

Fair Housing's Drug Problem: Combatting the Racialized Impact of Drug-Based Housing Exclusions Alongside Drug Law Reform

*Emily Ponder Williams**

I. INTRODUCTION

Five years after her release from incarceration and a decade after her last and only conviction for the sale of a controlled substance, Veronica Martinez¹ was deemed too dangerous for admission as a New York City Housing Authority tenant. Martinez was considered dangerous, despite her showing that the conviction arose from a coercive, abusive relationship and she had since become a dedicated mentor to young girls at risk of entering the criminal justice system. After Michael Newman was convicted for possession of a controlled substance with the intent to sell, he was displaced from his rent-stabilized apartment—his home of 18 years. The Manhattan District Attorney's office had compelled Newman's landlord to bring an eviction proceeding, even though they lacked evidence indicating that commercial drug activity had occurred inside the apartment. Hank Gilmore's public housing tenancy was terminated after nearly 40 years when he pleaded guilty to the sale of a controlled substance, notwithstanding evidence that his involvement in drug sales was merely as a "runner," selling small amounts, nowhere near his apartment, to support a drug habit for which he had since voluntarily and successfully sought treatment.

Martinez, Newman, and Gilmore are low-income Harlem residents, each a person of color, and each faced with the prospect of having nowhere else to go in light of New York City's affordable housing crisis.

Their stories are not unusual. Across New York City and the country, people swept up in the tide of punitive drug enforcement face seemingly impenetrable barriers to accessing and then maintaining stable housing. Left with few options, they are displaced and isolated. This Article seeks to examine these barriers in the context of the sweeping racial disparities now widely identified with the war on drugs and mass incarceration, with a critical lens on the justifications for these policies and the Fair Housing Act's inability to curtail their discriminatory effects sufficiently.

* Supervising Attorney at Neighborhood Defender Service of Harlem ("NDS"), representing indigent clients facing the collateral consequences of contact with the criminal justice system, including in the areas of housing, employment, civil forfeiture, and police misconduct. A special thanks goes to interns Molly Rugg and Alexandra Rockoff for their research support, collaboration, and, most of all, dedication to our clients.

¹ Names in this paragraph have been changed to protect client confidentiality, but each example, based on my own experience with clients represented by NDS, is factually unaltered.

To be sure, the criminal justice system in general, and drug criminalization and stigmatization in particular, have long been used as tools to repress and control racial minorities in the wake of civil rights advances.² Indeed, when crack cocaine entered the market in the early 1980s, just a few short years after sweeping civil rights legislation had been passed to combat Jim Crow, controlling crack cocaine quickly became a political instrument that, as then-senior adviser to Human Rights Watch Jamie Fellner observed, was used “to woo a white electorate anxious about its declining status through the race-coded language of ‘drugs’ and ‘crime.’”³ Fueled by sensational media reports, President Ronald Reagan and Congress declared a “war on drugs” that, in reality, was a war on crack cocaine and the people of color who were more likely to use it.⁴ At the outset, this effort targeted low-income pockets of inner cities—those spaces occupied primarily by Black families due to decades of systemic, state-sponsored segregation.⁵ As a result of this targeted enforcement, more people of color have been brought through the criminal justice system in the last four decades than at any other point in our nation’s history, with disparities at every stage of the process, from arrest to bail, prosecution, conviction, and sentencing.⁶

By now, the discriminatory impact of drug enforcement on Black and Latino people, as well as the resulting mass incarceration, have been well-recognized and widely criticized.⁷ With 2.2 million incarcerated people—a 500 percent increase since the commencement of the drug war—and an additional 4.5 million people under correctional control through probation or parole,⁸ many politicians have seized upon criminal justice reform as a plat-

² See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Justin M. Smith, *Maintaining Racial Inequality Through Crime Control: Mass Incarceration and Residential Segregation*, 15 CONTEMP. JUST. REV. 469 (2012); see also George Lipstiz, *In an Avalanche Every Snowflake Pleads Not Guilty: The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights*, 59 UCLA L. REV. 1746, 1780 (2012).

³ Jamie Fellner, *Race, Drugs and Law Enforcement in the United States*, 20 STAN. L. REV. 257, 264 (2009).

⁴ Kathleen R. Sandy, *The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed by Examining the Hysteria Over Crack*, 54 ALA. L. REV. 665, 681 (2003) (pointing out that although powder cocaine use among affluent whites increased in the 1970s, “it was not until President Reagan and the introduction of crack in a few urban ghettos in the mid-1980s that the media pounced upon the drug issue, bombarding the public with frightening images of crack cocaine as a unique demon drug . . .”) (internal quotation marks omitted).

⁵ See Ann Cammett, *Confronting Race and Collateral Consequences in Public Housing*, 39 SEATTLE U. L. REV. 1123, 1135–36 (2016).

⁶ Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1796–1800 (2017); TESS BORDEN, HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, *EVERY 25 SECONDS: THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES* 8–10 (2016); ASHLEY NELLIS, THE SENTENCING PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 10–11 (2016).

⁷ See, e.g., ALEXANDER, *supra* note 2; Fellner, *supra* note 3.

⁸ *Fact Sheet: Trends In U.S. Corrections*, THE SENTENCING PROJECT (June 2018), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>, archived at <https://perma.cc/NFH4-YVSR>.

form, and advocacy campaigns focusing on decarceration have taken root.⁹ The recently enacted First Step Act, which reduced mandatory minimums and expanded early release options for people in federal custody, is a testament to these efforts.¹⁰ However, arrest and incarceration account for only part of the war on drugs' incapacitating effect on people of color. Often, it is the debilitating collateral consequences of contact with the criminal justice system that exclude those affected from meaningful social and economic participation long after a criminal sentence is served. From stripping voting rights to limiting employment, denying public benefits, deporting non-citizens, and, of course, limiting access to housing, these collateral consequences destabilize and disenfranchise low income people of color and their communities.¹¹

Some scholars suggest that these incapacitating consequences are not merely incidental; rather, they are the intended effect of the racialized campaign against drugs.¹² As Gabriel J. Chin observes, "the history of drug policy and of collateral consequences reflects an unfortunate tendency to criminalize conduct thought to have been engaged in by minority groups, and to impose special punishments on those convicted of such crimes and not others."¹³ Perhaps it is unsurprising, then, that the collateral consequences attached to drug offenses are more extensive and severe than for any other category of crime.¹⁴

Whether intentional or incidental, the fact remains that like every other aspect of drug enforcement, low-income people of color experience these collateral consequences most acutely.¹⁵ Indeed, scholars have identified the contribution of the war on drugs, mass incarceration, and collateral consequences to the economic instability and disenfranchisement of people of color.¹⁶ However, few have closely examined the way state-led, drug-based

⁹ See generally Douglas A. Berman, *Leveraging Marijuana Reform to Enhance Expungement Practices*, 30 FED. SENT'G REP. 305 (2018).

¹⁰ See FIRST STEP ACT of 2018, Pub. L. No. 115-391, 132 Stat. 5194; see also Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law – and What Happens Next*, BRENNAN CTR. FOR JUSTICE (Jan. 4, 2019), <https://www.brennancenter.org/blog/how-first-step-act-became-law-and-what-happens-next>, archived at <https://perma.cc/NH6J-8WZS>.

¹¹ See ALEXANDER, *supra* note 2, at 140–77; see generally Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE, & JUST. 255 (2002).

¹² Chin, *supra* note 11, at 261.

¹³ *Id.*

¹⁴ *Id.*; Nora V. Demleitner, "Collateral Damage": No Re-entry for Drug Offenders, 47 VILL. L. REV. 1027, 1033 (2002). As Demleitner notes, although the public considers crimes such as murder and rape to be more serious offenses than drug possession or distribution, collateral consequences are much more severe for drug offenses.

¹⁵ It is difficult to capture how many people are affected by collateral consequences, which can sometimes be triggered by mere arrest. But given that nearly one-third of the entire Black male population is saddled with a felony conviction, as opposed to one-eighth of all men, the enormous, disparate impact is patently clear. See Shannon et al., *supra* note 6, at 1807.

¹⁶ See, e.g., ALEXANDER, *supra* note 2; Chin, *supra* note 11, at 255; Fellner, *supra* note 3, at 264.

housing consequences directly fuel the disparate displacement and resulting segregation of low-income people of color. Nor is there research examining the sufficiency of current civil rights legislation to curtail this effect.

This Article will first identify and critique the formal policies that restrict the housing options of those targeted by the war on drugs. Second, the Article will discuss the role of these policies in furthering the displacement and isolation of people of color, particularly in the context of gentrifying cities. Third, the Article will examine the sufficiency of the Fair Housing Act (“FHA”) to counteract this racially disparate result in light of recent federal guidance warning housing providers that excluding individuals with criminal records could run afoul of the FHA.¹⁷ Finally, the Article will propose policy solutions at the state and local level that can fill the FHA’s gaps and work to stem the tide of displacement and segregation resulting from the war on drugs and mass incarceration.

II. HOUSING AND THE WAR ON DRUGS

In the 1980s and 90s, bolstered and justified by the popular perception that low-income, high-density housing was plagued by drugs and violence,¹⁸ federal, state, and local governments enacted policies promoting eviction and exclusion from both public housing and the private market for anyone who sold, used, or was in any way associated with drug activity.¹⁹ As these policies arose in tandem with increasing criminal enforcement during the war on drugs, housing became not just another collateral consequence of contact with the criminal justice system. Rather, housing became an enforcement tool in its own right.²⁰ Today, that tool continues to be utilized even as authorities pull back on criminal enforcement measures.

