HOME RULES

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ABSTRACT

Thousands of American cities and towns are responding to social problems like bullying, drug abuse, and criminality by passing ordinances that hold individuals responsible for the wrongful acts of their family members and friends. Parental liability ordinances impose sanctions on parents when their children engage in bullying or other targeted behaviors; mandatory terms in rental housing leases require the eviction of tenants whose family members, friends, or guests engage in unlawful acts; and nuisance ordinances require evictions when a threshold number of calls to police is exceeded, even though such calls are often related to another person's wrongful or abusive behavior.

Cities typically rely on home rule authority to pass these ordinances, and these ordinances in turn create new "home rules" for the households affected. These new home rules are a form of third-party policing, and through them, the city is becoming an increasingly significant player in governing families and regulating intimate spaces. These home rules cut against the standard understanding of the home as mostly private and self-governed, and instead configure it as a site of state-required risk management and crime prevention. In so doing, these ordinances destabilize families and disrupt kinship structures, regardless of whether one is able to comply with them or not. Further, the ordinances allocate the burdens of preventing crime and managing risk in a manner inflected with gender, race, and class issues. Fortunately, the dynamism of localism can promise a better solution to the social problems that prompted these ordinances in the first place.

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INTRODUCTION

The ability to "establish a home and bring up children" is a fundamental part of the American dream.[1] Lately, however, residents in thousands of cities and towns across America are finding their

1. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

ability to do this undermined by a number of local ordinances.[2] These ordinances, passed in response to pressing social problems like bullying, criminality, and drug abuse, use strict or vicarious liability to hold parents and other heads of household legally responsible for the wrongful actions of their family members and friends.[3] For example, parental liability ordinances threaten parents with fines and other penalties if they do not prevent their children from bullying others, or if their children engage in other targeted behaviors.[4] Additionally, crime-free ordinances mandate that rental housing leases must include a "crime-free lease addendum," which sets out how tenants will be evicted if their friends or family members commit an unlawful act on or near the leased premises. Similarly, nuisance laws require a tenant's eviction from rental housing if a threshold number of calls to the police is exceeded, even if the basis for the calls is another person's wrongful or abusive behavior.

These laws can be understood as a form of third-party policing, an increasingly important form of regulation and law enforcement that is now often deployed to address social problems.[5] In third-party policing, the state requires private parties—who neither participate in nor benefit from the misconduct they are compelled to address—to enforce laws and prevent misconduct by enacting some method of control over a primary wrongdoer.[6] Failure to perform these assigned duties results in civil or criminal sanctions.[7]

The private parties typically called upon to perform these enforcement duties are businesses, professionals, and industrial actors, and the sites that they are asked to police are typically public.[8] However, fairly early in its development, third-party policing began targeting a more intimate arena. Through parental liability laws and the "one-strike" policy for residents of federal public housing projects, tenants and parents were required to police their homes.

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2. *See infra* text accompanying notes 93–101 and 116–18.

3. Although "head of household" has a technical meaning as a filing status for individual income tax purposes, it is used here in a more generic sense, as a broad term that encompasses any adult, tenant of record, or parental figure who performs the role of taking care of a home and the people in it.

4. See *infra* notes 100–09 and accompanying text.

5. LORRAINE MAZEROLLE & JANET RANSLEY, THIRD PARTY POLICING 45–46 (2005).

6. REINIER H. KRAAKMAN, *Gatekeepers: The Anatomy of a Third-party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 53 (1986).

7. MAZEROLLE & RANSLEY, *supra* note 5, at 7.

8. Janet A. Gilboy, *Compelled Third-Party Participation in the Regulatory Process: Legal Duties, Culture, and Noncompliance*, 20 LAW & POL'Y 135, 135 (1998).

Both parental liability laws and the one-strike policy became popular in the late 1980s, the former in response to a perceived increased in juvenile crime and disorder, and the latter in response to extremely high crime rates in federal public housing projects.[9] Under parental liability laws, parents were held legally responsible for the wrongful actions of their children. Under the one-strike policy, residents of federal public housing could be evicted if anyone associated with their household engaged in any criminal or drug-related behavior on the premises.[10]

Initially, significant bodies of scholarship grew up around both the parental liability laws and the one-strike policy.[11] However, this scholarship tended to treat each as isolated phenomena and focused on parental liability laws at the state level, and the one-strike policy at the federal one. But, "in the shadow of the debate" about these policies, "*local* governments nationwide have quietly implemented

9. JOEL SAMAHA, CRIMINAL LAW 229 (10th ed. 2010). Although the number of juveniles arrested for violent crime actually decreased in the period between 1978 and 1987, the number of those arrests that were for rape and aggravated assault went up. Kathryn J. Parsley, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children*, 44 VAND. L. REV. 441, 444 (1991). Further, the following year there was a drastic overall increase in juvenile arrests for violent crimes. *Id.*

10. For a discussion of the background and development of the one-strike policy, see generally Caroline Castle, Note, *You Call That a Strike? A Post-*Rucker *Examination of Eviction from Public Housing Due to Drug-Related Criminal Activity of a Third Party*, 37 GA. L. REV. 1435 (2003). Notably, in 2010, 86 percent of the evictions in federal housing projects in Chicago under the one-strike policy were for third-party activity. Laura Peterson, *Collective Sanctions: Learning from the NFL's Justifiable Use of Group Punishment*, 14 TEX. REV. ENT. & SPORTS L. 165, 165 (2013).

11. Examples of scholarship focused on the federal one-strike policy include Regina Austin, *"Step on a Crack, Break Your Mother's Back": Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 YALE J.L. & FEMINISM 273, 275 (2002); Christopher Mele, *The Civil Threat of Eviction and the Regulation and Control of U.S. Public Housing Communities*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES 121, 130 (Christopher Mele & Teresa Miller eds., 2005); Bryan Cho, Note, *Getting Evicted for the Actions of Others: A Proposed Amendment to the Anti-Drug Abuse Act*, 44 B.C. L. REV. 1229, 1234–35 (2003); Margaret E. Finzen, Note, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299, 313–14 (2005); and Lisa Weil, Note, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161, 171 (1991). Examples of scholarship focused on parental liability include Valerie D. Barton, Comment, *Reconciling the Burden: Parental Liability for the Tortious Acts of Minors*, 51 EMORY L.J. 877, 879 (2002); Jerry E. Tyler & Thomas W. Segady, *Parental Liability Laws: Rationale, Theory, and Effectiveness*, 37 SOC. SCI. J. 79, 81–82 (2000); Jason Emilios Dimitris, Comment, *Parental Responsibility Statutes—And the Programs That Must Accompany Them*, 27 STETSON L. REV. 655, 662 (1997). This literature generally focuses on parental liability laws at the state level, and has not yet focused on how they combine with other laws to target the home at the local level.

programs that apply the same 'one strike' logic."[12] Crime-free lease addendums and chronic-nuisance-abatement ordinances use the same form of vicarious liability as the one-strike policy, and local law has now brought that vicarious liability to bear on a much larger portion of the population.[13] An estimated 100 million people occupy 38.6 million rental properties in America, and given that crime-free lease addendums and nuisance ordinances are currently present in nearly 2000 cities and towns across the nation, many of these households are now subject to eviction based on the wrongdoing of others.[14] Parental liability ordinances are expanding, too, both in terms of the scope of behaviors they encompass, and the increasing number of cities enacting them.[15]

Despite their burgeoning numbers, the crime-free lease addendums, nuisance ordinances, and expanding parental liability ordinances have flown mostly under the radar of legal scholarship.[16] There are two reasons for this. First, the origin of these rules in local law has allowed them to proliferate mostly unnoticed. With the exception of a small group of prominent local-law scholars, the legal academy generally tends to overlook local law.[17] And, as a practical point, the breadth and variances between jurisdictions make it a difficult area to empirically or sometimes even qualitatively study.[18]

The second reason that these ordinances have proliferated relatively unremarked is that third-party policing itself is "generally

12. Scott Duffield Levy, Note, *The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 540 (2008) (emphasis added).

13. *Id*.

