

# INNOCENT UNTIL PROVEN GUILTY?: EXAMINING THE CONSTITUTIONALITY OF PUBLIC HOUSING EVICTIONS BASED ON CRIMINAL ACTIVITY

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## I. INTRODUCTION

As Jennie Williams sat handcuffed in the hallway of her public housing development, a police officer turned to her and said, “You shoulda did it. Now you really goin’ to jail.”<sup>1</sup> Jennie would soon find out this was only a fraction of the hard ways that public housing residents lose constitutional rights in exchange for safety.

Jennie Williams moved to Stateway Gardens, a public housing complex in Chicago, with her two young sons in 1980.<sup>2</sup> In August 2001, as Jennie walked across the courtyard to visit a friend in an adjacent building, she was stopped by six plainclothes police officers waiting in the lobby.<sup>3</sup> The officers demanded that she knock on apartment doors in the building so that they would not have to announce their identity to residents.<sup>4</sup>

When Jennie refused, the officers physically searched and handcuffed her.<sup>5</sup> They threatened that if she did not help them, she would be charged with criminal trespassing.<sup>6</sup> Reluctantly, Jennie agreed to help.<sup>7</sup> As a resident opened the door after hearing Jennie’s voice, the police rushed in and searched the apartment.<sup>8</sup> Upset by this, Jennie refused to continue helping the police.<sup>9</sup> On

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1. Jamie Kalven, *One Strike: Jennie Williams Part I*, ViewfromtheGround.com, June 18, 2002, <http://viewfromtheground.com/archive/2002/06/one-strike-jennie-williams-part-i/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

account of her refusal, the police handcuffed Jennie and left her in the hallway while they investigated other apartments.<sup>10</sup>

Jennie was in jail for three days.<sup>11</sup> Only a few weeks later, Jennie received two notices in the mail—one from criminal court and the other from the Housing Authority.<sup>12</sup> Jennie was charged with drug possession on August 21, 2001 and would have to go to criminal court.<sup>13</sup> But what was most disturbing is that even before Jennie was tried for the criminal charges, the Chicago Housing Authority commenced a proceeding to terminate her tenancy and thereafter to evict her whole family, all based on her arrest.<sup>14</sup>

While Jennie was entitled to a lawyer for her criminal case, she had no such right to legal representation in her eviction case.<sup>15</sup> The decision to evict Jennie was based solely on her arrest and the police officer's testimony.<sup>16</sup> After 21 years of living in one of the few affordable housing complexes in Chicago, Jennie and her two sons were displaced based on a charge for which she had not yet been convicted.<sup>17</sup>

Jennie's story<sup>18</sup> is not an isolated incident. It is one of many examples of the disastrous effects of a nationwide policy that affects millions of residents of public housing. The one strike policy, introduced in 1996 and still in effect in many developments, requires housing authorities to take aggressive measures to evict individuals suspected of criminal activity. The evictions occur even if the residents have not been convicted of a crime.

This article examines the legal implications of a federal regulation which authorizes public housing authorities (PHAs) across the nation to evict tenants on the basis of criminality without solid proof of guilt. PHA Denial of Admission and Termination of Assistance for Criminals and Alcohol Abusers Rule provides that:

The PHA may terminate assistance for criminal activity by a household member as authorized in this section if the PHA determines, based on a preponderance of the evidence, that the household member has engaged in the activity, regardless of whether the household member has been arrested or convicted for such

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Jamie Kalven, *One Strike: Jennie Williams Part II*, ViewfromtheGround.com, June 18, 2002, <http://viewfromtheground.com/archive/2002/06/one-strike-jennie-williams-part-ii/> ("As many public housing residents do, Jennie made the common sense assumption that if she prevailed in her drug case, the eviction case would necessarily be resolved. She hired a lawyer to represent her in the criminal case. While she didn't neglect the eviction case, she gave it less priority.").

15. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the U.S. Supreme Court held that indigent defendants have a right to counsel in criminal cases pursuant to the Fourteenth Amendment of the U.S. Constitution. This recognized right to counsel has not yet been extended to civil cases.

16. See Kalven, *supra* note 14. ("On April 2, the police appeared in court. Jennie did not. The police testified that on August 21, they arrested her for possession of drugs in her apartment. No counter-evidence was offered. The judge entered a judgment for the CHA and ordered Jennie evicted.").

17. *Id.*

18. *Id.*

activity.<sup>19</sup>

Section II provides an overview of the one strike policy, which was developed as a result of the War on Drugs. Section III examines the potential procedural due process violations that stem from one strike evictions. In particular, the low evidentiary standard that PHAs rely on for one strike evictions can amount to a violation of the Due Process Clause. Section IV considers whether there is a viable Fair Housing Act claim on the basis that the evictions disproportionately impact people of color. Finally, Section IV offers recommendations for change that will protect the due process and civil rights of public housing residents.

## II. OVERVIEW OF THE ONE STRIKE POLICY

### A. The History of the One Strike Policy

The origins of the one strike policy lie in the Anti-Drug Abuse Act of 1988, an omnibus bill passed by Congress to further the War on Drugs.<sup>20</sup> Citing a “reign of terror” in public housing, the Act required all public housing leases to include provisions providing for eviction if the tenant, household member, or guest “engage[d] in criminal activity. . . on or near public housing premises.”<sup>21</sup> Notably, while the Act’s purpose was to further the War on Drugs, the Act required public housing leases to provide for eviction based on any “criminal activity,” not just drug-related activity. These provisions were further codified by the Cranston Gonzalez National Affordable Housing Act of 1990, which required public housing leases to include eviction clauses for “any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants.”<sup>22</sup> Significantly, the Act also required the U.S. Department of Housing and Urban Development (HUD) to develop “performance indicators” to measure how closely the various local housing authorities were adhering to the new Congressional statutes and corresponding HUD regulations.

In 1996, former U.S. President Bill Clinton gave the one strike policy its current name in his State of the Union address. Decrying high rates of crime, drug use, and gangs in public housing, Clinton announced that, “From now on, the rule for residents who commit crime and peddle drugs should be one strike and you’re out.”<sup>23</sup>

But what did it mean to “commit” a crime? To many, the longstanding American principle of “innocent until proven guilty” implied that this policy would be applied to convicted criminals. However, this would not be the case.

19. PHA Denial of Admission and Termination of Assistance for Criminals and Alcohol Abusers Rule, 24 C.F.R. § 982.553 (2015).

20. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of the United States Code).

21. *Id.*

22. See Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990) (codified as amended in scattered sections of 12 U.S.C. & 42 U.S.C.).

23. President William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union (Jan. 23, 1996), <http://www.presidency.ucsb.edu/ws/?pid=53091>.

The HUD policy released in April 1996 stated that:

In order to terminate a lease and evict a tenant, a criminal conviction or arrest is not necessary, and [Public Housing Authorities, or PHAs,] need not meet the criminal standard of ‘proof beyond a reasonable doubt’ in eviction proceedings. PHAs should specify in their leases that criminal activity is cause for eviction even in the absence of conviction or arrest. Any provisions in state laws that require conviction in order to evict tenants are preempted by federal law.<sup>24</sup>

Furthermore, local PHAs would not only be permitted to evict tenants on these grounds, but would be aggressively required to do so. As President Clinton explained in 1996, “[u]nder the new rules, . . ., for the first time there will actually be penalties for housing projects that do not fight crime and enforce ‘one strike and you’re out.’”<sup>25</sup> Under the new system, HUD evaluations awarded points to PHAs that could show that they were taking measures to evict tenants engaged in criminal activity.<sup>26</sup> These evaluations would then determine the availability and amount of the PHA’s funding and the level of federal oversight, with failing PHAs facing a possible federal takeover.<sup>27</sup> While PHAs had previously been granted a significant amount of control and discretion in setting policies around eviction, one strike was established as a mandatory priority.

## B. The Impact of One Strike

The impact of one strike was significant. In the first six months after the one strike guidelines were adopted, evictions nationwide jumped from 9,835 to 19,405.<sup>28</sup> This represented an 84 percent increase.<sup>29</sup> Although HUD does not publish national data on evictions, there are data available from several individual housing authorities. Data regarding the New York City Housing Authority (NYCHA), for example, showed that in one calendar year (2011), NYCHA initiated 1,581 one strike cases against tenants.<sup>30</sup> Data released by the

24. “One Strike and You’re Out”: Screening and Eviction Policies for Public Housing Authorities, Notice PIH 96-16 (HA) (Apr. 12, 1996), <http://www.hud.gov/offices/pih/publications/notices/96/pih96-16.pdf>.