To better understand the role these policies have played in (a) furthering how people of color have been segregated and displaced from housing, and (b) limiting how tenants or potential tenants can combat segregation, it is worth briefly laying out the nature and extent of housing eligibility policies in both the public and private housing context.

¹⁷ U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF, archived at <https://perma.cc/M66X-G93Q> [hereinafter “HUD Guidance”].

¹⁸ As Fellner describes, much of the policy response in the war on drugs was fueled by sensationalist media reports that depicted these images. Fellner, *supra* note 3, at 264.

¹⁹ As then-HUD Secretary Andrew Cuomo put it, “drugs are public enemy number one. We must have zero tolerance for people who deal drugs. They are the most vicious, who prey on the most vulnerable. They are the jailers, who imprison the elderly. They are the seducers, who tempt the impressionable young. They must be stopped.” U.S. DEP’T. OF HOUS. & URBAN DEV., MEETING THE CHALLENGE: PUBLIC HOUSING AUTHORITIES RESPOND TO THE ONE STRIKE AND YOU’RE OUT INITIATIVE (Sept. 1997), <https://www.ncjrs.gov/pdffiles1/Photocopy/183952NCJRS.pdf>, archived at <https://perma.cc/G8RL-7U7B>.

²⁰ See generally Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95 (2001).

A. *Barriers to Federally Subsidized Housing*

The Anti-Drug Abuse Act of 1988 labeled drug dealers as “imposing a reign of terror on public and other federally assisted low-income housing tenants.”²¹ This characterization laid the groundwork for a collection of policies designed to exclude not only those posing a direct threat to other low-income tenants, but also anyone who is merely associated with drug activity regardless of their own culpability. Together, those policies are commonly called “one-strike” policies, a term coined by President Bill Clinton when he declared during his State of the Union address six years later, “If you break the law, you no longer have a home in public housing—one strike and you’re out.”²² If Clinton’s colloquialism was an exaggeration of the actual policy, it was only slight.

Indeed, through the Anti-Drug Abuse Act, Congress requires local public housing authorities (“PHAs”) to include lease provisions authorizing eviction based on any drug-related criminal activity occurring on or off the premises by any member or guest of the household.²³ If any person in the tenant’s household violates these terms, PHAs have the authority to evict the entire family, regardless of the primary leaseholder’s involvement in or knowledge of the activity—a “strict liability” standard.²⁴ Alternatively, PHAs can require a leaseholder to exclude only the family member believed to be involved in drug activity from residing in or even visiting the home.²⁵ Although evictions require some elements of due process—namely, notice and an informal hearing²⁶—legal services organizations funded by the federal Legal Services Corporation (“LSC”) are prohibited from representing individuals facing eviction from public housing on drug-related charges spe-

²¹ 42 U.S.C. § 11901(3) (2018).

²² William J. Clinton, President, United States of America, Address Before a Joint Session of Congress on the State of the Union (Jan. 23, 1996).

²³ 42 U.S.C. § 1437d(l)(6) (2018). Drug-related criminal activity is defined as “the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in Section 802 of Title 21).” 42 U.S.C. § 1437d(l); see also Leah Goodridge & Helen Strom, *Innocent Until Proven Guilty? Examining the Constitutionality of Public Housing Evictions Based on Criminal Activity*, 8 DUKE FORUM FOR L. & SOC. CHANGE 1, 3–4 (2016). Although the one-strike policy requires grounds for eviction to include any criminal activity, criminal activity other than drug-related activity must have a specific nexus to the housing premises. Drug-related activity, on the other hand, can constitute grounds for eviction and exclusion no matter where it occurs.

²⁴ See *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 125 (2002) (upholding the constitutionality of “no-fault” evictions, whereby a tenant can be held strictly liable for the illegal activity of guests and family members regardless of the tenant’s personal involvement or knowledge).

²⁵ *Id.*; Cammett, *supra* note 5, at 1144; see also MARGARET DIZEREGA ET AL., VERA INST. OF JUSTICE, REPORT TO THE NEW YORK CITY HOUSING AUTHORITY ON APPLYING AND LIFTING PERMANENT EXCLUSION FOR CRIMINAL CONDUCT 7 (2017), <https://www.vera.org/publications/report-to-the-new-york-city-housing-authority-on-applying-and-lifting-permanent-exclusions-for-criminal-conduct>, archived at <https://perma.cc/9S5M-7MBX>; *Rucker*, 535 U.S. at 125.

²⁶ 42 U.S.C. § 1437d(k) (2018).

cifically.²⁷ Notably, these regulations do not require a criminal *conviction*. A PHA need only offer proof under a preponderance of the evidence standard that some type of drug activity has occurred in order to provide cause for eviction.²⁸ In this way, Congress has ensured the cards are stacked against tenants facing termination of housing assistance.

In the same vein, regulations require PHAs to create standards excluding applicants with a family member who is currently using illegal drugs, whose drug use or pattern of drug use “may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents,” or was convicted “for manufacture or production of methamphetamine on the premises of federally assisted housing.”²⁹ Regulations also permit the denial of applicants with any household member who is currently engaged in or previously engaged in drug-related or violent criminal activity, or criminal activity that may threaten other tenants’ health, safety, or right to peaceful enjoyment of the premises.³⁰ These bars apply to initial tenancy applications, but also work to preclude family members with a criminal record from joining the household of a tenant already residing.³¹ As with evictions, PHAs can deny an entire family, or a family could decide to exclude only those individuals who are ineligible.³² Although PHAs are required to consider the individualized circumstances of a person’s conviction and an informal hearing must be afforded before a person is denied,³³ in practice applicants are rarely informed of this process or provided a meaningful opportunity to be heard.³⁴

When enacting these policies, Congress also created mechanisms and incentives to ensure their effective enforcement. For example, PHAs are required to collaborate with local police departments to develop crime prevention and safety plans, and police departments are encouraged to assist in

²⁷ 45 C.F.R. § 1633.3(a) (2019); *see also About Statutory Restrictions on LSC-Funded Programs*, LEGAL SERVS. CORP. (last visited Apr. 13, 2019), <http://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs>, *archived at* <https://perma.cc/8LYR-5MHS>.

²⁸ U.S. DEP’T OF HOUS. & URBAN DEV., GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAs) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS (Nov. 2, 2015), <https://www.hud.gov/sites/documents/PIH2015-19.PDF>, *archived at* <https://perma.cc/7FPG-M3GC>.

²⁹ 24 C.F.R. § 982.553(a)(1)(ii)(A)-(C) (2002); *see Goodridge, supra* note 23, at 3–4.

³⁰ 24 C.F.R. § 982.553(a)(1)(ii)(A)-(C) (2002).

³¹ This is because public housing residents must certify their household composition, and new members are subject to a background check and the policies excluding people with convictions. 42 U.S.C. § 1437d(l)(6) (2018).

³² CORINNE CAREY, HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 35 (2004) (describing families faced with choice to exclude members with criminal convictions in order to become eligible for assistance).

³³ *See* 42 U.S.C. § 13661 (2018); 24 C.F.R. § 960.203 (2019); *see also*, 42 U.S.C. § 1437d(q)(2) (requiring PHAs to provide applicants an opportunity to dispute the accuracy and relevance of a criminal record before taking adverse action).

³⁴ CAREY, *supra* note 32, at 54–59, 86–100.

carrying out those plans.³⁵ Often, this is done through record-sharing and increased surveillance of public housing premises.³⁶ Practices in New York City are indicative. The New York City Police Department (“NYPD”) automatically reports to the New York City Housing Authority (“NYCHA”) the arrest of anyone with a Housing Authority address, regardless of whether the arrestee actually lives there.³⁷ If NYCHA chooses to act on the arrest information, the NYPD will provide details, reports, and witnesses to facilitate eviction.

Although PHAs administering these programs largely have discretion to evict or exclude due to drug offenses, studies have shown that this “discretion” is often implemented more stringently than required by law, due in part to HUD’s allocation of funds based on how aggressively PHAs enforce one-strike policies.³⁸ Indeed, according to a 2013 study, 93 percent of PHAs impose some type of ban on drug-related activity, with most imposing a categorical three to five year bar despite no requirement to do so under federal law.³⁹ While HUD does not publish any national statistics on the implementation of these policies,⁴⁰ and recent local statistics are surprisingly difficult to find, it is evident that these policies continue to drive exclusions and evictions decades after their implementation. In Chicago, for example, one report found that between 2005 and 2010, 1,390 “one-strike” cases were opened and “hundreds” of tenants were evicted.⁴¹ In New York City, 1,502 cases were brought in 2017 alone, with 562 cases ending in either termination or the permanent exclusion of at least one person from housing assistance.⁴² While these numbers paint some picture of how many people are

³⁵ See 24 C.F.R. § 903.7 (2019); Goodridge, *supra* note 23, at 5–7; see also BARBARA WEBSTER & EDWARD F. CONNORS, NAT’L INST. OF JUSTICE, *THE POLICE, DRUGS, AND PUBLIC HOUSING* (June 1992) (describing police-PHA partnerships in four cities).

³⁶ Goodridge, *supra* note 23, at 5–7.

³⁷ See Press Release, City of N.Y., Dep’t of Investigation, DOI Finds Continued Failures To Remove Dangerous Criminal Offenders From Public Housing (Mar. 28, 2017), https://www1.nyc.gov/assets/doi/downloads/pdf/2017-Press_Release/10NYCHAMOU03-27-17wreport.pdf, archived at <https://perma.cc/Z2H9-VFYB>.