14. Janet Hawkins, *Landlord Accountability and Crime Prevention*, 63 CRIME PREVENTION 66, 66 (2011).

15. Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327, 1340 (2008).

16. *But see generally* Mishran Wroe, *Preemption of Municipal Crime-Free Housing Ordinances*, 2 TENN. J. RACE, GENDER & SOC. JUST. 123 (2014) (arguing that the Fair Housing Act preempts crime-free ordinances); Nicole Livanos, *Crime-Free Housing Ordinances: One Call Away From Eviction*, 19 PUB. INT. L. REP. 106 (2014) (discussing the impact of crime-free ordinances on victims of crime).

17. For instance, Professor Ethan Leib notes that "legal scholars have almost universally ignored the law in local courts, favoring the study of federal courts and state appellate courts." Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 898–99 (2013).

18. Fortunately, new online databases like Municode are opening up research possibilities in local law. *See* Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1125 (2012).

invisible."[19] Because it appears in many different contexts, and sometimes merely repurposes old laws that were originally enacted for other reasons, third-party policing has only just begun to attract the scholarly attention of a few pioneering academics.[20] Third-party policing practices are ubiquitous, but its emergence as an "articulated or developed doctrine" is still in its infancy, and while the literature is growing, there has not yet been widespread examination of third-party policing activities and practices.[21]

This Article offers an examination and excavation of the nationwide trend of cities and towns enacting ordinances that use vicarious liability to hold household and family members responsible for the actions of others. These laws can be understood as "home rule ordinances," a term that highlights three important features shared by these ordinances. First, home rule ordinances create a new standard of home governance that parents and heads of household must meet to avoid legal sanction. In other words, the ordinances create a set of "home rules" that apply to the internal workings of home life. Second, they establish rules about who gets to have a home at all; that is, they serve as a sorting rule, setting parameters for home-worthiness in a broader sense. The ability to keep one's home becomes contingent on one's ability to control the behavior of another person, and if a tenant fails to demonstrate such control, eviction can follow.[22] And, finally, the ordinances are home rule ordinances in another, more literal sense: they typically rely on a city's home rule authority for their existence.[23] Home rule ordinances

19. MAZEROLLE & RANSLEY, *supra* note 5, at 50.

20. Such academics include Michael Buerger, Reinier Kraakman, Lorraine Mazerolle, and Janet Ransley. Other scholars have used different terminology to describe the same or similar phenomena, such as "plural policing" or "third-party liability systems." See, for example, Ian Loader, *Plural Policing and Democratic Governance*, 9 SOC. & LEG. STUD. 323, 324 (2000) (plural policing) and Gilboy, *supra* note 8, at 135 (third-party liability systems).

21. MAZEROLLE & RANSLEY, *supra* note 5, at 50.

22. For low-income tenants, evictions often result in homelessness. *See infra* text accompanying notes 271–98. The use of home rule ordinances as a mechanism for displacing people has important implications for housing discrimination. As Desmond and others write, "Our efforts to monitor and reduce housing discrimination have been almost entirely concentrated on *getting in*; we have overlooked, meanwhile, the process of *getting (put) out*." Matthew Desmond, Weihua An, Richelle Winkler & Thomas Ferriss, *Evicting Children*, 92 SOC. FORCES 303, 304 (2013).

23. Home rule can be understood as a method by which state governments can transfer power to local governments, thereby allowing local governments "autonomy in the management of their local affairs." James D. Cole, *Constitutional Home Rule in New York: 'The Ghost of Home Rule*,*'* 59 ST. JOHN'S L. REV. 713, 713 n.1 (1985).

are passed as part of a city's power to regulate its own local or municipal affairs, and have faced challenges on the basis that they exceed the grant of home rule authority.[24]

This Article argues that although these home rule ordinances seem to hold some initial appeal, they are deeply problematic. They place an undue burden on familial and intimate relationships, undermine our legal, cultural, and aspirational notions of home, and represent an attempt by municipalities to regulate highly intimate spaces and alter people's home lives. Through these ordinances, cities coerce friends and family members into serving as "'intimate handler[s],'" and into becoming part of "networks of security production."[25] This "networked governance" governs both the watchers and the watched,[26] and has important implications for privacy, for parenting rights, for who can establish a home, and for how people must parent.

This Article proceeds as follows. Part I situates home rule ordinances in the context of third-party policing, and describes how a series of shifts in governance created a political landscape in which third-party policing measures could flourish. Part II describes how home rule ordinances establish the home as a site of risk management, crime prevention, and security production, compelling parents and heads of household to engage in a variety of surveillance and compliance behaviors. Part III explores the role of vicarious liability, fault, and vulnerability in home rule ordinances. Next, Part IV considers the consequences of noncompliance with home rule ordinances, including stigma, fines, and eviction. Part V first considers the current legal avenues for challenging home rule ordinances. Part V then argues that cities should consider moving away from home rule ordinances, and offers some alternative interventions that cities could employ to address the broader, structural issues often underlying problems involving misconduct, criminality, and drug use.

The Article concludes by suggesting that home rule ordinances are transforming the "*right* to maintain control" over one's home into a *duty* to control all the people connected to that home, and deter

24. *See infra* note 335.

25. Marcus Felson, *Routine Activities and Crime Prevention in the Developing Metropolis*, 25 CRIMINOLOGY 911, 912 (1987); Jennifer Wood, *Networked Policing for the Future* 1 (June 1, 2005), http://www.researchgate.net/publication/265303410_Networked_Policing_for_the_Future.

26. Wood, *supra* note 25.

them from engaging in wrongful conduct.[27] Such a duty is likely impossible to fulfill, and the attempt to comply with it can fracture familial and social bonds in ways that actually contribute to, rather than prevent, the social problems that initially prompted these ordinances.

I. THIRD-PARTY POLICING AS A RESPONSE TO SOCIAL PROBLEMS

This Part describes how third-party policing came to be a popular response to many social issues. Part I.A chronicles the growth of third-party policing out of a series of shifts in governance. With the late modern state's shift from sovereignty to governmentality, and from welfarism to neoliberalism, crime has emerged as a new paradigm for governance. The criminal paradigm is now applied in a variety of contexts, including the context of social issues that used to lie outside of its purview. Crime fighting also encompasses a variety of new tools. One of these new tools is a focus on the potential of third parties to control crime. Home rule ordinances are part of this trend.

Part I.B offers a more detailed sketch of each of the three types of ordinances that comprise the new home rules: parental liability ordinances, crime-free lease ordinances, and nuisance ordinances. These ordinances use strict vicarious liability to hold a parent or head of household responsible for the wrongful actions of another household member.

A. The Rise of Third-Party Policing

In modern Western societies, legal norms have traditionally been enforced through direct deterrence.[28] Lately, though, in their struggle to address complex social problems, governments at all levels are turning to third-party policing.[29] Third-party policing tries to deter unlawful conduct by coercing a third party into performing activities that will discourage a potential primary wrongdoer.[30] To motivate private parties to perform these policing duties upon primary

27. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993); *see* Javinsky-Wenzek v. City of St. Louis Park, 829 F. Supp. 2d 787, 797 (D. Minn. 2011) (quoting *James Daniel Good Real Prop.*, 510 U.S. at 53).

28. Kraakman, *supra* note 6, at 56; *see* Bartnicki v. Vopper, 532 U.S. 514, 516 (2001) ("The normal method of deterring unlawful conduct is to punish the person engaging in it.").