25. President William J. Clinton, Remarks by the President at One Strike Symposium (Mar. 28, 1996), <http://clinton6.nara.gov/1996/03/1996-03-28-president-remarks-at-one-strike-crime-symposium.html>.

26. Memorandum from Public Housing Management Assessment Program (PHMAP) on Indicator #8, Security: “One Strike and You’re Out” (Jul. 25, 1996), [https://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_11016.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11016.pdf).

27. *Id.*

28. ACLU DRUG POLICY LITIGATION PROJECT, COLLATERAL CONSEQUENCES OF THE WAR ON DRUGS, (Jan. 2003), <https://www.aclu.org/files/FilesPDFs/final%20brochure.pdf> (“Many public housing projects encounter drug activity and violent crime. Instead of going after drug sellers and users directly, this law targets innocent families. “One Strike” puts families on the street and increases family instability. Without housing, parents may lose custody of their children. Fear of being evicted or denied housing may also prevent families from taking in relatives with past or current drug problems or who are returning home from prison.”).

29. *Supreme Court to Rule on Zero Tolerance Policy for Drugs in Public Housing Projects*, THE ARGUS PRESS, Sept. 25, 2001, at A5. (“Evictions rose 84 percent in the first six months of the tougher 1996 policy, an analysis by the Associated Press at the time showed.”).

30. Erin Durkin, *De Blasio Vows He “Won’t Tolerate” Violent Criminals Living in NYCHA*

Public Housing Authority in Chicago tracked all one strike cases from August 2000 through April 2002. During that time, 717 one strike cases were concluded and an additional 847 one strike cases were pending. In 328 (46%) of the cases that were concluded, the entire family was evicted, and in 273 (37%) of the cases, one of the family members was evicted from the home.<sup>31</sup>

One strike also created a financial incentive to evict tenants in cities with plans to tear down public housing high-rises. In Chicago, for example, the housing authority was responsible for relocating and financing vouchers for any residents who lived in public housing as of 1999. Any tenants who were evicted, however, would no longer be the financial responsibility of the Housing Authority. This undoubtedly created a “structural incentive” to evict.<sup>32</sup>

In Florida, public housing residents and activists Connie Burton and Deloris Fletcher asserted that the Tampa Housing Authority and St. Petersburg Housing Authority respectively, were using one strike as a tool to prevent the housing authority from paying relocation fees. According to Ms. Burton:

It’s an attack on the entire community in that it criminalizes everyone. The housing authority has that tool to remove families. They’re using it to eliminate people from public housing. . . It negates any constitutional rights that you think you have because it goes on the assumption that you are guilty.<sup>33</sup>

A 2000 study similarly demonstrated that the Atlanta Housing Authority made a deliberate attempt to empty out the number of public housing residents as it relocated residents in Atlanta.<sup>34</sup> The study found that low-income families in public housing were consistently and strategically displaced by the onset of urban renewal initiatives over the course of two decades. As many public housing residents lost their affordable apartments, the Atlanta political regime replaced these low-income apartments with developments for higher-income residents. In Atlanta, eviction was not only part of a bureaucratic process, but also a business.

One strike also led to unprecedented levels of coordination between local law enforcement and local housing authorities. In many areas, local police referred all arrests directly to housing authority management so that eviction proceedings could be quickly initiated, even for minor offenses. Many housing authorities also built strong relationships with local police departments to coordinate additional policing and actions on housing authority property, including searches and raids. This web of policing and enforcement far exceeded any endeavors which existed in the private sector and grew to resemble the criminal justice system much more than real estate.

Sociologist Loic Wacquant uses the term the “prisonization of public housing” to describe the ways in which public housing complexes have come to

*Developments*, N.Y. DAILY NEWS (Nov. 9, 2015), <http://www.nydailynews.com/news/politics/de-blasio-won-tolerate-violent-criminals-nycha-housing-article-1.2428570>.

31. Kalven, *supra* note 14.

32. *Id.*

33. HOMING DEVICES: THE POOR AS TARGETS OF PUBLIC HOUSING POLICY AND PRACTICE 89 (Marilyn M. Thomas-Houston and Mark Schuller eds., 2006).

34. See Larry Keating, *Redeveloping Public Housing*, 66 J. AM. PLAN. ASS’N 384 (2000).

resemble jails and have developed systems that send a substantial number of residents to jail.<sup>35</sup> Video surveillance, curfews, illegal searches by the police, barbed wire fences, and restricted access for visitors were introduced in many public housing complexes in the 1980's and 1990's. In one public housing project in Chicago, residents had to pass through metal detectors and were subjected to pat-down searches upon entering the complex.<sup>36</sup> As one resident of public housing in the District of Columbia noted: "It's as though the children in here are being prepared for incarceration, so when they put them in a real lock-down situation, they'll be used to being hemmed in."<sup>37</sup>

In some cases, this close relationship between law enforcement and housing authorities led to serious constitutional abuse. Arlene Burke, a resident of public housing in Tampa, Florida, faced eviction proceedings after she attempted to take a video of a police interaction on public housing property.<sup>38</sup> The police alleged that she hit an officer on the arm and charged her with battery. However, several witnesses confirmed that the police's allegations were false. It is likely that the police concocted the battery charge to arrest her in retaliation for filming police misconduct.

Another example of the nexus between public housing and incarceration is the widespread use of "stop and frisk" practices on public housing grounds in New York City. In 2010, the NAACP Legal Defense Fund filed a federal class action challenging "the NYPD's unlawful policy and practice of routinely stopping and arresting NYCHA residents and guests without reasonable suspicion or probable cause of illegal conduct in a racially discriminatory manner."<sup>39</sup> These claims were upheld in federal court.<sup>40</sup>

The impact of the one strike policy has been swift and clear. It has led to the over-policing of mostly poor communities of color and the systematic disregard for the longstanding "innocent until proven guilty" standard. Citing resident support for such policies, Clinton and others argued that these measures were

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35. Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 108 (2001) ("Over the past decade, the Chicago Housing Authority has deployed its own police force and even sought to institute its own 'misdemeanor court' to try misbehaving tenants on the premises. Residents of Robert Taylor Homes, at the epicenter of the South Side, have been subjected to video surveillance and requires to bear special ID cards as well as pass through metal detectors, undergo patdown searches, and report all visitors to a housing officer in the lobby."). See also *Securing Buildings vs. Controlling Firearms: Rampant Gun Crime Demands Comprehensive Curbs*, L.A. TIMES, Apr. 19, 1994 ("Metal detectors in the lobbies of public housing projects? Sure. Add them to the list of 'secured' facilities in our midst: schools, banks, courthouses, airports. These measures help to a point. But that point is usually at the building's perimeter.").

36. *Id.*

37. *Id.*

38. Kathryn Wexler, *Woman Fights One Strike Eviction Policy*, ST. PETERSBURG TIMES, May 6, 2001, [http://www.sptimes.com/News/050601/Hillsborough/Woman\\_fights\\_one\\_stri.shtml](http://www.sptimes.com/News/050601/Hillsborough/Woman_fights_one_stri.shtml) ("[Burke's] case underscores the power police wield in public housing. The Housing Authority relies on police in every stage of the eviction process. The nature of Burke's complaint—that police targeted her for retaliation—underscores the potential pitfalls of the [eviction] policy.").

39. *Davis v. City of New York*, 10 Civ. 0699 (SAS), 2013 U.S. Dist. LEXIS 74189, at \*3 n.6 (May 24, 2013), <http://www.naacpldf.org/case/davis-vs-city-new-york>.

40. *Id.*

necessary to address new and unprecedented crime and drug use in the projects. The harsh approach and indiscriminate implementation, however, fit into a historical pattern of regulating and criminalizing poor people of color.

### C. One Strike and “Black Criminality”: The Colored Lines of Criminality in Public Housing

#### 1. *Who Lives in Public Housing?*

The first public housing developments were built in the late 1930’s as a reward for working-class whites.<sup>41</sup> By the 1990’s, however, the public and media narrative around public housing had cemented into a racialized image of low-income minorities living in high-crime high-rises ravaged by drug use and gangs. In the wake of three decades of federally-financed “white flight” to the suburbs,<sup>42</sup> steady disinvestment in public housing infrastructure,<sup>43</sup> and segregationist housing practices such as redlining,<sup>44</sup> this perception was partially supported by the numbers. By the 1990’s, median family income in public

41. Emily Badger, *How Section 8 Became a “Racial Slur,”* WASH. POST (June 15, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/06/15/how-section-8-became-a-racial-slur/> (“This [article] is the history of how public housing in the United States — originally conceived as enviable housing for working whites — has become a prism through which some Americans see poor blacks. It’s a history that explains how some of the most visible public projects in big cities became, over decades, almost exclusively black, how the residents living there came to be among the country’s most deeply impoverished. Today, households receiving government housing assistance — from traditional public housing to the private-market vouchers it inspired — live on average incomes of less than \$13,000 a year.”).