³⁸ Marah A. Curtis et al., *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 CITYSCAPE: J. POL’Y DEV. & RES. 37, 48 (2013); see also U.S. DEP’T OF HOUS. & URBAN DEV., *MEETING THE CHALLENGE: PUBLIC HOUSING AUTHORITIES RESPOND TO THE ONE-STRIKE AND YOU’RE OUT INITIATIVE* (Sept. 1997) (hereinafter “HUD Report”), <https://www.ncjrs.gov/pdffiles1/Photocopy/183952NCJRS.pdf>, archived at <https://perma.cc/95BZ-N47M>.

³⁹ Curtis et al., *supra* note 38, at 43–44.

⁴⁰ Goodridge, *supra* note 23, at 4.

⁴¹ Angela Caputo, *One and Done*, CHICAGO REPORTER (Sept. 1, 2011), <https://www.chicagoreporter.com/one-and-done/>, archived at <https://perma.cc/KD6V-5YA4>.

⁴² CITY OF N.Y., *SAFETY AND SECURITY AT NYCHA: 2017 REPORT ON OUTCOMES OF ADMINISTRATIVE ACTIONS RELATED TO PERMANENT EXCLUSION AND TERMINATION OF TENANCY FOR NON-DESIRABILITY* (2017), <https://www1.nyc.gov/assets/nycha/downloads/pdf/2017-permanent-exclusion-report.pdf>, archived at <https://perma.cc/9NH6-H7U4>. The relevant data speaks to terminations based on “non-desirability,” which is NYCHA’s catch-all for termination cases based on all criminal activity. Though the data do not differentiate between drug-related and other criminal activity, my personal experience suggests that drug-related charges form the basis for the vast majority of non-desirability cases in New York City. Be-

affected by terminations, it is difficult to find data on the number of applicants denied based on these policies, or deterred from even seeking assistance in the first place.⁴³

B. Restrictions in the Private Market

As the primary focus of drug-based exclusion policies at the federal level, public housing restrictions are well known and extensively studied.⁴⁴ The private market has not been insulated from these measures, either. Through establishing grounds for eviction, carrying out forfeitures, and encouraging tenant screening, the federal, state, and local governments have erected a panoply of drug-based barriers to the private rental market.

Although varying widely across jurisdictions, measures authorizing, and sometimes mandating, eviction from privately-owned housing based on drug activity have become ubiquitous since the war on drugs began.⁴⁵ Under some versions of these laws, city and state agencies are vested with authority to compel housing providers to initiate eviction proceedings when tenants are accused of drug-related activity or even to bring these proceedings themselves.⁴⁶ In New York City, for example, two agencies—the NYPD and the District Attorneys’ offices—frequently utilize two separate sets of laws to force the eviction of tenants based on drug-related charges. The Nuisance Abatement Law, a set of municipal statutes utilized frequently by the NYPD, allows the agency to bring an application for an injunction based on allegations that three instances of drug activity have occurred over a short period of time.⁴⁷ These proceedings are brought against the building itself and can result in the issuance of an injunction against the building’s owner, although typically the tenant is the only individual served and asked to answer the charges. Similarly, under a New York State law, District Attorneys’ offices can compel a housing provider to initiate eviction proceedings based on allegations that a tenant has been using the premises for commercial drug activ-

sides drug activity, allegations of violence are the only other type of criminal charges that regularly form the basis for termination proceedings.

⁴³ Cammett, *supra* note 5, at 1144.

⁴⁴ See, e.g., Lisa Weil, *Drug-Related Evictions in Public Housing: Congress’ Addiction to a Quick Fix*, 9 YALE L. & POL’Y REV. 161, 172 (1991); Cammett, *supra* note 5; CAREY, *supra* note 32; Demleitner, *supra* note 14; Goodridge, *supra* note 23.

⁴⁵ Scott Duffield Levy, *The Collateral Consequences of Seeking Order Through Disorder: New York’s Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 541 (2008); see also David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & SOC. INQUIRY 5, 15 (2008).

⁴⁶ Levy, *supra* note 45, at 543–47 (describing state-led narcotics eviction programs in New York, Los Angeles, Memphis, and Indianapolis).

⁴⁷ N.Y., N.Y.C., ADMIN. CODE §§ 7-701–7-722 (2017); see also 37-01 31st Ave. Realty Corp. v. Safed, 861 N.Y.S.2d 561 (N.Y. Civ. Ct. 2008) (describing the function and effect of a Nuisance Abatement proceeding); *The NYPD Is Kicking People Out of Their Homes, Even if They Haven’t Committed a Crime*, PROPUBLICA (Feb. 4, 2016), <https://www.propublica.org/article/nypd-nuisance-abatement-evictions>, archived at <https://perma.cc/S2YS-5WAS>.

ity.⁴⁸ Although the housing provider is ultimately the party responsible for initiating proceedings, failure to comply with the District Attorney's request can result in the housing provider being joined as a party and fined.⁴⁹ While New York's laws focus primarily on commercial drug activity,⁵⁰ other jurisdictions like California, for example, allow prosecutors and city attorneys to compel eviction proceedings when a tenant has been using the premises for a "controlled substance purpose," which includes sale or use.⁵¹

In addition to these state and city-led evictions, some jurisdictions vest housing providers with vast authority to evict tenants based on drug activity. In some cases, like Pennsylvania's Expedited Eviction of Drug Traffickers Act, these provisions mirror public housing regulations by permitting eviction for any "drug-related criminal activity" engaged in by a tenant, household member, or guest, "on or in the immediate vicinity of the leased residential premises."⁵² For example, under that statute, a family was evicted after the tenant's teenage son was arrested several blocks away from the home for possession of ten baggies of marijuana.⁵³ Based on the strict liability standard, the court found eviction was warranted despite the fact that the police never visited the tenant's apartment, no drugs were found there, and the tenant herself was not accused of any criminal activity.⁵⁴ Other jurisdictions provide similarly wide authority to evict tenants based on even low-level drug offenses.⁵⁵

⁴⁸ N.Y. REAL PROP. LAW § 231 (Consol. 2019); N.Y. REAL PROP. ACTS. LAW §§ 711, 715 (Consol. 2019) (collectively called the "Bawdy House Laws"); *see, e.g.*, *City of New York v. Wright*, 618 N.Y.S.2d 938 (N.Y. App. Div. 1994); *NYCHA v. Fashaw*, 53 Misc.3d 1209(A) (N.Y. Civ. Ct. 2016); *855-79 LLC v. Salas*, 40 A.D.3d 553, 2007 N.Y. Slip Op. 04581 (N.Y. App. Div. May 31, 2007).

⁴⁹ *See* N.Y. REAL PROP. LAW § 231 (Consol. 2019); N.Y. REAL PROP. ACTS. LAW § 715 (Consol. 2019).

⁵⁰ While both the Nuisance Abatement Law and Bawdy House Laws provide a cause of action based on drug sales or commercial use, respectively, practice shows that both types of cases are routinely brought based on limited hearsay evidence from confidential informants and in instances where small amounts of controlled substances are found. *See generally* cases cited *supra* note 47.

⁵¹ CAL. CIV. CODE § 3486 (Deering 2019); *see also* BENJAMIN TANG, CAL. RESEARCH BUREAU, A REVIEW OF THE CALIFORNIA UNLAWFUL DETAINER PILOT PROGRAM: 2018 UPDATE 1–3 (Mar. 2018), https://www.library.ca.gov/Content/pdf/crb/reports/Unlawful_Detainer_2018_Report.pdf, archived at <https://perma.cc/34Q3-G5SG>.

⁵² PA ST 35 P.S. 780-156.

⁵³ Hous. Auth. of City of Pittsburgh v. Underwood, No. 2151 C.D.2011, 2012 WL 8702756, at *1 (Pa. Commw. Ct. Aug. 9, 2012).

⁵⁴ This is particularly so because these civil proceedings are based on a mere preponderance of the evidence standard, a lower burden of proof than required in a criminal proceeding. Therefore, "evidence" often comes from uncorroborated statements made by confidential informants participating in "controlled buy" operations. Mr. Newman's case, cited *supra* Sec. I is a prime example of this typical scenario.

⁵⁵ *See, e.g.*, IDAHO CODE § 6-303(5) (2019) (allowing for eviction without notice or any use or sale of controlled substance); N.J. STAT. ANN. § 2A:18-61.1(n) (West 2019) (providing for eviction for any drug-related conviction occurring on the premises by the tenant or another occupant).

Relatedly, the war on drugs brought expanded forfeiture power authorizing the seizure of real property. Under this expanded power, law enforcement can seize homes that have been used in the commission of a drug offense.⁵⁶ Seized property is typically sold and the proceeds often go to the law enforcement agencies that initiated the actions.⁵⁷ Congress granted this authority at the federal level, but states have enacted similar provisions.⁵⁸ Like other drug exclusion provisions, some states do not require any criminal conviction to establish grounds for forfeiture.⁵⁹ Although these laws primarily target building owners, they still result in ousting tenants residing in seized buildings. Furthermore, at least in some instances, forfeiture proceedings are initiated with the primary goal of encouraging housing providers to evict tenants, rather than ultimately seizing the property.⁶⁰

Implementing formal eviction mechanisms is not the only way that the war on drugs has influenced the private housing market. Indeed, the potential liability faced by landlords as a result of compelled evictions and forfeitures, as well as other drug- and crime-related civil liabilities, has contributed to a sharp rise in tenant screening since the beginning of the war on drugs.⁶¹ By providing education programs and technical support to landlords, government agencies have also explicitly encouraged the screening of rental applicants with drug-related convictions.⁶²

In myriad ways, private housing providers have been, willingly or not, drafted into the drug enforcement army, ensuring that the government's cam-

⁵⁶ 21 U.S.C. §§ 881(a)(7)-(b) (2018); *see also* DRUG POLICY ALLIANCE, CIVIL ASSET FORFEITURE 2 (2015), https://www.drugpolicy.org/sites/default/files/Drug_Policy_Alliance_Fact_Sheet_Civil_Asset_Forfeiture.pdf, *archived at* <https://perma.cc/N6H7-55YS>.