29. MAZEROLLE & RANSLEY, supra note 5, at 2–3.

30. *Id.*

wrongdoers, third-party policing relies on a number of "legal levers": regulatory, civil, or criminal sanctions that befall those who fail to police properly.[31]

Third-party policing is now used to solve myriad "pressing social problems," at local, national, and international levels.[32] For instance, if juvenile vandalism or destruction of property is a problem in a particular community, that community may try to hold the parents liable for the costs of that damage.[33] Similarly, if sweatshop factories are an issue for a particular nation, that nation may hold manufacturers liable for their subcontractors' violations of federal laws, and may also co-opt retailers into the policing project to decrease the end market for these products.[34] The key is that a third party, thought to have some means of controlling the actions of a targeted party, is compelled by the threat of legal sanction to perform policing activities that could accomplish this goal.

The growing popularity of third-party policing as a solution to social problems can be traced to three shifts in modern governance.[35] First, there is a "movement from sovereignty to governmentality."[36] Under sovereignty, the state used "force and domination" to maintain its power both on the international stage and within its own borders.[37] Under governmentality, however, the state uses a different set of tools. Instead of force and domination, governmentality relies on subtler "technologies of governance."[38] These tools are "more diffuse and spread over institutions both of the state and civil society" and result in "individuals governing themselves" and one another.[39]

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31. *Id.*

32. Gilboy, *supra* note 8, at 140.

33. *Id*.

34. *Id*.

35. MAZEROLLE & RANSLEY, *supra* note 5, at 5.

36. *Id.* at 7 (citing MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1st ed. 1977)).

37. *Id.*

38. *Id.*

39. *Id.* at 13; *see* James Hay, *Unaided Virtues: The (Neo)Liberalization of the Domestic Sphere and the New Architecture of Community*, *in* MICHEL FOUCAULT, CULTURAL STUDIES, AND GOVERNMENTALITY 165, 166 (Jack Z. Bratich, Jeremy Packer & Cameron McCarthy eds., 2003) (discussing how the government "came to rely less upon political institutions . . . and to develop techniques for governing at a distance" by using practices that individuals "in their freedom can use in dealing with each other"); Ronen Shamir, *The Age of Responsibilization: On Market-Embedded Morality*, 37 ECON. & SOC'Y 1, 8 (2008) ("[R]esponsibilization operates at the level of individual actors . . . to mobilize designated actors actively to undertake and perform self-governing tasks.").

The configuration of individuals as "responsible for their own governance" is also part of a second political shift, from "welfarism to neoliberalism."[40] Under neoliberalism, individuals are not controlled or policed in the traditional sense. Instead, they are recruited into policing and regulating themselves and others.[41] These duties are justified not only on the grounds of ability—that is, the idea that members of the community *could* and therefore *should* prevent crime—but also on the grounds of *responsibility*.[42] "'[T]he community'" becomes "'the all-purpose solution'" to every social issue, not only because community members can help prevent crime and related problems, "but also because some were found to be *responsible* for it."[43]

Professor David Garland's theory of "responsibilization" helps explain how this works.[44] He notes that in managing populations, governments now tend to act not directly, through their own state agencies, but instead indirectly, through nonstate actors.[45] As he puts it, the current "primary concern" of government is "to devolve responsibility for crime prevention on to agencies, organizations and individuals which are quite outside the state and to persuade them to act appropriately."[46] Ultimately, the state "is seeking to implement 'social' and 'situational' forms of crime prevention which involve the re-ordering of the conduct of everyday life right across the social field," including the home.[47] Whereas the state's initial target for

40. MAZEROLLE & RANSLEY, *supra* note 5, at 23. The authors describe how between World War II and the 1960s, "the dominant Western framework was a Keynesian one, where the welfarist state operated through the government to control and regulate the economy, society and the provision of services to the community. In this conception of the state, government is everything and all social, economic, regulatory and political action occurs within its framework." *Id.* at 8.

41. Mele, *supra* note 11, at 130. Also, "[a]t the urban level, neoliberalism has important implications for the spatial development and governance of cities, which in turn affect patterns of crime, governance of police departments, and policing strategies and priorities." Jeremy Kaplan-Lyman, Note, *A Punitive Bind: Policing, Poverty, and Neoliberalism in New York City*, 15 YALE HUM. RTS. & DEV. L.J. 177, 180 (2012); *see* Ian Loader, *Plural Policing and Democratic Governance*, 9 SOC. & LEGAL STUD. 323, 324 (2000) ("We inhabit a world of plural, networked policing.").

42. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 119 (2013).

43. *Id.* (emphasis added).

44. David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 BRIT. J. CRIMINOLOGY 445, 452 (1996).

45. *Id.*

46. *Id.*

47. *Id*. at 454.

transformative action was the individual wrongdoer, it now seeks to alter "the norms, the routines, and the consciousness of everyone," in order to make crime prevention a part of everyone's quotidian culture and practice.[48]

Indeed, a third shift in modern governance is that crime itself has become a mode of governance in America.[49] Beginning in the 1960s, the United States has increasingly engaged in "governing through crime."[50] The tools of criminal law, like "criminalization, incarceration, [and] police intervention," are brought in as the answer to nearly every social problem, even those once considered well beyond the reach of criminal law.[51] Crime control has infiltrated areas and zones of personal lives that were once believed to be largely outside its scope, and has become "the funnel through which all other policy interventions flow."[52] It is now "the central metaphor through which government intervention and coercion is justified" and rationalized.[53]

In addition to the ever-expanding scope of criminal law, the kinds of interventions and coercive tools used in the name of fighting crime have become more diverse over time. For instance, civil remedies are now also often used in service of crime control. In the 1980s, problem-oriented policing started using civil ordinances to accomplish its goals, a practice that has continued to grow.[54] Civil ordinances provide the criminal law with an even greater sphere of impact and are able to access areas of private life that were once unavailable to it.[55] The National Institute of Justice, for instance, suggests that "one of the most important advantages of using civil remedies" is their ability to reach "beyond the scope of the criminal law" and control behavior that the criminal law could not access.[56]

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48. *Id.*

49. *See generally* JONATHON SIMON, GOVERNING THROUGH CRIME (2009) (asserting that since the 1960s, communities have slowly become governed through crime).

50. *Id.* at 1.

51. Levy, *supra* note 12, at 539. The school-to-prison pipeline is a good example of the expanding reach of the criminal law. *School-to-Prison Pipeline*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/school-prison-pipeline (last visited Jan. 16, 2015).

52. Levy, *supra* note 12, at 577; *see also* Kaplan-Lyman, *supra* note 41, at 180.

53. Kaplan-Lyman, *supra* note 41, at 188.

54. Michael E. Buerger, *The Politics of Third-Party Policing*, 9 CRIME PREVENTION STUD. 89, 91 (1998).

55. For a description of this expansion of criminal law, see generally SIMON, *supra* note 49.

56. Levy, *supra* note 12, at 577.

Many of the civil ordinances that are used in service of the criminal law concern land. In fact, crime management has recently turned away from traditional enforcement methods and toward "land management responses."[57] One legal scholar suggests that this shift is the result of "[t]he Warren Court's 'criminal procedure revolution,'" which placed constitutional limits on how police could impose social order.[58] Land-management solutions like "stricter housing codes, trespass zoning, and homeless campuses," which avoid such procedural and constitutional complications, thereby became an attractive option for policymakers.[59] Accordingly, the application of civil-law tools like "nuisance abatement, forfeiture, and eviction" to problems originally approached through the criminal law has been dramatically increasing.[60]

The shifts from sovereignty to governmentality, from welfarism to neoliberalism, and from traditional law-enforcement techniques to land-management tools have generated third-party policing as an important new technology of governance, one that is frequently relied upon as part of the state's crime-fighting apparatus.[61] Indeed, "the extensive use of third parties" has become "[o]ne of the most striking features of contemporary social regulation."[62] Many of these third-party policing schemes compel multiple third parties to perform policing duties.