42. *Id.* (“As the white “barely poor” moved out — and as the strict criteria for who could live in public housing faded — the median incomes of the families there began to fall. In 1950, the median household in public housing earned about 57 percent of the national median income. That number fell to 41 percent by 1960, then 29 percent by 1970. By the 1990s, the median family in public housing made only about 17 percent what the median family in America made. Relatively speaking, that means public-housing residents by the 1990s were about three times as poor as they had been in the 1950s.”).

43. See Paul Stinson, *Restoring Justice: How Congress Can Amend the One-Strike Laws in Federally-Subsidized Public Housing to Ensure Due Process, Avoid Inequity, and Combat Crime*, 11 GEO. J. POVERTY LAW & POL’Y 435 (2004) (“By 1988, the United States government was spending an estimated \$4.7 billion a year on the drug war. This number grew to \$13.2 billion by 1995 and \$26 billion in 2002. At the same time, funding and manpower for public housing was slashed; during the Reagan presidency, HUD’s budget was cut from \$26 billion to less than \$8 billion, and its work force reduced from 16,000 employees to 11,000. Funding for affordable housing remained at ‘record-low levels’ during the first Bush presidency, and Clinton’s record of HUD assistance was ‘mixed’, with ‘budget authority only slightly higher in 2001 than in 1993.’ And while the need for affordable housing solutions is greater than ever, there is no indication that the current administration has any intention of searching for any. Yet while money and manpower has moved out, ever-stricter regulations have moved in. As noted above, during the 1980s Congress targeted public housing as a particularly significant locus of drug-related crime and responded not with increased funding but with increased penalties and decreased procedural protections for public housing tenants involved with drugs.”).

44. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC MONTHLY (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> (“It was the Home Owners’ Loan Corporation, not a private trade association, that pioneered the practice of redlining, selectively granting loans and insisting that any property it insured be covered by a restrictive covenant—a clause in the deed forbidding the sale of the property to anyone other than whites. Millions of dollars flowed from tax coffers into segregated white neighborhoods.”).

housing had dropped to 17% of the median family income in America.<sup>45</sup> Empirical data from 1991 showed that 61% of public housing households were people of color and 48% of public housing households were black compared to 19% of all rental households.<sup>46</sup> By 2001, blacks and Latinos comprised 67% of the population of public housing across the nation.<sup>47</sup>

## 2. *Perceptions and Myths on Crime in Public Housing*

Interestingly, there was a dearth of national data about crime in public housing despite the unquestioned public narrative about this point. With the exception of New York City, police departments did not keep separate data for public housing developments. As late as 1998, HUD researcher Harold Holzman wrote, “valid statistics on the level of crime in public housing do not exist.”<sup>48</sup> In 2006, criminologist Garth Davies noted, “that public housing projects are rife with serious crime is . . . accepted as fact despite a discernable paucity of evidence.”<sup>49</sup> Dr. Fritz Umbach’s comprehensive survey of the last five decades of available research on the link between public housing and crime is non-conclusive: “some public housing seems to have increased crime rates under certain conditions, while other projects, under different conditions, are actually safer than private housing.”<sup>50</sup>

Nevertheless, certain cities (and public housing developments) were affected by increased crime and drug use in the late 1980’s and early 1990’s, and many residents led the way in calling for policies to increase safety. A 1995 national poll found that 88% of African Americans agreed that individuals convicted of illegal drug sales or possession should be evicted from public housing.<sup>51</sup> In New York City, tenant leaders and activists in the 1980’s demanded that the housing authority (NYCHA) take action to address drugs, crime, and prostitution which affected the City’s 600,000 public housing tenants.<sup>52</sup> As a result of this pressure, NYCHA formed an Anti-Narcotics Task Force in 1987 to examine the issue. The Task Force considered a variety of options, including “economic alternatives,” but eventually settled on harsher and speedier eviction

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45. Badger, *supra* note 41.

46. United States Department of Housing and Urban Development, *Public Housing: Image Versus Facts*, U.S. Housing and Market Conditions, Spring 1995, <http://www.huduser.gov/periodicals/ushmc/spring95/spring95.html#foot>.

47. David R. Jones, *One Strike and You’re Out If You’re Black!*, NEW YORK AMSTERDAM NEWS, Apr. 18, 2002.

48. Harold R. Holzman and Larry Piper, *Measuring Crime in Public Housing Methodological Issues and Research Strategies*, 14, J. QUANTITATIVE CRIMINOLOGY 4: 331, 331 (1998).

49. NICHOLAS D. BLOOM, PUBLIC HOUSING MYTHS: PERCEPTION, REALITY, AND SOCIAL POLICY 64–5 (Nicholas Dagen Bloom, Fritz Umbach, and Lawrence J. Vale eds., 2015).

50. *Id.* at 90.

51. This statistic was used to justify one strike policies despite the noticeable distinction between the poll question and the policy itself. The question asks if African Americans favor evicting convicted criminals while one strike allows for the eviction of tenants who have not been convicted of a crime. See Adam P. Hellegers, *Reforming HUD’s One-Strike Public Housing Evictions Through Tenant Participation*, 90 J. CRIM. L. & CRIMINOLOGY 323, 324–25 (1999-2000).

52. FRITZ UMBACH, THE LAST NEIGHBORHOOD COPS: THE RISE AND FALL OF COMMUNITY POLICING IN NEW YORK PUBLIC HOUSING 151 (2011).



policies for tenants. In many ways, these policies in New York City spurred on the public housing eviction clause in the Anti-Drug Abuse Act of 1988, opening the door for the use of such policies nationwide.

While affected residents led efforts for change and often supported the eviction of criminals, they did not fully support one strike's implementation, which sometimes led to the eviction of innocent tenants. Umbach suggests that conservative groups co-opted tenants' message into calls for "a new age of responsibility," ignoring decades of community activism within public housing where residents took responsibility for change in their communities.<sup>53</sup> One strike's calls for individual responsibility also ignored the systemic economic realities for many public housing residents. Sociologists Loïc Wacquant and William Julius Wilson's 1989 analysis of areas of extreme poverty in Chicago in the late 1980's centered on the city's public housing complexes. Their analysis found that high unemployment and economic exclusion in poor, black communities in Chicago had created a crisis that they called the hyperghetto.<sup>54</sup> Observers of the crime increase in the New York City Housing Authority in the 1980's came to a similar conclusion as well, attributing the shift to "the social dynamics of having fewer residents with full-time employment."<sup>55</sup>

To be clear, many public housing residents rejected the idea that they should have to choose between safe communities and their civil rights. A 1996 newspaper article aptly summarized this idea: "Public housing residents poured into a monthly board meeting at the Tampa Housing Authority Friday to let leaders know they don't want drug dealers and criminals in their neighborhoods. But they don't want government stepping on the innocent in an effort to clean up the neighborhoods, either."<sup>56</sup>

Unfortunately, as Umbach observed, this sort of nuance and "empirical precision has often seemed beside the point to an American public that has woven crime, [Public Housing Developments], and racial minorities into an 'unholy trinity.'"<sup>57</sup> Two elements of this "unholy trinity," crime and black

53. *Id.* at 155.

54. Loïc Wacquant and William Julius Wilson, *The Cost of Racial and Class Exclusion in the Inner City*, 501.1 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, 8-25, 11 (1989) ("The single largest force behind this increasing social and economic marginalization of large numbers of inner-city blacks has been a set of mutually reinforcing spatial and industrial changes in the country's urban political economy that have converged to undermine the material foundations of the traditional ghetto. Among these structural shifts are the decentralization of industrial plants, which commenced at the time of World War I but accelerated sharply after 1950, and the flight of manufacturing jobs abroad, to the Sunbelt states, or to the suburbs and exurbs at a time when blacks were continuing to migrate en masse to Rustbelt central cities; the general deconcentration of metropolitan economies and the turn toward service industries and occupations, promoted by the growing separation of banks and industry; and the emergence of post-Taylorist, so-called flexible forms of organizations and generalized corporate attacks on unions—expressed by, among other things, wage cutbacks and the spread of two-tier wage systems and labor contracting—which has intensified job competition and triggered an explosion of low-pay, part-time work.").

55. Stephen Nessen, *Housing Generations, Life in the Projects: A Shift to Violence*, NATIONAL PUBLIC RADIO, Dec. 19, 2012, <http://www.wnyc.org/story/258072-housing-generations-life-projects-shift-violence/>.