⁵⁷ DRUG POLICY ALLIANCE, *supra* note 56, at 1; *see also* MARIAN R. WILLIAMS ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 17 (2010).

⁵⁸ WILLIAMS ET AL., *supra* note 57 (providing description of civil asset programs across each state).

⁵⁹ DRUG POLICY ALLIANCE, *supra* note 56, at 1.

⁶⁰ PETER FINN, NAT'L INST. OF JUSTICE, THE MANHATTAN DISTRICT ATTORNEY'S NARCOTICS EVICTION PROGRAM 10 (1995), <http://www.druglibrary.net/schaffer/GovPubs/mann.pdf>, *archived at* <https://perma.cc/XML4-Z3WF> (describing referrals made to the United States Attorney for the Southern District of New York by the Manhattan District Attorney's Office in an effort to file forfeiture actions to leverage settlement agreements whereby housing providers agree to evict their tenants).

⁶¹ Thacher, *supra* note 45, at 10–18. Prior to the war on drugs, as Thacher identifies, the practice of criminal-record vetting was essentially non-existent. *Cf.* *United States v. One Parcel of Prop. Located at 121 Allen Place, Hartford, Conn.*, 75 F.3d 118, 121 (2d Cir. 1996). In *One Parcel*, a landlord disputed forfeiture of his property based on an “innocent owner” defense, but the court found that because the landlord failed to prevent drug-related activity by enhancing building conditions and security, screening and eviction of drug-using tenants, and investigating illegal drug activities, the owner had impliedly consented to the activity at issue.

⁶² *See, e.g.*, BUREAU OF JUSTICE ASSISTANCE, KEEPING DRUG ACTIVITY OUT OF RENTAL PROPERTY: ESTABLISHING LANDLORD TRAINING PROGRAMS (1995), <https://www.ncjrs.gov/pdffiles/landlord.pdf>, *archived at* <https://perma.cc/7628-5UY9>. These partnerships continue today. For example, the U.S. Attorney's Office for the District of Vermont maintains a page on its website dedicated to instructing landlords to monitor and control drug crime, including through eviction. *See* U.S. ATTORNEY'S OFFICE, DIST. OF VT., COMBATING DRUG TRAFFICKING IN OUR COMMUNITIES: A LANDLORD'S ROLE, <https://www.justice.gov/usao-vt/combating-drug-trafficking-our-communities-landlord-s-role>, *archived at* <https://perma.cc/SZ8D-KT4P>.

paign is carried through the private housing market in measures nearly equal to those applied in the public housing market.

III. DISPARATE DISPLACEMENT AND EXCLUSION

Because drug enforcement is laced with disparities at every turn, the disparate impact of drug-based housing exclusion policies is essentially a foregone conclusion.⁶³ But the disparities in housing exclusion are not merely a consequence of the disparities within the criminal justice system. Instead, when it comes to housing, those already deep disparities are compounded by historic inequality and systemic segregation, creating, as others have observed, a “double disparate impact” that has contributed to the disproportionate displacement and segregation of low-income people of color.⁶⁴ As a result, policies excluding people with drug-related offenses from accessing housing perpetuate patterns of segregation.

Historic segregation has played a large role in perpetuating the disparities of drug enforcement and related housing policies. Prior to the passage of the Civil Rights Act of 1968,⁶⁵ decades of pervasive, often state-sponsored efforts to enforce housing segregation put homeownership out of reach for many low-income Black families.⁶⁶ As a result, these families were pushed into the urban core generally, and public and other rental housing specifically, while whites dominated suburbia and homeownership.⁶⁷ This pattern was entrenched as the major pieces of anti-drug legislation were put into place beginning in the late 1980s.⁶⁸

At that time, 12 percent of the U.S. population was Black.⁶⁹ However, Black households represented 19 percent of the total rental household popu-

⁶³ See ALEXANDER, *supra* note 2, at 141–45, 184–85.

⁶⁴ Goodridge, *supra* note 23, at 22.

⁶⁵ Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18 U.S.C.).

⁶⁶ See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017); Casey Kellogg, *There Goes the Neighborhood: Exposing the Relationships Between Gentrification and Incarceration*, 3 THEMIS: RES. J. JUST. STUD. & FORENSIC SCI. 178, 194 (2015); Cammett, *supra* note 5, at 1129–32. As these works describe, practices like redlining—the federal government’s refusal to back home loans in minority and integrated neighborhoods—created barriers to homeownership and entrenched segregation patterns for low-income minorities.

⁶⁷ Cammett, *supra* note 5, at 1134–35; see Jesse Kropf, *Keeping Them Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Caste*, 4 GEO. J. L. & MOD. CRITICAL RACE PERSP. 75, 85 (2012).

⁶⁸ See generally U.S. DEP’T. OF HOUS. & URBAN DEV., *PUBLIC HOUSING: IMAGE VERSUS FACT* (1995), <https://www.huduser.gov/periodicals/ushmc/spring95/spring95.html#foot3>, archived at <https://perma.cc/AA64-HRLB>; WILLIAM H. FREY, *THE BROOKINGS INST., MELTING POT CITIES AND SUBURBS: RACIAL AND ETHNIC CHANGE IN METRO AMERICA IN THE 2000s* 3 (2011), https://www.brookings.edu/wp-content/uploads/2016/06/0504_census_ethnicity_frey.pdf, archived at <https://perma.cc/EHJ3-ZNVP>; Lisa N. Sacco, *Drug Enforcement in the United States: History, Policy and Trends*, Congressional Research Service (2014), <https://fas.org/sgp/crs/misc/R43749.pdf> (providing timeline of drug enforcement in the United States).

⁶⁹ U.S. CENSUS BUREAU, *THE BLACK POPULATION: 2000* (2001), <https://www.census.gov/prod/2001pubs/mso01-bp.pdf>, archived at <https://perma.cc/KVA6-BR64>.

lation and 48 percent of all public housing residents.⁷⁰ Black people also represented a disproportional 19 percent of the total rental household population and 24 percent of all U.S. cities, with a much higher concentration in some urban areas.⁷¹ Likewise, Black households represented 48 percent of all public housing residents nationwide, but, because public housing was highly segregated, many large developments had significantly higher percentages; in census tracts that were 70 percent or more Black in 1990, 92 percent of public housing residents were Black.⁷² In contrast, whites comprised 80 percent of the overall U.S. population⁷³ but 39 percent of public housing residents and 66 percent of renting households nationwide.⁷⁴ The majority of white families living in public housing resided in low-poverty, mostly white neighborhoods.⁷⁵ Although the demographics of many American cities have been shifting in recent years,⁷⁶ these trends remain fairly consistent: people of color still disproportionately reside in public or other rental housing in cities, while white households are still far more likely to own than rent.⁷⁷

These entrenched patterns set the stage for the profound racial disparities in drug enforcement.⁷⁸ According to Fellner, the concentration of low-income, minority people in urban neighborhoods enhanced the perception of danger as crack cocaine use spread there.⁷⁹ This perception led to targeted, highly concentrated enforcement in those neighborhoods.⁸⁰ Studies in cities across the U.S. support this race-space theory by showing that drug enforcement in majority-minority neighborhoods far outpaces actual incidents of drug use and sales, and also far underrepresents the white people who are likely to both use and sell drugs at the same rate as the people of color who are ultimately arrested.⁸¹ Such aggressive enforcement has been even more

⁷⁰ U.S. DEP'T. OF HOUS. & URBAN DEV., *supra* note 68.

⁷¹ *Id.*; FREY, *supra* note 68, at 3.

⁷² JOHN M. GOERING ET AL., THE LOCATION AND RACIAL COMPOSITION OF PUBLIC HOUSING IN THE UNITED STATES 1 (1994).

⁷³ *Id.*

⁷⁴ U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 68.

⁷⁵ GOERING ET AL., *supra* note 72, at 1–2.

⁷⁶ *Id.*

⁷⁷ NAT'L LOW INCOME HOUS. COALITION, WHO LIVES IN PUBLIC HOUSING 3 (2012), <https://nlhlc.org/sites/default/files/HousingSpotlight2-2.pdf>, archived at <https://perma.cc/X6LL-UYYM>; ANTHONY CILLUFFO ET AL., PEW RESEARCH CTR., MORE U.S. HOUSEHOLDS ARE RENTING THAN AT ANY POINT IN 50 YEARS (2017), <http://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/>, archived at <https://perma.cc/CHG5-ZTMH>; FREY, *supra* note 68; see also Kropf, *supra* note 67, at 85.

⁷⁸ See generally Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156, 164–66 (2001) (detailing historical segregation patterns in relation to modern policing strategies).

⁷⁹ Fellner, *supra* note 3, at 263–64; see also Chin, *supra* note 11, at 273–74; Kropf, *supra* note 67, at 85.