As the new focus on land-management responses suggests, third-party policing often involves monitoring and obtaining control over a specific geographical site.[63] A common example of this form of third-party policing involves taverns or bars. Usually, after discovering a problem associated with a particular drinking establishment, such as drunk and disorderly patrons, the police will ask the third party to perform some activity that is not normally part of its business

57. *Id*. at 548 n.61 (citing Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1078 (2005)). Examples of land-management responses include "stricter housing codes, trespass zoning, and homeless campuses." *Id*.

58. Garnett, *supra* note 57, at 1082.

59. Levy, *supra* note 12, at 548 n.61 (citing Garnett, *supra* note 57, at 1082).

60. *Id.* at 549.

61. Desmond & Valdez, *supra* note 42, at 117–18.

62. Gilboy, *supra* note 8, at 137. Historically, policing was actually an activity performed by citizens, as "[e]very man had a responsibility to secure his own neighborhood through the obligation to join in the 'hue and cry' and to keep in his house a stash of arms for the specific purpose of maintaining the peace." Julie Ayling & Peter Grabosky, *Policing by Command: Enhancing Law Enforcement Capacity Through Coercion*, 28 LAW & POL'Y 420, 421 (2006).

63. MAZEROLLE & RANSLEY, *supra* note 5, at 84.

practices.[64] This action can be a change to the physical environment, like constructing a barrier, adding lighting, or installing more access controls, or it can be a change to business behaviors, like adopting screening protocols for tenants or implementing rules of conduct for patrons.[65] If the third party accedes to the request, all is well.[66] If not, a "legal lever" will be deployed to coerce compliance.[67] For instance, bar owners who fail to make the requested change may "find themselves the subject of an unscheduled health or building code inspection, or other regulatory action."[68]

Another popular legal lever is the extension of liability from the primary wrongdoer to the secondary wrongdoer—a "gatekeeper" or "enabler"—who has the ability to "disrupt the wrongdoing" by either withholding services or performing some other preventive measure.[69] A common example of gatekeeping liability occurs when lawyers or accountants are held liable for the fraudulent security transactions of their clients.[70]

Although there is not yet much hard data studying the effectiveness of third-party policing,[71] these schemes have been rapidly replicating and reproducing themselves.[72] This is a common occurrence in lawmaking:

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64. Michael Buerger, *Third-Party Policing: Futures and Evolutions*, *in* POLICING 2020: EXPLORING THE FUTURE OF CRIME, COMMUNITIES, AND POLICING 452, 454 (Joseph A. Schafer ed., 2007).

65. *Id*.

66. *Id*. at 454–56.

67. *Id*.

68. *Id.* at 455.

69. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 365 (2003).

70. *Id*. The police or state actors have only a minor role in this version of third-party policing, generally consisting of "educating third parties about their potential liability or ways to reduce it." MAZEROLLE & RANSLEY, *supra* note 5, at 95.

71. Mazerolle and Ransley note that "very little discourse surrounds third party policing activities and there exists very little systematic assessment of third party policing practices." *Id.* at 50. Similarly, Professor Greg Koehle states that "very little research has been conducted on third party policing programs, and even less on the party expected to fulfill the third party policing role." Greg Koehle, *Controlling Crime and Disorder in Rental Properties: The Perspective of the Rental Property Manager*, 14 W. CRIMINOLOGY REV. 53, 54 (2013).

72. For a detailed account of the increasing prevalence of third-party policing, see generally MAZEROLLE & RANSLEY, *supra* note 5. As another example, the city of Escondido, California, enacted an ordinance entitled "Establishing Penalties for the Harboring of Illegal Aliens in the City of Escondido." Under this ordinance, landlords who "let, lease[d], or rent[ed] a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law" would face civil and criminal sanctions. *See* Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1048 (2006).

> Political scientists have noted the interesting phenomenon in legislative activity that over time certain notions or ways of dealing with problems become prominent (perhaps in part because of perceptions of their past success in solving problems) and these solutions come to be attached by decision makers to a wide range of problems as they come to their attention.[73]

Cities have been particularly keen on turning to third-party policing as a solution to social problems.[74] Perhaps surprisingly, in an era of globalization and the simultaneous rise of both nation-states and supranational governing bodies, the role of local governments and municipalities has not been diminished.[75] On the contrary, there is a growing "dialectical relationship" between local governments and these larger bodies of governance, such that local governments have managed to "not only persist in the age of 'globalization' but to actually acquire importance and new . . . powers."[76]

Local governments, seeking to address social issues like bullying, drug abuse, and other criminal or undesirable behaviors, are increasingly turning to third-party policing as the answer. Continuing the new tradition of characterizing social problems as criminal issues, cities and municipalities across the nation are increasingly enacting ordinances that piggyback onto criminal behaviors and require third parties to monitor and control the behavior of others.

In particular, cities are increasingly pushing third-party policing into the home and using it as a tool to govern households.[77] Initially,

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73. Gilboy, *supra* note 8, at 139.

74. Professor Jeffrey Parness states that cities have also been using third-party policing for more mundane purposes, like municipal automated-traffic-enforcement schemes. Under this form of enforcement, cameras capture driving infractions and the city issues tickets to vehicle owners, regardless of who was driving at the time of the infraction. This results in a "form of strict liability for secondary culprits,' those owning the vehicles." Jeffrey A. Parness, *Beyond Red Light Enforcement Against the Guilty But Innocent: Local Regulations of Secondary Culprits*, 47 WILLAMETTE L. REV. 259, 259 (2011). The justification for this imposition is that the "secondary culprits" have some "ability to control the 'primary culprits,' those using the vehicles," and should use that ability to ensure adherence to the rules of the road. *Id.* This system of regulation mimics the principal's liability doctrine found in tort law.

75. Mariana Valverde, *Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance*, 45 LAW & SOC'Y REV. 277, 307 (2011).

76. *Id*. at 307–08 (noting that this is "in part because of their ability to serve new functions and become a tool of global rather than local capital").

77. Perhaps surprisingly, the very idea of policing has deep historical and etymological connections to both households and third parties. For much of "Western political history," "police" referred not to uniformed individuals who drive squad cars and arrest people, but instead to "the hierarchical mode of governance in which the polis is treated as a household rather than a gathering of autonomous equals." Alec C. Ewald, *Collateral Consequences*, *in*

in the middle of the last century, municipalities tried to police social disorder by focusing on outside spaces, through ordinances such as vagrancy and loitering laws.[78] However, in the 1960s courts began striking down these laws,[79] so cities began refocusing the attention from external to internal spaces, and "reached into a sector previously untouched by vagrancy laws: the home."[80] Cities "were able to do so, in part, because the recent criminalization of domestic violence allowed—indeed, required—the expansion of criminal law into private space."[81] Once the home had been opened up to legal intervention in this way, other criminal and civil laws entered the home, a space the legal system had begun to envision as not solely private, but instead "'in need of public control, like the streets.'"[82] Cities began to focus on curing disorder inside the home, and intervening in that formerly private space, in order to promote the broader goal of order and security in the city.

B. The Home Rule Ordinances

Home rule ordinances have emerged from this overall landscape. They follow this tradition of envisioning homes "'as in need of public control'" in order to promote the interests of reducing crime and increasing security.[83] The ordinances are designed with "the self-conscious purpose of leveraging familial solidarity" to both directly

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LAW AS PUNISHMENT / LAW AS REGULATION 77–123, 105 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2011) (citing Markus D. Dubber, *Regulatory and Legal Aspects of Penalty*, *in* LAW AS PUNISHMENT / LAW AS REGULATION, *supra*, at 19, 19–49 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2011)). Further, prior to the establishment of modern police forces, "'policing' itself was a third-party obligation, imposed or offered to citizens." Buerger, *supra* note 64, at 458.