56. Darlene McCormick, *Public Housing Rule Aired*, TAMPA TRIB., May 4, 1996, at 1.

57. See NICHOLAS D. BLOOM, PUBLIC HOUSING MYTHS, *supra* note 49.

people, had been united in the American imagination since our nation's early days, with public housing sliding neatly into this narrative by the mid to late twentieth century. Contextualizing one strike within this long, historical trajectory helps us understand how and why this policy was implemented in such harsh and draconian terms.

### 3. *The Origins of "Black Criminality"*

The notion of blacks as criminals was written into the U.S. Constitution by way of the Fugitive Slave Clause, which provided that slaves who committed the crime of running away or escaping must be returned to "the party to whom such service or labour may be due."<sup>58</sup> As Frederick Douglass told his audiences, "I appear before you this evening as a thief and a robber. I stole this head, these limbs, this body from my master, and ran off with them."<sup>59</sup> However, running away was not the only crime that blacks were thought to be likely to commit. In 1860, *The New York Herald* expressed widespread attitudes regarding blacks while reporting on runaway slaves living in Canada. The article concluded that the runaways displayed "a savage ferocity peculiar to the vicious Negro" and reported that "the criminal calendars would be bare of a prosecution but for the Negro prisoners."<sup>60</sup>

After the end of slavery, white society used black criminality as a principal rationale for continued oppression, discrimination, and violence. According to Khalil Gibran Muhammad, the director of the Schomburg Center for Research in Black Culture at the New York Public Library, "From the 1890's through the first four decades of the twentieth century, black criminality would become one of the commonly cited and longest-lasting justifications for black inequality and mortality in the modern world."<sup>61</sup> Perhaps the most violent manifestations of this were the mass lynchings carried out against blacks, justified by "the shadow of the Negro criminal" who made such actions necessary by virtue of "their own hot-headedness."<sup>62</sup>

Significantly, the link between illegal drug use and black people was also established by the early 1900's. In 1914, the federal government initiated its first war on drugs by limiting the sale of opiates and cocaine with the Harrison Narcotics Tax Act.<sup>63</sup> The rhetoric justifying this legislation featured reports of a South overrun by "cocaine-crazed negroes" and Congressional testimony stating that, "It has been authoritatively stated that cocaine is often the direct incentive to the crime of rape by the negroes of the South and other sections of the country."<sup>64</sup>

While the civil rights movement of the 1960's rendered this overt racism to be outwardly unacceptable, ideas of black criminality persisted under the guise

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58. U.S. CONST. art. IV, § 2, cl. 3.

59. See Coates, *supra* note 44.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (citation omitted).

64. *Id.*

of race-neutral language. Former U.S. President Richard Nixon's law-and-order strategy highlighted a perceived moral decline in America marked by rising drug use and increased crime. Nixon believed that the solution was an aggressive war on crime focused on a group of people who were never named publicly but always present: blacks and other racial minorities. They were sometimes named behind the scenes however. In describing the Nixon campaign's electoral strategy, Nixon aide John Ehrlichman put it bluntly: "We'll go after the racists . . . . That subliminal appeal to the anti-black voter was always in Nixon's statements and speeches on schools and housing." In an outtake from a 1968 campaign ad, Nixon was also caught on tape talking to himself: "Yep this hits it right on the nose . . . . [I]'s all about law and order and the damn Negro-Puerto Rican groups out there."<sup>65</sup>

#### 4. *The War on Drugs as Pretext for the War on the Poor*

Law and order politics and the War on Drugs were centerpieces of national policy for the next three decades, and the target - people of color - remained the same. Today, the United States now accounts for 25% of the global incarcerated population, despite having only 5% of the world's population.<sup>66</sup> These policies have disproportionately affected people of color, despite surveys showing that over time, blacks and whites have used drugs at remarkably similar rates.<sup>67</sup> In 2000, one in every ten black males were currently incarcerated versus one in every 100 white.<sup>68</sup> Today, one out of every four black men born since the late 1970's has spent time in prison.<sup>69</sup>

With the advent of one strike, public housing residents felt the impact of these policies acutely. In 1994, complexes across Chicago were targeted as part of Operation Clean Sweep, where mass arrests were made in predawn raids in violation of many residents' Constitutional rights. Furthermore, data obtained by *The New York Times* also showed that from 2005 to 2010, 73% of one strike cases in Chicago were initiated based on drug possession charges, including 28% for marijuana possession.<sup>70</sup> Only 8% of cases were related to drug sales and only 4% were related to weapon possession. These numbers demonstrated that in Chicago, the focus of one strike was not on violent crimes, but on the suspected drug use of public housing residents.

The story of Kimberly Preston in Oakland, California provides a striking example of this focus. Preston faced eviction in 2000 after her son was found with a wad of cash in his pocket. Preston stated that it was grocery money but police found a ball of crack hidden in a wall nearby. While her son was never charged

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Angela Caputo, *Application of First Strike Policy is Questioned*, N.Y. TIMES, Sept. 3, 2011, [http://www.nytimes.com/2011/09/04/us/04cncfirststrike.html?\\_r=0](http://www.nytimes.com/2011/09/04/us/04cncfirststrike.html?_r=0) ("No community has experienced more recent one-strike cases than Cabrini. Roughly one in five of the arrests of C.H.A. tenants over the past six years involved its residents. A decade ago, nearly 13,000 people lived there; today, just 444 units are reserved for public housing.").

with a crime, Ms. Preston received an eviction notice a few weeks later. Although she was fortunate enough to secure a free lawyer and win her case, she reported that 4 of the 14 families living in her courtyard had been evicted due to drugs and crime. While she believed that one strike had some impact on crime, she maintained that the Housing Authority was focusing on the wrong people and that a better result could be achieved simply with better policing.<sup>71</sup>

Many have noted that the War on Drugs failed to extend similar policies to other forms of housing that were traditionally held by white families. In his formal remarks announcing the initiative in March of 1996, Clinton elaborated on his reasoning. "Public housing has never been a right; it has always been a privilege."<sup>72</sup> Clinton's remarks underscore the public consciousness on what qualifies as subsidized housing and what does not. For example, while many white families benefited from federal tax credits facilitating home ownership, public housing residents—many of whom were families of color—were told that their homes were a "privilege" that could be removed at any moment. In a 2001 article in the *Amsterdam News*, David Jones points out that if we want to ensure that all housing that receives a government subsidy is tax-free, then we should also deny the mortgage interest deduction credit to any homes identified for drug crimes.<sup>73</sup>

This contrast was put into sharp relief by Ms. Connie Burton, a Tampa Housing Authority resident, former building manager, and leader who vocally opposed the one strike policy. After years of fighting the one strike policy, Ms. Burton was evicted in 2005 based on her son's arrest for drug possession. "I make no apologies," Burton said. "But because of the rules of public housing, we are forced to abandon people who find themselves in a crisis. People reached out to Gov. [Jeb] Bush when his daughter, Noelle, had problems with drugs."<sup>74</sup> Burton's comparison is especially apt since the Florida Governor's Mansion was also paid for with public funds.

The stated goals of the one strike policy - increased safety and crime reduction- were important and certainly shared by many public housing residents. However, in design, application, and implementation, the one strike policy fit into and indeed, relied upon the country's long history of criminalizing people of color. The policy authorizes Housing Authorities to assign guilt and criminality without the need for legal representation, the criminal standard of beyond a reasonable doubt, or judges trained in the complexities of criminal

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71. Janelle Brown, *Evicting Grandma*, SALON, Apr. 10, 2002, 5:30PM, [http://www.salon.com/2002/04/10/eviction\\_risk/](http://www.salon.com/2002/04/10/eviction_risk/) ("Under the terms of a 1996 law upheld by the court, any public housing resident can be evicted from his or her apartment if anyone living in or visiting their home is discovered using drugs, or participating in other criminal activity. The rule means that Lark, already overwhelmed with the business of mothering, has to take on the role of cop. If she wants to stay in her apartment, she has to make sure that no one in it — friends, visitors, her addicted daughter — takes drugs, sells drugs, hangs out with drug dealers or commits any crime. If she fails, she could be evicted.").

72. *Supra* note 25.

73. Jones, *supra* note 47.

74. Tom Zucco, *Community activist lost her voice, now loses her home*, ST PETERSBURG TIMES, May 23, 2005, [http://www.sptimes.com/2005/05/23/news\\_pf/Hillsborough/Community\\_activist\\_lo.shtml](http://www.sptimes.com/2005/05/23/news_pf/Hillsborough/Community_activist_lo.shtml).

procedures. Furthermore, as significant amounts of scholarship have noted, one strike painted all residents with the same brush by allowing Housing Authorities to evict entire households for the actions of one member or even a guest.<sup>75</sup> These procedures require a base assumption that the accused party is already a criminal, likely to be guilty, undeserving of the protections afforded to most citizens, and perhaps less than fully human.