⁸⁰ Fellner, *supra* note 3, at 263–65; see also Chin, *supra* note 11, at 273–74.

⁸¹ Mona Lynch et al., *Policing the “Progressive” City: The Racialized Geography of Drug Law Enforcement*, 17 THEORETICAL CRIMINOLOGY 335, 338–39 (2013) (citing studies in Seat-

pronounced in surveillance of public housing residents.⁸² In this way, persistent segregation patterns are intimately tied to the racial disparities found in the criminal justice system. Following a touch with the criminal justice system, people of color are then disproportionately impacted by the housing consequences that follow.⁸³

The disparities in drug-based housing exclusions are, like disparities in enforcement, rooted in the historical barriers to homeownership and unregulated housing. Indeed, the vast majority of drug-based exclusion policies target tenants rather than owners.⁸⁴ Thus, the fact that the low-income people of color targeted by the war on drugs are far more likely to rent their homes means that they will also be more likely to face eviction following a drug-related arrest or conviction.⁸⁵ This disparity is further exaggerated in the public housing context, both due to the greater disproportion of people of color in public housing and also the greater number of formal restrictions in public housing as opposed to the private market, including eviction, permanent exclusion, and denial of admission.⁸⁶ While no national data exists tracking those excluded under these policies,⁸⁷ one study shows that every 25 seconds someone is arrested for drug possession alone across the U.S., and one-third of those arrested are Black.⁸⁸ Moreover, across types of housing, housing-exclusion policies have the potential to displace not only the individual arrested or convicted, but also their entire family—increasing the raw number of people who face exclusion beyond statistics that can be seen in arrest and incarceration numbers.⁸⁹

Displacement and exclusion are also likely to have a greater impact on people of color. A white person is more likely to be able to overcome the obstacle of a criminal record when seeking alternate housing. Indeed, research shows that race compounds criminal record barriers because it enhances the stigma associated with arrest and conviction.⁹⁰ As sociologist

tle, New York, and Cleveland); *see also* THE SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 2–4 (2018).

⁸² *See generally* Jeffrey Fagan et al., *Race and Selective Enforcement in Public Housing*, 9 J. OF EMPIRICAL LEGAL STUD. 697 (2012). *See also* Wacquant, *supra* note 20, at 106–07.

⁸³ Goodridge, *supra* note 23, at 22.

⁸⁴ *See supra* Sec. II.

⁸⁵ *See supra* note 77.

⁸⁶ *See supra* Sec. II.

⁸⁷ *See* CAREY, *supra* note 32, at 2.

⁸⁸ *See* BORDEN, *supra* note 6, at 2, 6.

⁸⁹ *See supra* notes 24, 30–32 and accompanying text. As other scholars have noted, this phenomenon disproportionately affects women of color, who represent the vast majority of leaseholders in low-income neighborhoods. *See* Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. OF SOC. 88, 91 (2012); Marne Lenox, Note, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 281 (2011); *see also* Cammett, *supra* note 5, at 1142–45 (describing families as “collateral damage” in war on drugs); Kropf, *supra* note 67, at 79 (describing the harmful effects of one-strike evictions and exclusions on entire families).

⁹⁰ Devah Pager, *The Mark of a Criminal Record*, 5 AM. J. SOC. 937, 959–60 (2003); Smith, *supra* note 2, at 472; *see also* GREATER NEW ORLEANS FAIR HOUS. ACTION CTR., LOCKED OUT: CRIMINAL BACKGROUND CHECKS AS A TOOL FOR DISCRIMINATION 19–27

Loïc Wacquant observes, the negative credential of a criminal record acts to solidify the centuries-old association of being Black with a heightened degree of deviousness, violence, and criminality.⁹¹ Mass incarceration and the war on drugs have cemented this effect, particularly in the housing context. As Fellner writes:

Law enforcement efforts against crack in poor minority neighborhoods reinforced control of the urban “underclass,” a group deemed by the political and white majority to be particularly “dangerous, offensive and undesirable.”⁹² The conflation of the underclass with crack offenders meant the perceived dangerousness of one increased the perceived threat of the other.⁹²

Accordingly, when seeking housing, people of color with drug-related convictions face layers of stigma: first, they are stigmatized for having been convicted and then they are perceived as particularly dangerous due to their race. Their white counterparts, on the other hand, face less stigma and fewer historically constructed and formalized barriers to the private market, dampening the effect of drug-based exclusion policies.

The gentrification and affordability crises many cities have experienced over the last several decades heighten these effects. As competition and prices increase in the urban rental market, housing providers who seek to profit from and appease incoming, often white residents have greater incentive to utilize tools like drug eviction statutes to exclude anyone who may be deemed undesirable.⁹³ Public housing is not insulated from the forces of gentrification either. Indeed, some have argued that one-strike policies have been used as a pretext for systemically evicting tenants in order to avoid paying relocation costs necessary when replacing dilapidated public housing

(2015), http://www.gnofairhousing.org/wp-content/uploads/2015/09/Criminal_Background_Audit_FINAL.pdf, archived at <https://perma.cc/MLF7-2EWV> (describing rampant criminal records-related disparate treatment in New Orleans).

⁹¹ Wacquant, *supra* note 20, at 117; see also Smith, *supra* note 2, at 471.

⁹² Fellner, *supra* note 3, at 265; see also ALEXANDER, *supra* note 2, at 198–99.

⁹³ In gentrifying neighborhoods, landlords will take extreme measures to evict tenants even where there is no basis; presumably they will even more readily do so when they are granted actual legal authority. See Steven Wishnia, *How Forcing Tenants to Move Became a Business Model for NYC Landlords*, VILLAGE VOICE (Sept. 18, 2017), <https://www.villagevoice.com/2017/09/18/how-forcing-tenants-to-move-became-a-business-model-for-nyc-landlords/>, archived at <https://perma.cc/7V7Q-EN5G>; see also Deena Greenberg et al., *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. C.R.-C.L. L. REV. 115, 121 (2016) (describing increased frequency of eviction of people of color from integrated neighborhoods). Indeed, media reports all too frequently chronicle white gentrifiers lodging complaints against people of color even when they are not engaged in any illegal activity at all—sometimes with fatal results. See, e.g., P.R. Lockhart, *White People Keep Calling the Cops on Black People for No Reason. That’s Dangerous.*, VOX (May 11, 2018), <https://www.vox.com/identities/2018/5/11/17340908/racial-profiling-starbucks-yale-police-violence-911-bias>, archived at <https://perma.cc/D34J-8SQW>; Tanvi Misra, *New Neighbors, New Noise Complaints*, PAC. STANDARD (Oct. 24, 2018), <https://psmag.com/social-justice/gentrification-increases-noise-complaints-in-nyc>, archived at <https://perma.cc/WRR6-Q2ER>.

buildings.⁹⁴ At least one study showed that some federally subsidized housing vacated by an onslaught of one-strike evictions during urban renewal efforts was converted to developments for higher-income residents.⁹⁵

As low-income people of color are displaced and excluded, they also face few alternative options in the gentrifying neighborhoods they have historically occupied. My clients, who exclusively live in either federally subsidized or other rent regulated housing, when faced with losing their affordable homes often speculate about what their other options may be. Those options always involve, in some way, being pushed further to the margins: joining family in an overcrowded apartment, relocating to an as-yet ungentrified neighborhood, leaving the city altogether, or, most often, becoming homeless.⁹⁶ These lived experiences are supported by studies showing that low-income families who are evicted are most likely to move to even lower-income zip codes.⁹⁷ This displacement is "linked to higher crime rates and neighborhood disorganization. High crime rates and social disorganization, in turn, are linked to increased levels of police surveillance and punishment."⁹⁸ In this way, the cycle of concentrated poverty is perpetuated.

By contributing to this cycle, state-led policies that promote the eviction and exclusion of those ensnared in the war on drugs, with their disparate impact on people of color, are reminiscent of the *de jure* policies that established patterns of segregation in the pre-Civil Rights era.

IV. SOLUTIONS

While observing the disparate impact that drug-based exclusions have on people of color, some may question whether this negative outcome is outweighed by the purported public safety justifications for these policies. Surely, the argument goes, no one wants to live in a place that is consumed with drugs or violence. Yet the decades following implementation of exclusion-based policies have shown that these policies have had little measurable effect on eliminating crime in public housing and low-income neighborhoods;⁹⁹ rather, some research suggests these policies may actually be responsible for an *increase* in crime rates and recidivism.¹⁰⁰ In part, this is

⁹⁴ See, e.g., Goodridge, *supra* note 23, at 5; see also Caputo, *supra* note 41 (describing analysis showing one-strike evictions sharply increased in Chicago where demolition of Chicago Housing Authority developments was eminent).

⁹⁵ See Caputo, *supra* note 41.

⁹⁶ See Cammett, *supra* note 5, at 1136; see also Greenberg et al., *supra* note 93, at 118.

⁹⁷ See, e.g., Desmond, *supra* note 89, at 120.

⁹⁸ See *id.* at 121.

⁹⁹ See CAREY, *supra* note 32, at 35 (describing limited evaluation of exclusion-based programs and uncertainty as to effectiveness); SENTENCING PROJECT, *supra* note 81, at 4 (describing how New York City's racially discriminatory stop-and-frisk policy was shown to be ineffective); Tang, *supra* note 51 (describing insufficient data to determine effectiveness of California's unlawful detainer program).