78. *See* Desmond & Valdez, *supra* note 42, at 120.

79. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (placing constitutional limitations on loitering statutes); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (striking down a vagrancy ordinance); Parker v. Mun. Judge, 427 P.2d 642, 643–44 (Nev. 1967) (holding the ordinance unconstitutional because it punished the status of poverty).

80. Desmond & Valdez, *supra* note 42, at 120 (quotation mark omitted).

81. *Id.* (citing Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006)). It should be noted, however, that the focus on homes is in addition to, not instead of, the focus on public spaces. Cities continue to engage in "urban social control" through regulating public spaces, through now they often rely on new legal mechanisms to do so. *See* Katherine Beckett & Steve Herbert, *Dealing with Disorder: Social Control in the Post-Industrial City*, 12 THEORETICAL CRIMINOLOGY 5, 6 (2008).

82. Desmond & Valdez, *supra* note 42, at 120 (quoting JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 11 (2009)).

83. *Id.*

and indirectly deter potential wrongdoers.[84] The possibility of a negative impact on friends and family members is meant to *directly* dissuade potential wrongdoers from engaging in unlawful behaviors. At the same time, the ordinances are also meant to *indirectly* deter wrongdoing, by eliciting a series of behaviors from those friends and family members that will ward against criminal activity.[85] Family members and friends are thereby implicated "in the responsibility and liability for the management" of the risk of wrongdoing.[86] The three ordinances discussed below—parental liability ordinances, crime-free lease ordinances, and nuisance ordinances—attempt to achieve the goal of public security by controlling "not just individual behaviors," but also "broader social arrangements—where and how people live."[87]

1. *Parental Liability Ordinances.* Desperate to stop youth bullying and the suicides connected to it, many cities are now passing or considering passing ordinances that hold parents responsible for their children's bullying or other wrongdoing.[88] Bullying and

84. Levinson, *supra* note 69, at 413.

85. *Id.* (discussing the federal Anti-Drug Abuse Act of 1988, which was "designed to conscript family members to police and prevent their relatives' criminal behavior").

86. Mele, *supra* note 11, at 130.

87. Levy, *supra* note 12, at 540.

88. At the time of this writing, the cities that have passed ordinances holding parents vicariously liable for their children's bullying behavior include Monona, Wisconsin (population 7715, a suburb of Madison); Detroit, Michigan (population 701,475); Village of Mount Horeb, Wisconsin (population 7294) (using the same language as the Monona ordinance); and Kansas City, Missouri (population 464,310). *See* DETROIT, MICH., CODE OF ORDINANCES § 33-3-44 (2011); KANSAS CITY, MO., CODE OF ORDINANCES § 50-244 (2013); MONONA, WIS., CODE OF ORDINANCES § 11-2-17 (2013); MOUNT HOREB, WIS., CODE OF ORDINANCES 2013-14 (2013). Population numbers are taken from CITY DATA, http://www.city-data.com (last visited Jan. 17, 2015).

Carson City, California (population 93,000), voted on but ultimately rejected such an ordinance. Part of the opposition to the bill was based on the idea that it could be used in a racially discriminatory manner, to "further criminalize Black and Brown youth." Charlene Muhammad, *Punishing Bullies or Targeting Black Youth?*, FINAL CALL (May 22, 2014, 9:19 AM), http://www.finalcall.com/artman/publish/National_News_2/article_101450.shtml. The ordinance called for a one-hundred-dollar fine for the first violation, two hundred dollars for the second, and "a fine and counseling for the entire family" following a third violation. *Id.* The law also provided that "[a]nyone between 18-25 who participates in or encourages bullying or cyberbullying would also face misdemeanor charges." *Id.* Benton Harbor, Michigan (population 10,040), also considered a bullying ordinance that would hold parents liable for their children's bullying. First offences would require community service, and subsequent offenses would attract fines of seventy-four to five hundred dollars. That proposal is currently tabled. Barbara Harrington, *Proposed Anti-Bullying Ordinance Carries Strict Punishments*, WNDU.COM (Dec.

"bullycides" are now a major social issue across the nation and frequently dominate news headlines.[89] A recent *Psychology Today* article describes the coverage and scope of the problem: "It's relentless. Virtually every week the media informs us about another new tragedy of a young person taking his or her own life because they could no longer tolerate being bullied."[90] Bullying is understood in the popular imagination to be an extremely common and extremely dangerous social problem among kids and teens. The American Medical Association states that 3.2 million children have been bullied, and other studies suggest that 42 percent of children have experienced online bullying.[91] Celebrities and not-for-profit organizations have launched a number of campaigns to combat the

18, 2013, 11:50 PM), http://www.wndu.com/home/headlines/Proposed-anti-bullying-ordinance-carries-strict-punishments--236489351.html.

Milton, Wisconsin (population 5549), has a bullying ordinance that holds only the child, not the parent accountable. *See* Eric Schulzke, *Could Bullying and Harassment Become a Criminal Offense?*, DESERT NEWS NAT'L (May 22, 2014), http://national.deseretnews.com/article/1526/Could-bullying-and-harassment-become-a-criminal-offense.html. Marshfield, Massachusetts (population 24,324), and Dexter, Missouri (population 7864), have similar ordinances. *See* Jonathon Dawe, *Ballot Issue Won't Change Procedure for DPD*, DAILY STATESMAN (Aug. 1, 2014), http://www.dailystatesman.com/story/2105774.html; Raymond Neupert, *Marshfield Passes Cyber Bullying Ordinance*, WDEZ (Apr. 18, 2011, 3:00 AM), http://wdez.com/news/articles/2011/apr/18/marshfield-passes-cyber-bullying-ordinance. A nonparental bullying ordinance was also considered in East Greenwich, Rhode Island (population 13,146). *See* Barbara Polichetti, *East Greenwich, RI Considers Anti-Bullying Ordinance*, E. GREENWICH F.A.C.E.S. (Jan. 27, 2011, 10:50 PM), http://www.eastgreenwichfaces.org/apps/blog/show/5966854-east-greenwich-ri-considers-anti-bullying-ordinance.

89. For examples of these headlines, see Jeff Coltin, *Strike a Chord: Does Bullying Cause Suicide?*, WFUV.ORG (Nov. 6, 2014, 6:00 AM), http://www.wfuv.org/news/news-politics/141106/strike-chord-does-bullying-cause-suicide; Corinne Lestch, *Distraught South Carolina Mom Says Bullying Drove Son To Commit Suicide*, N.Y. DAILY NEWS (Nov. 21, 2014, 4:38 PM), http://www.nydailynews.com/news/national/south-carolina-mom-bullying-drove-son-commit-suicide-article-1.2019446; Chris Minor, *Local Parents Combat "Suicide by Bullying" After 12-Year-Old Daughter's Death*, WQAD8 (Nov. 6, 2014, 10:00 PM), http://wqad.com/2014/11/06/local-parents-combat-suicide-by-bullying-after-12-year-old-daughters-death. The term "bullycide" was coined in NEIL MARR & TIM FIELD, BULLYCIDE: DEATH AT PLAYTIME 1 (2001). It is a controversial term, as it seems to ignore the intervening act of the victim's suicide, instead attributing that act to the bully's wrongdoing. *Bullycide*, STOP BULLYCIDE NOW (May 16, 2014), http://stopbullycidenow.weebly.com/observation-blog-entry/bullycide.

90. Izzy Kalman, *Why Are So Many Kids Committing Bullycide?*, PSYCHOL. TODAY (Jan. 11, 2012), http://www.psychologytoday.com/blog/psychological-solution-bullying/201201/why-are-so-many-kids-committing-bullycide.