### III. LEGAL ANALYSIS OF PROCEDURAL DUE PROCESS VIOLATIONS OF EVICTIONS BASED ON ARRESTS

#### A. The Low Evidentiary Burden of Proof Constitutes a Violation of Procedural Due Process

Although the genesis of one strike evictions stemmed from the War on Drugs, public housing authorities ultimately expanded the ideology of “one strike and you’re out” to residents suspected of *any* crime. Today, public housing residents can lose their public housing apartment on the grounds that they allegedly engaged in criminal activity without a conviction or guilty plea.

Under the federal rule 24 C.F.R. §982.553, a public housing authority can terminate the tenancy for a tenant’s suspected criminal activity.<sup>76</sup> After the termination of the tenancy, the public housing authority may proceed to civil court to initiate the eviction. Even more problematic, the language and ambit of the federal regulation is so broad that an arrest itself is not necessary to evict a tenant based on criminal activity. Theoretically, a landlord can evict a tenant for “suspected criminal activity” using the testimony of neighbors who claim to have witnessed the conduct. Once evicted, there is no guarantee that the tenants can regain their apartments if they are subsequently absolved of criminal liability. These evictions, in the name of safety, pose a great danger to the procedural due process rights of subsidized housing tenants.

The loss of public housing based on suspected criminal activity without solid proof conflicts with the Due Process Clause of the Fourteenth Amendment. When an individual is deprived of property, the procedure must be fair and thorough. As part of a fair process, the evidentiary burden of proof cannot be so low as to allow the party commencing the process an unfair advantage. The use of the preponderance of the evidence standard enables housing authorities to meet their burden of proving that a tenant engaged in criminal activity by using an arrest as proof of guilt. This section discusses two issues: (1) how arrests used as proof of guilt violate procedural due process and (2) how an elevated evidentiary burden can ensure procedural safeguards.

##### 1. *An Arrest is Not Proof of Guilt*

The Due Process Clause attaches when the state deprives a person of property, life or liberty.<sup>77</sup> Once the Due Process Clause is triggered, courts

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75. See *Dep’t of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 130 (2002).

76. 24 C.F.R. § 982.553, *supra* note 19.

77. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that welfare benefits are a statutory

determine what process is due by looking at (1) the importance of the private interest at stake; (2) the risk of erroneous deprivation; and (3) any burdens the due process pose on the state.<sup>78</sup>

In the context of evictions based on criminal activity, housing authorities are essentially deputized as an arm of law enforcement by adjudicating and excluding the resident. These evictions are problematic because, in many cases, they are based on only an arrest. In these instances, an arrest is used as the basis of proof that criminal activity took place.

*a. Importance of the Private Interest at Stake*

The importance of the interest at stake determines the weight of the due process. For example, the evidentiary standard in a parental termination hearing may be elevated because the interest at stake is the loss of parental rights.<sup>79</sup> Similarly, courts have elevated the evidentiary standard in naturalization cases because a person's citizenship was at stake.

In some cases, the forfeiture of an individual's professional license was held to be a procedural due process violation, and thus the license was rendered an important private interest. However, shelter is equally if not more important of an interest than a professional license. Indeed, New York State has a legal right to shelter pursuant to the State Constitution.<sup>80</sup> Shelter is constitutionally guaranteed. There is no similar constitutional right to a professional license. Therefore, shelter and the right to a home is an important private interest that merits an evidentiary burden which reflects the degree of importance.

*b. Risk of Erroneous Deprivation*

Another factor in determining what process is due is the risk of deprivation by error. Within the context of an evidentiary threshold, courts consider whether a person is likely to be deprived of his life, liberty, or property if the evidentiary standard is not elevated. Evictions based on suspected criminal activity with little evidence of guilt can lead to large margins of error. In *Schwartz v. Bd. Of Bar Exam of N.M.*, the U.S. Supreme Court held that an arrest does not prove guilt.<sup>81</sup> In this 1957 case, a man seeking to be admitted to practice law was denied because, among other reasons, he had been arrested. In the applicant's favor, the U.S. Supreme Court wrote,

The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated.<sup>82</sup>

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entitlement under the Due Process Clause).

78. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

79. *See Santosky v. Kramer*, 455 U.S. 745, 763 (1982)

80. *Callahan v. Carey*, No. 79-42582 (Sup. Ct., N.Y. 1979).

81. *Schwartz v. Bd. Of Bar Exam of N.M.*, 353 U.S. 232 (1957).

82. *Id.* at 241.

The Court held that the New Mexico bar violated the applicant's procedural due process rights by denying his law license on the basis of his arrest, which did not result in a conviction. *Schware* is significant because the low evidentiary threshold—an arrest—was considered a due process violation. Therefore, the state contravened the Fourteenth Amendment when it deprived a person of a license on the basis of inadequate evidence. The following sub-sections explore what process is due in the context of public housing evictions based on criminal activity.

In addition, statistics indicate that an arrest does *not* prove guilt of the underlying offense. In 2009, 26% of felony arrests in the largest U.S. counties did not result in a conviction.<sup>83</sup> In one Florida county alone, nearly 10% of arrests resulted in dropped charges.<sup>84</sup> This means that many people who are arrested are *not* ultimately found guilty of the crime.<sup>85</sup>

The low evidentiary threshold is also problematic because arrest records do not provide an accurate portrayal of the final disposition of the case. For example, many arrest records do not show whether the arrest resulted in a conviction or dismissal of the charge.<sup>86</sup> In 2012, ten states reported that fifty percent or less of their arrest records had final dispositions.<sup>87</sup> That means that for many states, most arrest records do not comprise adequate verification that the arrest occurred to the person accused. Even when criminal charges are dismissed, tenants still need time to gather evidence to prove innocence because

83. Brian A. Reaves, Bureau of Justice Statistics, *U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 2009* at 24, Table 21 (2013).

84. Cindy Swirko, *Why Are Hundreds of Cases Dropped Over Insufficient Evidence?*, THE GAINESVILLE SUN (Mar. 11, 2016), <http://www.gainesville.com/article/20121216/ARTICLES/121219734>. (“In 2011, the [Alachua County Sheriff's Office] made 49,72 arrests and dropped a total of 510 cases for insufficient evidence and related reasons. Over the same period, [the Gainesville Police Department] made 10,845 arrests and dropped 917 cases for the same reasons.”)

85. BJ Lutz, *CHA Won't Evict Family of Acquitted Fenger Student*, NBC CHICAGO 5, Mar. 2, 2016, 7:51 PM, <http://www.nbcchicago.com/news/local/cha-bailey-greyer-eviction-reversal-65055777.html>. Sixteen year old Eugene Bailey was arrested on suspicion that he murdered his classmate. Two days after his arrest, his family received a notice of termination, commencing the eviction process from their Chicago Housing Authority apartment. Bailey's mother wryly noted to news reporters, “They acted real fast and quick. Ain't nobody went to trial or none of that. That's wonderful.” Three weeks after Bailey's arrest, prosecutors dropped the murder charge against him. Due to high media coverage, the Chicago Housing Authority rescinded its notice of termination and allowed the family to retain their subsidized apartment. Had the Chicago Housing Authority proceeded with the eviction, it is likely that Bailey would have lost his subsidized home due to an erroneous determination that he committed a crime. Bailey's story is an illustration that an arrest itself does not prove that the individual is guilty of the crime.

86. Some researchers have argued against using arrest records to determine criminality. See Delbert S. Elliot, *Lies, Damn Lies, and Arrest Statistics*, Sutherland Award Presentation, American Society of Criminology (Nov. 1995)

87. U.S. GOV'T ACCOUNTABILITY OFFICE, *Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used for Employment-Related Background Checks* at 19, Feb. 2015, <http://www.gao.gov/assets/670/668505.pdf>. According to the same report, of thirteen states, 51 to 75 percent had arrest records with final dispositions. Only twenty states had a 76 to 100 percentage of arrest records with final dispositions. FBI officials notes, “it is not possible for states to have 100 percent complete records because it can take more than 1 year for criminal felony cases to conclude and disposition information to be entered into criminal record systems.”

the arrest record does not show the outcome of the case.<sup>88</sup>

In some instances, public housing authorities have successfully evicted a tenant using the arrest record alone as evidence. In response to these evictions, HUD released a circular in November 2015 which guided public housing authorities away from the use of an arrest as evidence of criminal activity. In pertinent part, the circular provided:

An arrest record can trigger an inquiry into whether there is sufficient evidence for a PHA or owner to determine that a person engaged in disqualifying criminal activity, but is not itself evidence on which to base a determination. PHAs and owners can utilize other evidence, such as police reports detailing the circumstances of the arrest, witness statements, and other relevant documentation to assist them in making a determination that disqualifying conduct occurred. Reliable evidence of a conviction for criminal conduct that would qualify an individual for tenancy may also be the basis for determining that the disqualifying conduct in fact occurred.<sup>89</sup>

Although the HUD circular makes clear that an arrest is not proof of guilt, it does not go so far as to require that public housing authorities postpone an eviction until the tenant is convicted or at least the criminal case is resolved. Instead, the HUD circular focuses on “verifiable arrests.” In many one strike cases, no officer or witnesses testified to prove that the tenant engaged in criminal activity and therefore the arrest itself was never “verified.” In response to these evictions, the HUD circular emphasizes that a public housing authority should not use the arrest record itself as the sole evidence to prove guilt. After all, some arrest records might even have the wrong name. The circular is clear, however, that a public housing authority may supplement the arrest record with testimony of a police officer to verify that the arrest occurred. Therefore, the HUD circular does not squarely address the overarching issue—that tenants should not lose their homes based on an arrest that has not yet been resolved with a conviction or guilty plea in criminal court.

