire family from public housing for something as low-level as an arrest if the housing authority decided to use its discretion in that manner.[311]

As burdensome as the one-strike policy has been for the low-income tenants who rely on public housing for a roof over their heads, local governments have since imposed the same risk of eviction on millions of private-market tenants as well. CHOs, which require or coerce private-market landlords into evicting tenants under virtually the same provisions as the federal one-strike policy, have proliferated across the country in recent years. By imposing these strictures on tenants in ways that have been largely unchecked by the courts, local governments have placed an unprecedented number of people at risk of eviction and its attendant consequences.

CHOs present several serious legal concerns, including unfettered discretion by the police to evict tenants, potential constitutional and civil rights violations, and the spread of third-party policing that significantly expands the scope of activities that can lead to eviction. These issues, and the evictions they have the potential to cause, will continue to present a serious challenge to governments and policymakers. In the meantime, tenants remain at risk of losing their homes, and communities remain vulnerable to increasing instability. Before implementing or renewing CHOs, municipalities should resist the lure of the political popularity of crime prevention and broadly consider the needs of the community and the long-term negative consequences of CHOs.

310. *See* 42 U.S.C. § 1437d(*l*)(6) (2012).
311. *See* 535 U.S. 125, 135–36 (2002).