91. Kathy Quinn, *KCMO Council Passes Anti-Bullying Ordinance That Fines Parents for Kids' Bullying*, FOX4KC.COM (Aug. 15, 2013, 8:35 AM), http://fox4kc.com/2013/08/15/kcmo-council-considers-anti-bullying-ordinance-that-fines-parents-for-kids-bullying.

problem, and the law continues to explore the role and responsibilities of schools and parents in combatting bullying.[92]

At the state level, many legislatures are exploring the potential of parental liability statutes to address the problem. For instance, following the bullying-related suicide of twelve-year-old Rebecca Sedwick, some Florida lobbyists are attempting to craft legislation that would hold parents criminally liable for their children's bullying behavior.[93] Also, in Iowa, a bill imposing parental liability for bullying behavior was drafted and proposed.[94] The rationale underlying these proposed state laws is that poor parenting causes juvenile misconduct.[95] Proponents of these laws believe that "parents will spend more time and effort in monitoring the activities of their children if they know they will be held responsible for their children's actions," and that this monitoring will be an effective deterrent to bullying.[96]

Not content to wait for the sometimes laborious political process to work itself out at the state level, however, cities have forged ahead

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92. For example, activists Dan Savage and Terry Miller started the It Gets Better Project (www.itgetsbetter.org), a web-based campaign focused on helping gay youths who experience bullying. *What is the It Gets Better Project?*, IT GETS BETTER PROJECT (last visited Jan. 16, 2015).

93. *Bullying Felony Charges Right or Wrong?*, USATODAY (Oct. 20, 2013, 5:10 PM), http://www.usatoday.com/story/opinion/2013/10/20/cyber-bullying-rebecca-sedwick-charges-florida-column/3110697.

94. H.F. 143, 2013 Gen. Assemb. (Iowa 2013), *available at* http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&hbill=hf143; Heather Leigh, *Iowa Bill Could Hold Parents Responsible for Bullying*, SIOUXLAND NEWS, http://www.siouxlandnews.com/story/17590770/iowa-bill-could-hold-parents-responsible-for-bullying (last visited Jan. 16, 2015); Mike Wiser, *Branstad Sees Hope in Another Anti-Bullying Summit*, SIOUX CITY JOURNAL (July 7, 2013, 9:00 AM), http://siouxcityjournal.com/news/local/a1/branstad-sees-hope-in-another-anti-bullying-summit/article_69a59e21-8b70-573d-b5fc-95773d8dc003.html. It ultimately failed to pass during the 2014 legislative session. Connie Ryan Terrel, *Slate Needs to Try Again on Anti-Bullying Bill*, DES MOINES REGISTER (May 24, 2014, 11:17 PM), http://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2014/05/25/state-try-bullying-bill/9561923.

95. This is not a new idea. As Professor Leslie John Harris notes, "Family historian John Demos traced the antecedents of contemporary parental responsibility statutes at least to the seventeenth and eighteenth centuries, when poor parents would be summoned to court, admonished, and if they did not improve, have their children taken away." Leslie Joan Harris, *An Empirical Study of Parental Responsibility Laws: Sending Messages, but What Kind and To Whom?*, 1 UTAH L. REV. 5, 7 (2006).

96. *Parental Liability Laws*, JOHN HOWARD SOC'Y OF ALTA., http://www.johnhoward.ab.ca/pub/C11.htm (last visited Jan. 16, 2015). For a discussion of the similar reasoning underlying parental liability laws in tort, see generally Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533 (2013).

with their own ordinances. In June 2013, the city of Monona, Wisconsin, attracted widespread media attention when it passed a city ordinance holding parents liable for their children's bullying behaviors.[97] The ordinance offers a definition of bullying and other prohibited behaviors, and then provides that "[i]t shall be unlawful for any custodial parent or guardian of any unemancipated person under eighteen (18) years of age to allow or permit such person to violate the provision[ ][prohibiting bullying] above."[98]

Under the Monona ordinance, parents who violate the provision may be fined between $50 and $1000 ("plus 'the costs of prosecution'") for a first offense, and double that for additional violations.[99] According to Monona's police chief, the fines will be levied only in situations in which the parents are uncooperative and do not make an effort to address the bullying.[100] Other cities have followed Monona's lead. For example, in Kansas City, Missouri, the

97. Carol Kuruvilla, *Parents of Bullies in Wisconsin Town to Be Fined for Their Kids' Bad Behavior*, N.Y. DAILY NEWS (June 4, 2013, 5:27 PM), http://www.nydailynews.com/news/national/parents-bullies-fined-kids-behavior-article-1.1363172. No parents had been fined under the ordinance as of April 25, 2014. *Parents Learn About Monona Bullying Ordinance*, MCFARLAND THISTLE (Apr. 25, 2014, 6:15 AM), http://www.hngnews.com/mcfarland_thistle/news/local/article74497836-cb06-11e3-9d87-001a4bcf6878.html. However, Monona Police Det. Sgt. Ryan Losby, who spearheaded the efforts to enact the ordinance, believes that its presence on the books has been an effective deterrent, because "no one wants to fork out $144 for no reason." *Id.* The town of McFarland, Wisconsin, was interested in passing a similar ordinance, though the police chief there expressed concerns with the potential legality, and advocated for "in-depth family counseling and behavior modification training" as a better alternative. *Id.*

98. MONONA, WIS., CODE OF ORDINANCES § 11-2-17 (2013). The ordinance also states that notice serves as a rebuttable presumption that a parent allowed or permitted the bullying:

> The fact that prior to the present offense a parent, guardian or custodian was informed in writing by a law enforcement officer of a separate violation of [the provision prohibiting bullying] by the same minor occurring within ninety (90) days prior to the present offense shall constitute a rebuttable presumption that such parent, guardian or custodian allowed or permitted the present violation.

Id. Presumably, a parent could rebut the presumption with evidence that she took reasonable steps to prohibit the behavior. In a similar instance, a court held that a statute that created parental liability for a child's wrongful act, subject to the defense that the "person took reasonable steps to control the conduct of the child at the time" in question, was still vicarious liability because there was no identifiable act or omission that served as the predicate for culpability. *See* City of Maple Heights v. Ephraim, 898 N.E.2d 974, 978 (Ohio Ct. App. 2008).

99. Eugene Volokh, *Ban on Behavior That "Emotionally Abuse[s]" or "Is Likely to Create an Offensive Environment" and "Which Serves No Legitimate Purpose" + Liability for Parents Who "Allow" Such Speech*, VOLOKH CONSPIRACY (June 3, 2013, 2:30 PM), http://www.volokh.com/2013/06/03/ban-on-behavior-that-emotionally-abuses-or-is-likely-to-create-an-offensive-environment-and-which-serves-no-legitimate-purpose-liability-for-parents-who-allow-such-speech.

100. *Id.*

city council approved an ordinance that would see parents of bullies fined up to $1000, unless they enrolled their child in an antibullying program.[101]

The path to ordinances targeting bullying has been paved by other cities enacting more generalized parental liability statutes.[102] In the 1990s, many states and municipalities began passing such ordinances.[103] Many of these ordinances eliminated the parental-intent requirement that was present in older parental liability laws, and imposed a strict-liability standard instead.[104]

One of the first cities to start this trend was Silverton, Oregon. Silverton passed a law that charges parents with the misdemeanor

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101. The Kansas City Ordinance states:

> It shall be unlawful for the parent, guardian or other person having custody or control of a minor to permit, or by insufficient control to allow, such minor to bully or cyber-bully another minor. Upon conviction of a violation of this subsection, a parent, guardian or other person having custody or control of the minor shall be subject to a fine not to exceed $1,000.00 and costs. In lieu of a fine, the court may impose probation provided that a condition of probation is attendance in an available anti-bullying program either provided by the school district wherein resides the convicted parent, guardian or other person having custody or control of the minor or provided by a group or entity approved by the court.