*c. Burden on the State*

Lastly, a court considers whether the proposed process would pose an administrative burden on the state. In this case, an elevated evidentiary standard (as a mechanism of due process) would not present an administrative burden.

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88. CORINNE CAREY, HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING (2004), <https://www.hrw.org/report/2004/11/17/no-second-chance/people-criminal-records-denied-access-public-housing> (“PHAs recognize that criminal justice records are sometimes inaccurate, and they have different ways of dealing with inaccuracies—from allowing applicants to view their records before housing officials see them, to confirming any negative information by requiring applicants to submit fingerprints. But most PHAs simply rely on applicants to challenge their denials at informal hearings. This is not an effective way to ensure that applicants are treated fairly, because [a]pplicants have difficulty availing themselves of their right to challenge denials.”).

89. U.S. Dep’t of Housing and Urban Development Office of Public and Indian Housing, *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions*, (Notice PIH 2015-19), 4, <http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf>.



The adjudication process in criminal cases is lengthy. Accordingly, tenants who have been arrested may not have their criminal case resolved *before* the civil eviction case ends. A legal services lawyer crystallized the issue: “The problem is the criminal justice system moves slow, but the eviction process it moves really fast.”<sup>90</sup>

To that end, the U.S. Department of Justice reported that in 2009, eighty-five percent of arrests in the largest U.S. counties were adjudicated within one year.<sup>91</sup> Very few cases are resolved quickly—in fact, only five percent of these cases were adjudicated in one week. Although New York has a “speed trial” law that sets of a target of six months after an arraignment, “in practice, there are many ways to stretch that limit: court scheduling delays do not count toward that time limit and prosecutors can pause the clock by asking for a few days postponement when the court cannot reschedule a case for months.”<sup>92</sup> These external factors have contributed to the notoriously lengthy “gulag” in Bronx criminal court where the average length of time is 517 days from the arrest to final disposition of the case.<sup>93</sup>

## 2. *Safeguarding Tenants’ Due Process Rights: Why We Need to Elevate the Evidentiary Standard*

One approach to ensuring procedural due process in evictions based on criminal activity is to heighten the evidentiary threshold. This section will discuss three evidentiary standards: reasonable doubt, clear and convincing evidence, and preponderance of the evidence.

The legal burden of proof in most civil cases is the preponderance of the evidence standard. One of the lowest burden thresholds, the preponderance of the evidence standard requires that litigants prove “more likely than not” that the accused engaged in the underlying conduct.<sup>94</sup> Thus, by its very nature, there could be some doubt about whether the accused party committed the conduct.

90. Richard A. Webster, *Arrest Record Not Enough to Ban Public Housing Rental, HUD Says*, THE TIMES PICAYUNE (Nov. 4, 2015), [http://www.nola.com/politics/index.ssf/2015/11/arrest\\_record\\_not\\_enough\\_to\\_ba.html](http://www.nola.com/politics/index.ssf/2015/11/arrest_record_not_enough_to_ba.html).

91. Reaves, *supra* note 85.

92. William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013), <http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html> (“The number of felony cases citywide that exceed the courts’ own guidelines for excessive delay – 180 days in most felony cases – has more than doubled since 2000, even as the total number of felony cases has dropped by nearly a quarter.”).

93. Kalief Browder was arrested at age 16 and detained at Rikers for three years until prosecutors finally dropped the charges against him. Browder’s ultimate suicide shed light on not only the delayed process of criminal cases in New York, but also the mental and physical toll that false arrests have on victims. For more on Kalief Browder and the Bronx criminal court gulag, see James C. McKinley Jr., *Calls Mount for Changes to Speed Criminal Cases to Trial*, N.Y. TIMES (June 17 2015), <http://www.nytimes.com/2015/06/18/nyregion/calls-mount-for-changes-to-speed-criminal-cases-to-trial.html> (“Previous efforts to reduce court backlogs have met with only limited success. Over the last two decades, the average time New York courts take to resolve felony cases has increased even as the number of arrests has declined generally, said Michael P. Jacobson, a former city correction commission[r].”).

94. *McEwen v. Tennessee Dept. of Safety*, 173 S.W. 3d 815, 825 (Tenn. Ct. App. 2005).

In some instances, public housing tenants have lost court battles and have been subsequently evicted because the preponderance of the evidence standard tipped the scale in favor of the housing authority. For example, in *Hoopa Valley Housing Authority v. Hunsucker*, a tribal court in California held that the Hoopa Housing Authority could evict a tenant who was arrested but not convicted because the preponderance standard was such a low threshold.<sup>95</sup> The court reasoned that a criminal conviction is not required to prove drug-related criminal activity because the preponderance of the evidence threshold is so low.

The preponderance standard differs from “beyond a reasonable doubt” employed in criminal cases, which leaves no room for error.<sup>96</sup> To meet the reasonable doubt standard, a litigant must use evidence to show that the party committed the act without the shadow of a doubt. Reasonable doubt is the highest evidentiary burden because it leaves little room for error. As such, it is almost never used in civil cases.

Clear and convincing evidence is considered the middle ground between the preponderance of the evidence standard and beyond a reasonable doubt. If the clear and convincing evidence standard were required to prove that the tenant engaged in criminal activity, solid proof, such as a conviction, would likely be necessary to satisfy the burden of proving that a tenant engaged in criminal activity. Therefore, elevating the evidentiary burden would require housing authorities to prove that the tenant is guilty.

The U.S. Supreme Court has held that a low evidentiary burden can rise to a violation of procedural due process. In *Schneiderman v. U.S.*, the Supreme Court found that denaturalization cases must use the clear and convincing evidence standard rather than the preponderance standard because “rights once conferred, should not be lightly revoked.”<sup>97</sup> Similarly, in *Woodby v. Immigration and Naturalization Services*, the petitioner argued that the reasonable doubt standard should be used in his deportation civil proceeding because the issue related to a criminal element.<sup>98</sup> The U.S. Supreme Court reasoned that while the reasonable doubt standard would not apply here, the clear and convincing

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95. *Hoopa Valley Hous. Auth. v. Hunsucker*, No. Ud-13-003/A-13-003 (Feb. 27, 2014). *See also* *Martinez v. Hous. Auth. of DeKalb County*, 592 S.E.2d. 245 (Ga. Ct. App. 2003) (upholding the termination of tenancy of public housing residents who were arrested for drug possession but police found no drugs no accomplice. Tenants’ eviction upheld because court reasoned that under the preponderance of the evidence standard, a jury could have concluded that the tenant engaged in criminal activity – it did not require proof that the tenant actually engaged in the activity.”).

96. In one of the first cases to use the reasonable doubt standard, *Miles v. U.S.*, 103 U.S. 304, 310 (1880), the U.S. Supreme Court wrote, “Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant’s guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests.”

97. *Schneiderman v. United States*, 320 U.S. 118, 125 (1943). *See also* *Chaunt v. United States*, 364 U.S. 350, 354 (1960) (holding that denaturalization cases must use the clear and convincing evidence standard).

98. *Woodby v. Immigration and Naturalization Servs.*, 385 U.S. 276 (1966).

evidence standard was appropriate. The Court reasoned that while a deportation case is not a criminal proceeding, “it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case.”<sup>99</sup>

Arguably, loss of a federally-subsidized apartment may not be as life-altering as deportation. However, the U.S. Supreme Court has singled out civil cases which involve a “quasi-criminal wrongdoing” and ruled that these proceedings should have a higher burden than preponderance of the evidence. “The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof.”<sup>100</sup> The Court’s reasoning shows that the evidentiary standard must align with the weight of the private interest at stake. In the cases at hand, a public housing tenant’s lease is terminated for a breach of lease based on alleged criminal activity. Although a breach of lease is a civil matter, its underlying claim is that the tenant breached the lease by engaging in criminal activity. Therefore, in order to meet its legal burden, a housing authority must present evidence that the tenant engaged in criminal activity.