¹⁰⁰ See Chin, *supra* note 11, at 270 (citing Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Population*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982)).

because the initial violence associated with the crack cocaine market—which, some argue, was exaggerated even at the outset—was a result of prohibition and enforcement, which naturally subsided as the market stabilized itself.¹⁰¹ Furthermore, these policies do not only target those involved in gangs and large-scale commercial activity; users and those involved in low-level “subsistence” sales¹⁰² unassociated with the larger market are the vast majority of those arrested for drug offenses and pose little real threat of violence.¹⁰³ But when excluded from housing, these low-level offenders become more likely to recidivate because they lack access to the social safety net that provides essential support for rehabilitation.¹⁰⁴

Moreover, and most poignantly, the fact remains that white people both sell and use drugs at the same rate as people of color.¹⁰⁵ If drug activity perpetuated conditions of violence and crime requiring housing exclusion, white neighborhoods would be similarly plagued. And yet, it is people of color who are disparately excluded from their homes and restricted in accessing stable housing because of the disproportionate enforcement in their neighborhoods. Accordingly, drug activity is, at the very least, much more nuanced than sweeping exclusionary policies recognize, and the effectiveness of those policies is questionable at best.

The disparate racial impact associated with drug exclusion policies is wholly unjustified. Correction is urgently needed. While the FHA¹⁰⁶ has the potential to be a useful part of this approach, by itself it is a flawed tool. Instead, advocates must utilize and advance policies that prioritize destigmatization and enhance procedural protections for those with drug-related arrests and convictions.

¹⁰¹ Fellner, *supra* note 3, at 263–66; *see also* DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. CIVIL LIBERTIES UNION, *CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 5* (2006), https://www.aclu.org/sites/default/files/field_document/cracksinsystem_20061025.pdf, *archived at* <https://perma.cc/ZDT9-72XM> (attributing initial violence to prohibition and describing later studies showing that significantly less trafficking-related violence is associated with crack cocaine than initially presumed).

¹⁰² *See Drug War Statistics*, DRUG POLICY ALL. (last visited Apr. 13, 2019), <http://www.drugpolicy.org/issues/drug-war-statistics>, *archived at* <https://perma.cc/BG8C-3CK3>.

¹⁰³ *See* BORDEN, *supra* note 6, at 23; *see also* Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 228, 271 (2015); Paul E. Bellair & Thomas L. McNulty, *Gang Membership, Drug Selling and Violence in Neighborhood Context*, 26 JUST. Q. 644, 645 (2009); Fellner, *supra* note 3, at 266–69.

¹⁰⁴ *See* Faith E. Lutze et al., *Homelessness and Re-Entry: A Multisite Outcome Evaluation of Washington State’s Reentry Housing Program for High Risk Offenders*, 41 CRIM. JUST. & BEHAV. 471, 472–73 (2014); Cammett, *supra* note 5, at 1143; CAREY, *supra* note 32, at 41–43; Demleitner, *supra* note 14, at 1028; Kropf, *supra* note 67, at 77–78.

¹⁰⁵ Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 108 (2006).

¹⁰⁶ Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3631 (2018).

A. *The Fair Housing Act*

In recent years, as scholars, advocates, policymakers, and stakeholders have better understood the racial disparities found within the criminal justice system, potential to utilize the FHA to fight against criminal records-based housing discrimination has grown. Although those with a criminal record do not form a protected class under the FHA, advocates,¹⁰⁷ courts,¹⁰⁸ and the Department of Housing and Urban Development (“HUD”)¹⁰⁹ have identified two primary race-based theories of liability that apply to criminal records-based housing exclusions. The disparate *treatment* theory of liability as it relates to criminal record exclusion is the more straightforward: a housing provider cannot rely on criminal background screening procedures to exclude members of one race but not similarly situated members of another.¹¹⁰ Disparate *impact* liability, on the other hand, prohibits a criminal records-based exclusion policy or practice that, while facially neutral, has a disproportionate impact on a protected class, such as racial minorities.¹¹¹

Neither theory has been extensively tested in the courts. However, in 2016, HUD issued formal guidance acknowledging the racial disparities associated with criminal records and resulting access to housing, and detailing when criminal records-based exclusion may constitute a violation of the FHA under both the disparate treatment and disparate impact theories of liability.¹¹² Although HUD's guidance does not hold the force of law, it is persuasive and a strong indicator of the liability that courts would assign.¹¹³ As such, it is worth closely examining the guidance and its applicability to drug-based exclusions.

With respect to potential disparate treatment liability, HUD made clear that evidence that a housing provider considers criminal record information differently for a non-white renter versus a white renter will be considered disparate treatment, which constitutes a form of intentional discrimination.¹¹⁴ A Seventh Circuit case, *Allen v. Muriello*,¹¹⁵ provides an example of a successful disparate treatment claim based on criminal record information. There, the plaintiff, a Black applicant for federally assisted housing, was

¹⁰⁷ See, e.g., Rebecca Oyama, Note, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 207–12 (2009); Goodridge, *supra* note 23, at 22–24.

¹⁰⁸ See *Allen v. Muriello*, 217 F.3d 517, 520–21 (7th Cir. 2000); *Alexander v. Edgewood Management Corporation*, No. 15-01140, 2016 WL 5957673, at *3–*4 (D.D.C. July 25, 2016).

¹⁰⁹ See generally HUD Guidance, *supra* note 17.

¹¹⁰ See *Allen*, 217 F.3d at 520.

¹¹¹ See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2514–15 (2015).

¹¹² See generally HUD Guidance, *supra* note 17.

¹¹³ See Fair Hous. Rights Ctr. in *Se. Pa. v. Post Goldtext GP, LLC*, No. 14-4441, 2015 WL171840, at *6–*7 (E.D. Pa. Jan. 14, 2015) (describing the effect of HUD's guidance with respect to the implementation and administration of the FHA).

¹¹⁴ HUD Guidance, *supra* note 17, at 8.

¹¹⁵ 217 F.3d 517 (7th Cir. 2000).

denied assistance after a background check indicated that someone with the same social security number but a different name had been convicted of a disqualifying offense.¹¹⁶ When the plaintiff sought to appeal the decision and correct the background check error, the local housing authority refused to provide a copy of the background check; at a hearing, the housing authority refused to accept the plaintiff's word and demanded that he produce evidence "then and there" that he was not the person who committed the offense.¹¹⁷ In contrast, the plaintiff showed that two white applicants in similar circumstances were taken at their word and provided assistance in clearing a record error.¹¹⁸ This, the Seventh Circuit found, constituted a *prima facie* disparate treatment case.¹¹⁹

While giving nod to this type of disparate treatment liability, the meat of HUD's guidance is its discussion of disparate impact liability.¹²⁰ This form of liability, according to the guidance and the burden-shifting framework established by the Supreme Court in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,¹²¹ requires a showing that a housing provider's policy or practice of excluding people with criminal records results, actually or predictably, in a disparate impact on a class of people because of their race.¹²² Once this showing has been made, the burden then shifts to the housing provider to show that, nonetheless, its criminal records-based exclusion policy is necessary to achieve a "substantial, legitimate, nondiscriminatory interest."¹²³ While HUD recognizes that interests such as resident safety and protecting property may be valid, its guidelines warn that a policy must *actually* achieve that goal, and that demonstrating this will usually require some sort of individualized analysis based on factors including the nature, severity, and recency of an offense.¹²⁴ Significantly, HUD warns that making a housing decision based on the fact of an arrest not leading to conviction will *never* be sufficient to meet this burden, though it takes the stance that a conviction for an offense will constitute conclusive proof of the proscribed conduct in most instances.¹²⁵ If, after this analysis, the housing provider has shown that its policy meets the substantial, legitimate, nondiscriminatory interest threshold, the burden shifts back to the

¹¹⁶ *Id.* at 518.

¹¹⁷ *Id.* at 519.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 521.

¹²⁰ See HUD Guidance, *supra* note 17, at 2–8.

¹²¹ *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2514–15 (2015).

¹²² HUD Guidance, *supra* note 17, at 2–3.

¹²³ *Id.* at 2, 4–7.

¹²⁴ *Id.* at 7.

¹²⁵ *Id.* at 6. According to the Guidance, circumstances where a conviction may not be conclusive proof of the conduct include an "error in the record, an outdated record, or another reason for not relying on the evidence of a conviction," such as where a record was expunged or downgraded from a felony to a misdemeanor.

claimant to prove that a lesser discriminatory alternative exists to achieving the same interest.¹²⁶

Although disparate impact theory in general has been tested in courts for decades,¹²⁷ there is limited case law specifically analyzing the disparate racial impact of criminal records-based exclusion in the housing context. In one recent case, *Alexander v. Edgewood Management Corporation*,¹²⁸ the District Court for the District of Columbia denied a motion to dismiss a criminal records-based disparate impact claim, relying in part on HUD's guidance, where the plaintiff demonstrated the statistical disparate impact of a housing provider's criminal record policy on Black people in the D.C. area.¹²⁹ Though the merits of the case have yet to be addressed at the time of publication, the court's decision reflects a willingness to follow HUD's guidance and embrace the criminal records-based disparate impact theory of liability.¹³⁰

HUD's guidance has had at least some impact beyond the courts as well. For example, the New York City Commission on Human Rights recently settled a "landmark" housing discrimination complaint based on the disparate racial impact of a housing provider's criminal record exclusion policy.¹³¹ Again relying in part on HUD's guidance, the Commission alleged that the provider's policy, which failed to take into account the individualized circumstances of applicants' criminal histories, had a disparate impact on Black and Hispanic New Yorkers.¹³² Additionally, and at the very least, HUD's guidance has gained significant attention from advocates and housing providers and has the potential to serve as a strong deterrent, even if the cases are not numerous.¹³³

¹²⁶ *Id.*

¹²⁷ See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2519 (2015) and cases cited therein.