KANSAS CITY, MO., CODE OF ORDINANCES § 50-244 (2013). *See* Quinn, *supra* note 91. Kansas City has also implemented the crime-free housing program. *See Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/testimonials.htm (last visited Jan. 16, 2015); *infra* text accompanying notes 119–38.

102. Collins et al., *supra* note 15, at 1340. The authors note the fact that these laws are created at the local level means that they are "difficult to survey," and "scholarly estimates" of their prevalence and scope are virtually nonexistent. *Id.* Nevertheless, this Article suggests that media reports and tools like Municode offer at least an overgeneralized picture of what is happening.

103. In 1996, a *New York Times* article noted the "proliferation of 'dozens' of ordinances in towns near Chicago in the 'last two years.'" *Id.* at 1341 n.61 (quoting Peter Applebome, *Parents Face Consequences as Children's Misdeeds Rise*, N.Y. TIMES, Apr. 10, 1996, at A1). Parental responsibility laws parallel those in jurisdictions like "Central America, South America, and Europe," where there is a "'cultural emphasis on family solidarity,'" rather than "'the high value the common law places on individualism.'" Dimitris, *supra* note 11, at 662. It appears that the public perception of an increase in juvenile crime in the 1990s was not based in fact: overall, juvenile crime actually declined by 30 percent from 1993 to 1998. Barton, *supra* note 11, at 879.

104. Portia Allen-Kyle, Note, *Women at the Forefront: An Examination of the Disparate Exposure of Mothers to Liability Under Parental Responsibility Laws*, EXPRESSO (2013), *available at* http://works.bepress.com/portia_allen-kyle. The older parental liability laws expanded the parental liability available at common law. Historically, in tort law, parents were generally "not liable for the acts of their child[ren]." Dimitris, *supra* note 11, at 662. There were four main exceptions to this general rule. Liability could attach if parents "directed or subsequently ratified the act[s]"; if the child "was acting as the parent's agent or servant"; if the child was "entrusted with a dangerous instrumentality, such as a gun, or was negligently given access to an automobile"; or if "the parents' negligence was a proximate cause of the harm." *Id.* at 662, 663.

offense of "'failing to supervise a minor'" whenever a child or youth violates a provision of the Silverton Municipal Code.[105] The violations that trigger parental liability under the ordinance include acts as minor as cigarette smoking.[106] The ordinance allows fines of parents even for a first offense of children up to the age of eighteen.[107] According to the mayor of Silverton, the law has been effective because "'[w]hen their parents are being dragged into it, most kids . . . realize they're not the only ones who pay the price for their actions, and kids begin to take stock of themselves.'"[108] By the time the ordinance was a year old, "approximately a dozen parents had been charged" under it, Oregon state had passed a similar law, and Silverton city officials had received requests from "Europe, Japan, and Australia for copies of their ordinance."[109]

Using the Silverton ordinance as a template, a suburb in Cleveland, Ohio, passed a nearly identical ordinance.[110] Prosecutors there could "criminally charge parents based on the misdeeds of their children" with "a third offense" potentially resulting in parents serving 180 days in jail.[111] Recently, though, the ordinance was struck down on the grounds that it "was inconsistent with a state statute requiring the person charged to commit an act or omission as a predicate for culpability."[112]

Another community, St. Clair Shores, Michigan, enacted a similar law in 1994.[113] According to the St. Clair Shores provision, parents can be held criminally responsible for failing to "'reasonably control'" their children.[114] The ordinance was drafted by two police

105. *Parental Responsibility Laws*, OFF. JUV. JUST. & DELINQ. PREVENTION, http://www.ojjdp.gov/pubs/reform/ch2_d.html (last visited Jan. 16, 2015) (quoting SILVERTON, OR., ORDINANCE 95117 (1995)) (quotation marks omitted).

106. Tyler & Segady, *supra* note 11, at 86.

107. *Id.*

108. Collins et al., *supra* note 15, at 1340 (quotation marks omitted).

109. Tyler & Segady, *supra* note 11, at 87.

110. DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 67 (2009).

111. *Id.*

112. *Id.*

113. Tami Scarola, *Creating Problems Rather Than Solving Them: Why Criminal Parental Responsibility Laws Do Not Fit Within Our Understanding of Justice*, 66 FORDHAM L. REV. 1029, 1042 (1997).

114. *Id.* (quotation marks omitted).

officers who were "motivated by juvenile crime increases," and it passed "without debate."[115]

The proliferation of parental liability statutes is likely to continue. Numerous municipalities across America have already implemented parental liability ordinances, and many of those ordinances are "hybrid laws that both lower the mens rea required for the parent and define conduct by a minor that would not be separately subject to criminal sanction as evidence of 'improper parenting.'"[116] These laws are not based on culpable parental transgressions, like active participation or encouragement of the unlawful behavior. Rather, they set "liability for parents based solely on their status as a parent and the misconduct of their child alone."[117] Cities nationwide often consider proposals to extend such liability, and local legislatures will almost certainly "continue to explore regulatory strategies" like this to "reduce juvenile misconduct" and address social problems like bullying.[118]

2. *Crime-Free Ordinances*. In addition to attracting a fine under a parental liability ordinance, a criminal or unlawful act committed by a child or any other household member could also potentially result in the child's entire family's eviction from rental housing under a mandated crime-free lease addendum. If her household lives in a municipality that has passed a crime-free ordinance mandating that landlord–tenant leases must contain a crime-free lease addendum, and the lease accordingly contains such an addendum, the household may be evicted for her unlawful act. The standard crime-free lease addendum requires the eviction of an entire tenant family when a tenant, family or household member, guest, or other person deemed to be under the tenant's control, engages in criminal conduct on—and sometimes even off—the relevant premises.[119] The following is an

115. *Id.*

116. Collins, *supra* note 15, at 1341.

117. *Id.* at 1342–43. The parents will then be able to "plead their good parenting skills as an affirmative defense rather than making the prosecution prove the absence of good parenting as part of its case-in-chief." *Id.* at 1343. Indeed, it is unclear whether parents are actually being punished for the wrongful act of their children, or for their unwillingness to accept law enforcement interventions. *See infra* text accompanying notes 239–46.

118. *Id.* at 1342.

119. See, for example, West Palm Beach, Florida's addendum. *One Strike Policy*, W. PALM BEACH HOUSING AUTH., http://www.wpbha.org/housing/one_strike_policy.html (last visited Jan. 16, 2015).

example of an expansive, yet relatively common, crime-free lease addendum:

> Resident, any member(s) of the resident's household, a guest or any other person affiliated with the resident on or off the premises:
>
> Shall not engage in criminal activity, including drug-related criminal activity, on or off the said premises.[120]

This type of addendum is part of the International Crime Free Association's (ICFA's) programs for rental or multi-unit housing.[121] The ICFA, a not-for-profit started in Arizona in 1992 by a former police officer, markets these programs to municipalities and provides support to those that implement them.[122] Illinois, in particular, has championed this program, with over one hundred municipalities in the state having adopted these ordinances.[123] To fight crime and disorder and promote the goal of security, approximately two thousand cities and towns in forty-four states have implemented the ICFA program.[124] Proponents assert that the Crime-Free Program offers myriad benefits, including "reduced crime, better community awareness, increased property values, more attractive neighborhoods . . . and improved quality of life."[125]

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120. CLARK COUNTY ORDINANCE § 6.12.090 and CITY OF LAS VEGAS CODE § 6.09.020 require all landlords of multihousing units to undergo training, and at the training session landlords are taught to use this addendum. *Crime Free Multi-Housing*, LAS VEGAS METRO. POLICE DEP'T, http://www.lvmpd.com/ProtectYourself/CrimeFreeMultiHousing/tabid/110/default.aspx (last visited Jan. 16, 2015).