Moreover, the elevation of the evidentiary standard also takes into account the imbalance of power between the litigants. In *Santosky v. Kramer*, two parents challenged the use of the preponderance standard in a parental termination proceeding on the grounds that it violated procedural due process.<sup>101</sup> The U.S. Supreme Court raised the burden of proof from the preponderance standard to clear and convincing evidence, reasoning that parents in the proceedings tend to be “poor, uneducated or members of minority groups” and thereby “vulnerable to judgments based on cultural or class bias.”<sup>102</sup> In bolstering its holding, the Court also relied on the fact that the state’s attorney is normally an expert on the issues and the agency (terminating parental rights) often is able to call its own employees as witnesses.<sup>103</sup> Therefore, as the Court recognized, the resources are inherently mismatched between the litigants when the evicted resident is challenging a housing authority in court.

## **B. Additional Procedural Due Process Violations in Criminally-based Evictions**

Aside from the low evidentiary standard, there are additional procedural due process violations when a tenant is evicted from his or her home on the basis

99. *Id.* at 285.

100. *Addington v. Texas*, 441 U.S. 418, 424 (1979). In this case, the appellant asserted that his procedural due process rights were violated when a court used the preponderance of the evidence standard rather than reasonable doubt to determine whether he should be involuntarily committed to a state mental institution. The Court held that while the reasonable doubt standard was too extreme as it “may impose a burden the state cannot meet”, the clear and convincing evidence standard stuck a “fair balance.”

101. *See Santosky v. Kramer*, 455 U.S. 745 (1982).

102. *Id.* at 763.

103. *Id.*

of criminal activity without solid proof. This section analyzes: (1) inadequate termination notices; (2) Fifth Amendment violations; and (3) the effect of the lack of right of counsel in civil proceedings.

### 1. *Inadequate Notices*

In general, a landlord is required to serve the tenant with a written pretermination notice before commencing an eviction proceeding in court. The notice specifies the reason based on which the landlord seeks to terminate the tenancy and sometimes offers the tenant the opportunity to cure the defect. To satisfy jurisdictional requirements, the pretermination notice cannot be vague and must specify the acts or conduct giving rise to the breach. For example, if a landlord seeks to terminate a tenancy based on the tenant's unauthorized alteration of the apartment, the notice must specify the alleged conduct by the tenant that amounted to the breach of lease. If a landlord alleges that a tenant breached a provision of the lease, the landlord must cite to that provision. The purpose of a clear and unambiguous termination notice is to provide the tenant with the opportunity to prepare an adequate defense. If, for example, the tenant is accused of engaging in criminal activity, it is insufficient to fail to disclose the criminal statute which the tenant allegedly violated.

Nevertheless, some states have held that a tenant can be evicted on the basis of engaging in criminal activity, even where the pretermination notice does not specify what crime the tenant allegedly committed. In *Housing Authority of City of New Haven v. DeRoche*,<sup>104</sup> the Housing Authority of the City of New Haven sent a tenant a termination notice alleging that the tenant became intoxicated and started a fire in her apartment which damaged the property. The notice provided that the tenant violated terms of her lease and also that she engaged in criminal activity. However, the notice neither specified the crime that the tenant allegedly committed nor cited any penal provisions to bolster its claims.

The *DeRoche* court held that a public housing authority need not specify the criminal statute the tenant violated because federal regulations authorize a termination of tenancy regardless of whether the tenant has been arrested or charged.<sup>105</sup> There, the tenant was not arrested or charged with any crime. This is a gross violation of procedural due process because it allows for a vague predicate notice which relies on an allegation that a crime took place but absolves the landlord of the responsibility to list the actual crime or criminal statute.

### 2. *Fifth Amendment Violations*

In parallel proceedings in which two cases are litigated in separate courts on a single underlying issue, the criminal case typically precedes the civil case to avoid prejudicing the defendant.<sup>106</sup> Civil courts are not required to stay the proceeding until the resolution of the parallel criminal case, but the parties in the

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104. *Hous. Auth. of City of New Haven v. DeRoche*, 962 A.2d 904 (Conn. App. Ct. 2009).

105. *Id.* at 911.

106. For example, a defendant might face a homicide charge in criminal court and a wrongful death claim in civil court regarding the same claim.

civil case may request to stay the proceeding until the criminal case is resolved.<sup>107</sup> Although a tenant is not entitled to a stay of a civil eviction proceeding (either at the administrative termination of tenancy stage or the eviction case in civil court) when he has a pending criminal case, the strongest argument to stay the civil eviction process is that forcing the tenant to litigate it would violate her Fifth Amendment rights to avoid self-incrimination.

Nevertheless, the remedy of a stay is undermined by the fact that federal regulations authorize a public housing authority to terminate the federal benefit regardless of whether the tenant has been arrested or convicted of a crime. Therefore, courts have no incentive to wait for a conviction because the claim itself can be proven without said conviction. This presents thorny issues for subsidized housing tenants.

Allowing a civil case to proceed simultaneously or before the resolution of a criminal case results in detrimental consequences to the tenant related to the right of counsel. The statements by the tenant in the civil case can be used against the tenant in the criminal case. For example, HUD regulation §982.555(e)(5) provides that evidence in an administrative hearing “may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings.”<sup>108</sup> Many courts have interpreted this provision to mean that hearsay is admissible evidence.<sup>109</sup> Therefore, the admission of “hearsay”—such as a neighbor testifying as to what he hear about tenant’s conduct—could result in the tenant’s eviction.<sup>110</sup> Some case precedent affords litigants protection from the use of legal loopholes to use a civil case to build a criminal case.<sup>111</sup> However,

107. *DeSiervi v. Liverzani*, 136 A.D.2d 527 (N.Y. 1988) (“[T]he pendency of a criminal proceeding does not give rise to an absolute right under the United States or New York State Constitution to a stay of a related civil proceeding.”).

108. Informal Hearing for Participant, 24 C.F.R. § 982.555(e)(5) (2015).

109. *See, e.g., Costa v. Fall River Hous. Auth.*, 903 N.E.2d, 1108 (Mass. App. Ct. 2009) (“We read the regulation’s specific reference to the inapplicability of formal rules of evidence as support for the conclusion that there is no categorical prohibition of hearsay.”).

110. *Id.* at 627 (holding that “hearsay evidence may form the basis of a PHA’s decision to terminate Section 8 assistance so long as that evidence contains substantial indicia of reliability.”). *See also Figgs v. Boston Hous. Auth.*, 14 N.E.3d 229 (Mass. App. Ct. 2014) (holding that a hearing officer’s reliance on hearsay to determine the termination of a housing subsidy was proper).

111. *See Eisenberg*, 654 F.2d 1107 (5th Cir. 1981) (holding that plaintiff’s attempts to depose a witness in a civil case were a veiled attempt to bypass the stricter evidentiary rules in a parallel criminal proceeding related to the same claim); *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962) (“A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a doge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit); *United States v. Tison*, 780 F.2d 1569, 1573 (11th Cir. 1986) (referring to 18 U.S. Code §1514 of the federal rules to restrain harassment of victims, the court wrote, “Filing a civil lawsuit to avoid the restrictions on criminal discovery and thereby obtain documents that a defendant would not ordinarily be entitled to for use in his criminal case, while at the same time attempting to intimidate a witness from providing accurate information to federal law officials is exactly the kind of harassment this legislation was designed to eliminate.”); *F.D.I.C. v. Chang*, 1986 WL 3518, \*1 (holding that a stay is granted to “preclude parties from using the broad civil discovery rules to circumvent the more restrictive rules of criminal discovery); *Larouche Campaign v. Fed.I Bureau of Investigation*, 106 F.R.D. 500, 501 (1985) (court granted motion for a stay of civil court proceeding under “the general proposition that the broad rules of civil discovery cannot be used to circumvent the more restrictive rules of criminal discovery.”).

two factors present problems. First, the federal regulations essentially undercut any argument for a stay because an arrest or conviction is not required to evict the tenant. Second, civil cases typically proceed quicker than criminal cases. Although the indigent tenant is protected by right of counsel in criminal cases, the same tenant does not have a court-appointed counsel in a civil case. Without that protection, the tenant may not know the effect of his statements or even adequately prepare his defense in the civil case.