¹²⁸ *Alexander v. Edgewood Management Corp.*, No. 15-01140, 2016 WL 5957673 (D.D.C. July 25, 2016).

¹²⁹ *Id.* at *1–*2.

¹³⁰ *Id.*

¹³¹ Press Release, N.Y.C. Comm'n on Human Rights, NYC Commission on Human Rights Settles Landmark Housing Discrimination Case With Bronx Management Company Controlling 100 Buildings with 5,000 Units Citywide Accused of Denying Housing to any Applicant with Criminal Record (Dec. 6, 2018), <https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/PRESS%20RELEASE%20-%20Criminal%20History%20Disparate%20Impact%20Press%20Release%20120618.pdf>, archived at <https://perma.cc/CS6F-YR2Z>.

¹³² *Id.*

¹³³ See, e.g., AUSTIN/TRAVIS CTY. REENTRY ROUNDTABLE, LOCKED OUT: CRIMINAL HISTORY BARRIERS TO AFFORDABLE RENTAL HOUSING IN AUSTIN & TRAVIS COUNTY, TEXAS (2016), http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final_.pdf, archived at <https://perma.cc/E8RK-AMVN>; Kaycee Miller, *Fair Housing Update: Illegal Use of Criminal Records for Tenant Screening*, RENTEC DIRECT: BLOG (Apr. 7, 2016), <https://www.rentecdirect.com/blog/tenant-screening-criminal-records/>, archived at <https://perma.cc/Q7L8-A99F>; Jessica Ryan, *HUD Issues New Guidance on Use of Criminal Records in Housing Transactions*, KOVITZ SHIFRIN NESBIT: BLOG (Nov. 1, 2016), <https://www.ksnlaw.com/blog/hud-issues-guidance-criminal-records-housing-transactions-2/>, archived at <https://perma.cc/MMH3-N3CK>.

However, notwithstanding these small but measured successes, the FHA still falls short in its ability to counteract the disparate drug-related displacement and exclusion of people of color.

In part, the FHA's shortcomings are technical. For instance, asserting a disparate treatment or disparate impact claim is complicated.¹³⁴ Making a claim requires at least some evidence that a housing provider has either engaged in disparate handling of criminal records information, or has some policy or practice in place that statistically has a disparate racial impact.¹³⁵ Even if an individual tenant facing exclusion or eviction were aware of her rights under the FHA, she would have difficulty compiling sufficient proof to make a claim unless she were to obtain counsel and pursue litigation—a process likely to be too protracted and insufficient to provide any immediate relief.

Moreover, others have observed particular challenges to applying the disparate impact theory to evictions, as opposed to initial access to housing.¹³⁶ This is because, where grounds for eviction exist, it is difficult to show that the housing provider's decision-making is the source of the disparate impact as opposed to the activity warranting eviction. Indeed, with respect to public housing, laws *already* require an individualized consideration of an offense before denial of an application and before eviction.¹³⁷ So while the FHA may provide grounds to challenge policies that do not engage in an individualized consideration that is narrowly tailored, those PHAs that comport with regulations will likely be able to overcome that burden. Likewise, when it comes to drug-based exclusion policies in the private market, state laws designating grounds for eviction provide protection for housing providers who have a policy or practice of terminating leases due to drug-related offenses regardless of any disparate impact this may have.

Beyond these technical hurdles, however, lies a larger, substantive issue: for decades, legislators and courts have been establishing the justification for housing providers who exclude those with drug-related arrests and convictions.¹³⁸ Accordingly, even if all other elements of a disparate impact

¹³⁴ See Rigel C. Oliveri, *Beyond Disparate Impact: How the Fair Housing Movement Can Move On*, 54 WASHBURN L. J. 625, 625 (2015); Kate Linden Morris, Note, *Within Constitutional Limitations: Challenging Criminal Background Checks by Public Housing Authorities Under the Fair Housing Act*, 47 COLUM. HUM. RTS L. REV. 1, 4 (2016); Greenberg et al., *supra* note 93, at 147–50.

¹³⁵ See *Allen v. Muriello*, 217 F.3d 517, 522 (7th Cir. 2000) (allowing case to proceed where Black plaintiff alleged his housing application was handled differently than those of two similarly-situated white applicants).

¹³⁶ Greenberg et al., *supra* note 93, at 149–50.

¹³⁷ See *supra* notes 33–34 and accompanying text.

¹³⁸ See, e.g., *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 134 (2002) (upholding constitutionality of no-fault eviction policies because Congress's approach to drug-related evictions was reasonable given “drugs lead[] to murders, muggings, and other forms of violence against tenants and to the deterioration of the physical environment”); *City of New York v. Wright*, 636 N.Y.S.2d 33, 34–35 (N.Y. App. Div. 1995) (holding that because the intent of New York's drug-eviction statute is “to protect the health, safety and welfare of the other tenants, as well as the nearby community from the dangers and social evils that follow the drug

claim could be established, housing providers will undoubtedly enjoy the presumption that a policy excluding drug offenders in particular serves a substantial, legitimate, and nondiscriminatory interest. This entrenched justification has even been incorporated into the FHA itself, which was amended during the war on drugs to exclude altogether those convicted of certain drug-related offenses from its protection “*regardless of any discriminatory effect that may result from such a policy.*”¹³⁹ Specifically, Section 807(4) of the FHA provides that discriminatory conduct is not prohibited “because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act.” As such, a policy excluding anyone convicted of one of these offenses without considering the nature, severity, or recency of the offense, will never result in disparate impact liability.¹⁴⁰ Although this provision does not exempt those convicted of simple drug possession from protection, it still creates significant barrier to challenging drug-based exclusions by perpetuating the presumed threat of drug activity in general.

Indeed, when the FHA was amended in 1988 to include this exception, this assumption was clearly the driving force. Senator Strom Thurmond,¹⁴¹ the amendment's major proponent, succinctly articulated the intent behind the exception:

A landlord should be allowed to protect other tenants from a dope dealer. There is no rational reason to wait until an individual is convicted twice of a drug offense. One offense is sufficient for a landlord to refuse to rent to a drug dealer. It is that simple. I urge my colleagues to vote for this amendment. Failure to do so makes the rights of law-abiding citizens meaningless. Drug dealers deserve no Federal protection.¹⁴²

Despite this seemingly reasonable justification to exclude the dangerous “dope dealer,” however, the FHA's exemption goes further. The FHA's ex-

trade,” the statute is not so punitive as to implicate double jeopardy); *see also* Baradaran, *supra* note 103, at 254–58 (describing case law perpetuating the drug-violence link).

¹³⁹ HUD Guidance, *supra* note 17, at 8 (citing Section 807(b)(4) of the FHA) (emphasis added).

¹⁴⁰ Although HUD does not indicate so in its guidance, it would seem that disparate *treatment* liability could still be imposed when a person of color is excluded for an enumerated offense that is overlooked for a white person because, in that instance, the individual is actually being excluded due to their race and not because of their conviction.

¹⁴¹ Senator Strom Thurmond was a well-known anti-integrationist perhaps most famous for his record-breaking 24-hour filibuster against the passage of the civil rights bills of 1957, during which he asserted that “all the laws of Washington and all the bayonets of the Army cannot force the Negro into our homes, our schools, our churches and our places of recreation and amusement.” Adam Clymer, *Strom Thurmond, Foe of Integration, Dies at 100*, N.Y. TIMES (June 27, 2003), <https://www.nytimes.com/2003/06/27/us/strom-thurmond-foe-of-integration-dies-at-100.html>, archived at <https://perma.cc/ZM79-6LCU>.

¹⁴² 134 CONG. REC. S10454, 10468 (1988) (statement of Sen. Thurmond).

emption allows housing providers to exclude both the person convicted of sharing a joint with a friend a decade ago and the recently convicted “king-pin” without distinction. It allows people like Veronica Martinez, Michael Newman, and Hank Gilmore to lose their affordable housing without meaningful consideration of their individual circumstances.

This unjustified, overbroad exclusion lends credence to the presupposition established throughout the war on drugs that anyone caught in the punitive tide of drug enforcement is undeserving of and ineligible for stable housing. In this way, even in light of HUD’s forward-thinking guidance, the FHA is limited in its ability to provide relief for those disparately impacted by drug-related exclusions from housing, and the discriminatory impact of drug enforcement will continue to impose barriers and contribute to the displacement and segregation of people of color.

B. Beyond the Fair Housing Act

Recognizing the FHA’s failure to mitigate the discriminatory harms of the war on drugs, the potential housing consequences of drug-related arrests and convictions should inform and direct future criminal justice and drug law reform. Although there is a strong case for decriminalizing drug activity altogether,¹⁴³ I advance several potential avenues short of decriminalization that can have a marked impact on the housing consequences of drug arrests and convictions.

First, advocates should incorporate broad expansion of expungement and sealing¹⁴⁴ legislation into reform efforts. Because housing exclusions are regularly based on criminal record information, shielding the dissemination of arrest information is essential to reducing the number of people excluded and displaced. Many states have begun to adopt such legislation, but the availability of such relief is often limited in the type and number of convictions that may be expunged.¹⁴⁵ To ensure the greatest impact, expungement legislation should automatically remove any record of an arrest not leading to conviction and provide expansive expungement. Expansive expungement includes short waiting periods between the date of conviction and expungement; expungement for both misdemeanor and felony drug convictions including possession and sale charges; and availability no matter how many

¹⁴³ See generally BRIAN STAUFFER, HUMAN RIGHTS WATCH, EVERY 25 SECONDS: THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES 8–10 (2016).