### 3. *Right of Counsel Does Not Attach in Civil Proceedings*

Unlike defendants in criminal cases, tenants in civil cases do not have a legal right to counsel. Allowing a civil case to proceed simultaneously or before the resolution of a criminal case adversely affects a tenant's right of counsel in criminal matters. For example, the statements made by the tenant in the civil case or administrative proceeding can be used against the tenant in the related criminal case. The end result is that prosecutors could use the civil case discovery against the tenant in the criminal case.

Most public housing residents have low-income. The state's attorney is normally an expert on the issue while most tenants are *pro se*. The state has caseworkers, most of whom are its own employees, to call on as witnesses. In New York, 99% of tenants are unrepresented in eviction proceedings.<sup>112</sup> Therefore, it is much easier for any housing authority to make a case against the public housing residents because it typically has a wealth of resources at its disposal.

## IV. THE DISPARATE IMPACT CREATED BY PUBLIC HOUSING EVICTIONS BASED ON CRIMINAL ACTIVITY

In 2009, the United Nations Special Rapporteur on the Right to Adequate Housing singled out one strike policies and their discriminatory effect on public housing residents.<sup>113</sup> In many ways, tenants who face eviction on the basis of an unlawful arrest face "double disparate impact." At the first stage, people of color are disproportionately arrested on the basis of race. At the second stage, these tenants subsequently face an eviction on the basis of an unlawful arrest.

The *Davis v. NYCHA* case, litigated by the NAACP Legal Defense Fund, shed light on discriminatory stop and frisk practices on public housing grounds in particular. The case challenged the practice of the New York Police Department, which heavily patrolled, stopped, and arrested residents of public housing. Many of these arrests were unlawful, the complaint alleged, because

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112. Frank G. Runyeon, *Few Benefit from Millions Spent on Anti-Eviction Lawyers*, CITY & STATE, (Nov. 3, 2015), <http://www.cityandstateny.com/articles/politics/new-york-city/few-benefit-from-millions-spent-on-anti-eviction-lawyers.html#.VzIqaU32aUk>.

113. Raquel Rolnik, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, UNITED NATIONS HUMAN RIGHTS COUNCIL (Dec. 26, 2011), [http://www.ohchr.org/Documents/Issues/Housing/A-HRC-19-53\\_en.pdf](http://www.ohchr.org/Documents/Issues/Housing/A-HRC-19-53_en.pdf). (While the Special Rapporteur recognizes the duty of the State to protect its population, she is concerned by the discriminatory nature of these practices towards the residents of public housing, and their negative, fragmenting effects on families.").

they were based on the resident's race or ethnicity.<sup>114</sup> A black public housing resident was more likely to be stopped and arrested than a white public housing resident. When a public housing resident is unlawfully arrested on the basis of race and is subsequently evicted due to the unlawful arrest, housing authorities are creating a disparate impact of race-related evictions.

The Fair Housing Act prohibits policies and practices by a state actor which result in a racially skewed adverse impact, even if there is no intention to discriminate.<sup>115</sup> According to HUD, "while having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability)."<sup>116</sup> African Americans and Hispanics are disproportionately affected by systemic racial and ethnic disparities, including but not limited to those within the criminal justice system. HUD itself concluded that "criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers."<sup>117</sup> Moreover, because criminal records can include an arrest that never led to a conviction,<sup>118</sup> many individuals "encounter significant barriers to securing housing, including public and other federally-subsidized housing, because of their criminal history."<sup>119</sup>

The Fair Housing Act requires housing providers who consider one's criminal history to show a legally sufficient justification for doing so.<sup>120</sup> Whether a policy or practice that restricts a person's access to housing on the basis of their criminal history has a disparate impact is assessed under a three-step, burden-shifting analysis.<sup>121</sup> The first step requires a plaintiff to prove that the policy or practice "actually or predictably" results in disparate impact on a group of persons because of race or national origin.<sup>122</sup> Supporting evidence may include national statistics where "state or local supporting statistics are not readily available and there is no reason to believe they would differ markedly" from the former.<sup>123</sup> To these ends, applicant data, tenant files, census demographic data, and localized criminal justice data may also be used to support a claim.

114. *Davis v. City of New York*, 10 Civ. 0699 (SAS), 2013 U.S. Dist. LEXIS 74189, at \*3 n.6 (May 24, 2013), <http://www.naacpldf.org/case/davis-vs-city-new-york>.

115. 42 U.S.C. § 3604 (2011)

116. Office of General Counsel Guidance on Application of Fair Housing Act Standards to Use of Criminal Records by providers of housing and Real-Estate Transactions, U.S. Dep't of Housing. & Urban Development (Apr. 4, 2016), [http://portal.hud.gov/hudportal/documents/huddoc?id=HUD\\_OGCGuidAppFHASstandCR.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASstandCR.pdf).

117. *Id.*

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

119. U.S. Dep't of Housing and Urban Development Guidance on Application of Fair Housing Act Standards, *supra* note 118.

120. *Id.*

121. *Id.*

122. *Id.* at 3.

123. *Id.*

The second step requires the housing provider to prove that the policy or practice being challenged is necessary to serve a “substantial, legitimate, nondiscriminatory interest” and that it in fact achieves that specific interest.<sup>124</sup> While courts may consider interests such as tenant safety and property protection, for example, a housing provider must prove vis-à-vis “reliable evidence” that its policy or practice actually assists in maintaining alleged interests.<sup>125</sup> “Bald assertions based on generalizations or stereotypes” are not sufficient to satisfy this burden.<sup>126</sup> In particular, exclusions based solely on one or more prior arrests not resulting in conviction do not satisfy this burden.<sup>127</sup> While exclusions based on prior convictions are sufficient evidence to prove a person engaged in criminal conduct, housing providers must still prove the policy or practice is necessary to serve a “substantial, legitimate, nondiscriminatory interest.”<sup>128</sup> A housing provider can reduce the discriminatory impact by showing a policy or practice that is more tailored, using factors such as the type of crime, the nature and severity of the conviction, and the date of the conviction, but ultimately the analysis is fact-specific and determined on a case-by-case basis.<sup>129</sup>

Evictions based on criminal activity have racially disparate impact because people of color are disproportionately arrested. Specifically, as the *Davis v. NYCHA* case shows, people of color are targeted for arrest on public housing grounds. Therefore, any evictions based on an unlawful arrest contribute to the disparate impact on people of color by their exclusion from public housing.

## V. RECOMMENDATIONS

As shown, the one strike policy for public housing raises significant due process and fair housing issues. Therefore, public housing authorities should only be permitted to initiate evictions if the resident is found guilty of criminal charges. This could be accomplished nationally through a change in HUD regulations or federal law. While imperfect, the criminal justice system at a minimum will ensure that the public housing resident receives the benefit of the right to counsel and the beyond a reasonable doubt standard.<sup>130</sup> Public housing authorities should leave the determination of guilt on criminal issues to our criminal justice system and weigh the appropriate action only after that system has made its determination.

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124. *Id.*

125. *Id.*

126. *Id.* at 5.

127. *Id.*

128. *Id.* at 6.

129. *Id.*

130. During the criminal proceeding, it is crucial that defense attorneys inform public housing residents of the potential collateral consequences of any guilty pleas or convictions so that residents can make informed decisions during the criminal case. In 2010, the Supreme Court found that defense attorneys have an obligation to inform defendants of the possible immigration consequences of a guilty plea. *See Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). While no such obligation exists for other civil penalties, we believe that effective counsel for public housing residents accused of crimes should include information about the possible collateral consequences of guilty pleas, including eviction.



Furthermore, public housing authorities should develop guidelines to ensure that evictions are only pursued when tenants pose a significant threat to the safety of other residents. One strike's broad mandate allows for public housing residents to be evicted based on offenses as minor as trespassing and often leads to significant law enforcement presence in public housing and the accompanying criminalization of large numbers of public housing residents. Affected tenants face eviction, family separation, and homelessness. PHAs should never pursue evictions for offenses that are unrelated to the safety of other public housing residents. For offenses that may affect the safety of other public housing residents, PHAs should develop guidelines that allow them to make individualized determinations. These determinations must balance the current risks to tenant safety against the potential harm caused by evictions and family separation.

The recent HUD circular emphasizing that arrests alone should not be used as evidence in the pursuit of evictions is a step in the right direction.<sup>131</sup> While still insufficient, this shift demonstrates a desire to reduce the number of one strike evictions pursued in public housing. HUD should go one step further and issue new policy guidance as outlined above. These recommendations will ensure that public housing residents are not asked to choose between their safety and their basic rights.

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131. U.S. Dep't of Housing and Urban Development Guidance on Application of Fair Housing Act Standards, *supra* note 118.