¹⁴⁴ The words expungement and sealing are often used interchangeably, but, while having a similar effect, they technically differ. Expungement is generally the physical destruction of records, whereas sealed records are maintained but made unavailable except under narrow circumstances. See 20 ILL. COMP. STAT. ANN. §§ 2630/5.2(E), 2630/5.2(K) (LexisNexis 2019).

¹⁴⁵ For a comprehensive overview of state expungement laws, see MARGARET LOVE ET AL., COLLATERAL CONSEQUENCES RESEARCH CTR., FORGIVING & FORGETTING IN AMERICAN JUSTICE: A 50 STATE GUIDE TO EXPUNGEMENT AND RESTORATION OF RIGHTS (2018), https://www.ali.org/media/filer_public/4b/8b/4b8b2744-043d-41b3-b8b8-3a7d3988a353/forgiving_forgetting_jan_2018_final.pdf, archived at <https://perma.cc/LSN7-RCST>.

total convictions are on a person's record.¹⁴⁶ Once expunged, information should be totally protected from public view and prohibited from forming the basis of any adverse decision-making.

Second, municipalities can consider adopting a "Fair Chance Housing" ordinance that prohibits the blanket denial of housing based on a person's criminal record. Reflective of "ban the box" legislation in the employment context,¹⁴⁷ Fair Chance Housing laws, like the one passed in Seattle in 2017,¹⁴⁸ prohibit housing providers from inquiring about criminal history before offering an apartment and limit instances where a landlord can deny housing or evict a tenant based on criminal history information. Seattle's law, like the FHA, recognizes that a landlord may have a "legitimate business interest" in considering a criminal record and requires consideration of the individual circumstances of a tenant or applicant, including the nature and severity of the offense; the number and type of convictions; the time passed from the date of the conviction; the person's age at the time of the offense; evidence of positive tenant history before and after the offense occurred; and evidence of rehabilitation.¹⁴⁹ However, unlike the FHA, Seattle's law places no limitations on its protections based on the type of drug offense.¹⁵⁰ Also unlike the FHA, a local ordinance like Seattle's reduces the technical barriers to redress because it does not require any showing of actual disparate impact and provides an accessible forum in the way of the city's civil rights commission for filing a complaint.¹⁵¹ A law like Seattle's also puts procedural protections into place by requiring housing providers to inform prospective tenants of their rights, warn them of potential adverse action, and give them an opportunity to respond in a meaningful way.¹⁵² Municipal regulations of this type have enormous potential to curb the arbitrary denial of housing based drug-related convictions and beyond, and Seattle's law should serve as a model for reform advocates across the country.

Additionally, cities should expand access to legal services that are not dependent on federal LSC funding to curb displacement caused by punitive

¹⁴⁶ Illinois provides an example of a state with expansive sealing. There, most misdemeanors and felonies, with the exceptions of DUIs, sex crimes, animal care crimes, and domestic assaults, can be sealed after a short three-year, conviction-free period with no limitation on the number of offenses that may be sealed at one time. 20 ILL. COMP. STAT. ANN. §§ 2630/5.2 (LexisNexis 2019). In contrast, New York provides for sealing of convictions only if a person has no more than two convictions on their record, only one of which can be a felony and none of which can be a violent felony or sex offense, and only after 10 years have passed from the date they were last released from incarceration. N.Y. CRIM. PROC. § 160.59 (Consol. 2019).

¹⁴⁷ See generally 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 (2015) (describing the ban-the-box movement in the employment context).

¹⁴⁸ SEATTLE OFFICE FOR CIVIL RIGHTS, FAIR CHANCE HOUSING (2019), <https://www.seattle.gov/civilrights/civil-rights/fair-housing/fair-chance-housing>, archived at <https://perma.cc/8JG7-HPUE> (establishing law's date of passage and content).

¹⁴⁹ SEATTLE, WASH., MUN. CODE § 14.09 (2019).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* § 14.09.020.

drug policies, and, crucially, ensure those programs extend to representation of tenants in federally subsidized housing. New York City and San Francisco recently became the first two U.S. cities to implement a “right to counsel” in eviction proceedings for low-income tenants.¹⁵³ Other cities, including Los Angeles, may soon follow.¹⁵⁴ In launching programs detached from federal LSC funding and its restrictions on representing those facing drug-related eviction,¹⁵⁵ these cities will allow for the representation of tenants regardless of the nature of the proceeding. Moreover, enforcing access to attorneys as a right will ensure that legal services providers themselves do not discriminate in choosing which tenants are deserving of representation.¹⁵⁶ A right to counsel in eviction proceedings can put tenants in a better position to defend themselves against punitive drug-related evictions and help curb their effects.

Furthermore, advocates can call on local public housing authorities to reevaluate their approach to drug-based exclusions. While federal regulations do require a restrictive approach to drug activity to some extent, local authorities are also vested with a significant amount of discretion¹⁵⁷ and should be encouraged to utilize it. The Housing Authority of New Orleans is a prime example, having recently implemented a policy providing that “[t]here is absolutely no presumption that an applicant with a criminal conviction should be denied housing assistance[.]”¹⁵⁸ Other housing authorities, such as some across New York State, have worked directly with elected officials to implement programs permitting re-entry to public housing directly from incarceration.¹⁵⁹ These programs are a reminder that, notwithstanding restrictive federal regulations, advocacy can be effective in pushing

¹⁵³ *From the Field: San Francisco Voters Guarantee Right to Counsel for All Tenants Facing Eviction*, NAT'L LOW INCOME HOUS. COALITION (June 11, 2018), <https://nlhc.org/article/field-san-francisco-voters-guarantee-right-counsel-all-tenants-facing-eviction>, archived at <https://perma.cc/7VVU-46RN>.

¹⁵⁴ See ‘Right to Counsel’ Law for L.A. Tenants Facing Eviction Moves Forward, L.A. DAILY NEWS (Aug. 11, 2018), <https://www.dailynews.com/2018/08/11/right-to-counsel-law-for-l-a-tenants-facing-eviction-moves-forward/>, archived at <https://perma.cc/XS2X-7U6X>.

¹⁵⁵ See *supra* note 27 and accompanying text.

¹⁵⁶ The current federal funding structure for the provision of civil legal services has been criticized for its emphasis on meeting the needs of only the “deserving” poor. See, e.g., Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1796–97 (2001)

¹⁵⁷ See *supra* notes 38–39 and accompanying text.

¹⁵⁸ HOUS. AUTH. OF NEW ORLEANS, CRIMINAL BACKGROUND SCREENING PROCEDURES 1 (2016), https://www.hano.org/agency_plans/2016%20CRIMINAL%20BACKGROUND%20PROCEDURES%20-%20FINAL.pdf, archived at <https://perma.cc/HAE9-Q6ZT>; Katy Reckdahl, *Housing Authority Eliminates Ban of Ex-Offenders*, SHELTERFORCE (July 6, 2016), <https://shelterforce.org/2016/07/06/housing-authority-eliminates-ban-of-ex-offenders/>, archived at <https://perma.cc/FPZ2-85PU>.

¹⁵⁹ In New York City, for example, NYCHA has instituted a re-entry pilot program, allowing for recently released individuals to join family in public housing. At the behest of the governor, other cities throughout New York State have adopted similar programs. See Olivia Ugino, *Prison to Public Housing Project to be Tested in CNY*, LOCALSYR.COM (Mar. 19, 2017), <https://www.localsyr.com/news/local-news/prison-to-public-housing-project-to-be-tested-in-cny/674908558>, archived at <https://perma.cc/SJZ6-BHEN>.

housing authorities to exercise their discretion in an inclusive way to ameliorate the devastating effects of eviction and exclusion of both family members and tenants in public housing.

Finally, advocates should push for reforms of the local, state, and federal laws that permit eviction based on drug-related offenses. In particular, laws permitting eviction based on use or low-level sales or with limited nexus to the premises do little to advance public safety.¹⁶⁰ Yet, the displacement caused by these laws contributes to homelessness, recidivism, and concentrated poverty.¹⁶¹ However, even as criminal justice reform efforts have made strides, these formal policies remain largely untouched. To truly minimize the disparate impact of the war on drugs, reduce incarceration, and dismantle the cycle of poverty, reform efforts must extend beyond the criminal justice system and push to repeal and amend the formal housing exclusion policies that perpetuate these cycles.

Together, these measures can minimize the disparate impact of drug-based housing-exclusion policies and reduce the resulting displacement and segregation of people of color.

V. CONCLUSION

The policies and practices that continue to disparately exclude people of color from stable housing based solely on drug-related charges and convictions are vestiges of the punitive tirade of drug criminalization that have no place in our civil rights era. As the weak justifications for aggressive drug enforcement continue to be exposed through the criminal justice lens, it is imperative to incorporate the attenuated housing consequences into the fold of reform-oriented advocacy. Those advocates and lawyers representing tenants facing housing consequences should continue to push back against the deep-seated assumption codified throughout the war on drugs that drug activity, whether it be use, sale or association with such activity, is an inherent threat to urban communities. Rather, it is the unforgiving policies that promote family and economic instability that represent a threat to these communities—a threat our civil rights laws fail to address.

¹⁶⁰ See *supra* notes 102–104 and accompanying text.

¹⁶¹ *Id.*; see *supra* notes 96–98 and accompanying text.