121. Art Sharp, *CPTED: Cleaning up the Complexes*, 49 LAW & ORD. 117, 119 (2001). It is also widely used in Canada: cities in three Canadian provinces have implemented the program. For example, in Edmonton, Alberta, it governs over sixteen thousand families. *Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, *supra* note 101.

122. *Crime Free Programs*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/index.html (last visited Jan. 16, 2015).

123. EMILY WERTH & SARGENT SHRIVER, NAT'L CTR. ON POVERTY LAW, THE COST OF BEING "CRIME FREE": LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 1 (2013).

124. *Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, *supra* note 101. A smattering of these cities have provided positive testimonials on the Crime Free Program's website, including Riverside, California; Kansas City, Missouri; Champlin, Minnesota; Monroe, Georgia; Columbia, Missouri; San Dimas, California; Lenexa, Kansas; St. Cloud, Minnesota; Baton Rouge, Louisiana; Henrico County, Virginia; El Cajon, California; Puyallup, Washington; Waite Park, Minnesota; and Fargo, North Dakota. Locales in other countries, including Canada, Mexico, England, and Finland, have also adopted the ordinances. *See Crime Free Programs*, *supra* note 122.

125. *Crime Free Multi-Housing Program*, CITY OF DUBLIN, CAL., http://www.ci.dublin.ca.us/index.aspx?NID=118 (last visited Jan. 16, 2015).

The Crime-Free Program involves several prongs, including training for property owners and managers, and attention to the physical aspects of security, like lighting and locks.[126] The crime-free lease addendum, however, is the "cornerstone" of the program.[127] The model addendum was originally created by the U.S. Department of Housing and Urban Development, in the form of the one-strike policy applicable only to federal housing projects.[128] The new municipal ordinances import this policy from the public housing context—where it was part of the artillery in the war against drugs—into the private rental housing market at large.[129]

The typical crime-free lease addendum has five notable features. First, in the private rental housing market, the addendum draws multiple third parties into the project of policing. The named tenant or the head of the household and the landlord are both conscripted into the project of crime control. The tenant is required to monitor and deter potentially unlawful behavior, and the landlord is required to evict tenants who fail to do so. Police or other city officials communicate their desire for eviction to the landlord, who must usually comply or face a series of escalating sanctions, including fines or the loss of a business license.[130]

Second, the crime-free lease addendum holds tenants responsible for actions that they may be connected to only tangentially, by virtue of their familial or social relationship with another person. The addendum is based in strict vicarious liability, so although "the tenant herself may have had absolutely nothing to do with the alleged criminal conduct or drug activity, she is nevertheless subject to

126. *Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, *supra* note 101.

127. *Id*.

128. Sharp, *supra* note 121, at 119. For a discussion of the one-strike policy in the context of Section 8 housing, see Michael Zmora, Note, *Between* Rucker *and a Hard Place: The Due Process Void for Section 8 Voucher Holders in No-Fault Evictions*, 103 NW. U. L. REV. 1961 (2009); Wendy J. Kaplan & David Rossman, *Called 'Out' At Home: The One-Strike Eviction Policy and Juvenile Court*, 109 DUKE F. FOR L. & SOC. CHANGE 109 (2011).

129. While crime-free lease addendums have not yet attracted much attention from legal scholars, there is a large body of literature focused on the one-strike policy. Because it formed the precedent for the crime-free lease addendum, and many of the issues surrounding them are similar, this Article uses the one-strike literature where appropriate. *See* Levy, *supra* note 12, at 540.

130. *Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, *supra* note 101. Typically, following some kind of arrest or police involvement, the city will send the landlord a letter, indicating that they must evict their tenants or face a series of sanctions, including fines and the revocation of the rental license. *See, e.g.*, Javinsky-Wenzek v. City of St. Louis Park, 829 F. Supp. 2d 787, 790 (D. Minn. 2011).

eviction for the conduct of the person who actually engaged in the prohibited activity."[131] Indeed, some ordinances "actually specify their intent to penalize the entire household for criminal activity regardless of whether members were aware of the activity or able to control the participants in the activity."[132] It is thought that such an addendum will offer "maximum incentives to tenants to prevent, discover, and remedy" the drug or criminal issues of household members.[133]

Third, a crime-free lease addendum often encompasses a wide spectrum of behaviors, including not just criminal wrongs, but any sort of unlawful act, such as "local ordinance violations, the creation of a nuisance, and/or any conduct that endangers health, safety or welfare."[134]

Fourth, although some versions of these addendums limit the geographical scope to encompass only activities engaged in at the relevant premises, other versions, like the one set out in full above, extend to locations beyond the relevant rental property.[135]

Fifth, and finally, these addendums do not generally require a criminal conviction of any kind. Instead, arrests and simple accusations of criminal or drug-related activity can trigger eviction.[136] This is particularly important when one remembers that order-maintenance policing, which is currently the dominant mode of policing in America, targets misdemeanor and minor or noncriminal offenses. The vast majority of arrests currently made are not for serious crimes, but rather for minor infractions, and under the crime-free program, these arrests are a valid basis for evicting a household.[137] Some ordinances specifically state that arrests or

131. Robert Hornstein, *Litigating Around the Long Shadow of* Department of Housing and Urban Development v. Rucker*: The Availability of Abuse of Discretion and Implied Duty of Good Faith Affirmative Defenses in Public Housing Criminal Activity Evictions*, 43 U. TOL. L. REV. 1, 4 (2011).

132. WERTH, *supra* note 123, at 12.

133. Reply Brief for the Petitioner, Brief for Respondent at 24, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (Nos. 00-1770, 00-1781), *available at* http://www.justice.gov/osg/brief/hud-v-rucker-reply-merits.

134. WERTH, *supra* note 123, at 4.

135. *Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, *supra* note 101.

136. Hornstein, *supra* note 131, at 275.

137. For example, in New York City in 1989, prior to the adoption of zero-tolerance policing, "there were approximately 86,000 non-felony arrests." K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 281, 291 (2009). In 1998, "when the policy was well-entrenched," 176,000 nonfelony arrests were made. *Id.* Further, arrests are a zone fraught with discretion, which unfortunately is often exercised in racially discriminatory ways. "[B]lack youths are

accusations of unlawful activity are sufficient grounds for eviction, whereas other ordinances have the slightly higher requirement that, at an eviction proceeding, criminal activity must be proven to the civil standard of a preponderance of the evidence.[138] Eviction proceedings, however, do not often go all the way to a courtroom because most tenants do not fight their eviction notices.[139]

3. *Nuisance Ordinances*. Nuisance ordinances are often used in conjunction with crime-free lease addendums.[140] They first became popular in the 1980s, mainly as a response to drug dealing.[141] Currently, many large U.S. cities rely on nuisance ordinances as part of their crime-control efforts.[142] Under these ordinances, tenants will be evicted if the police are called to the property more than a threshold number of times, regardless of whether or not the tenant had any participation in the nuisance activity that prompted the calls. Those who pass nuisance ordinances believe that they have many "important long-term benefits," including providing safer and more

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arrested at a disproportionately higher rate than whites," and the discriminatory treatment at the arrest stage is merely the first stop on a two-path system, exacerbated by eviction policies. "When the children of affluent people are caught using drugs, they're apt to end up in treatment programs; the children of poor people are more likely to end up in jail, while their parents may end up on the streets." Renai S. Rodney, *Am I My Mother's Keeper? The Case Against the Use of Juvenile Arrest Records in One-Strike Public Housing Evictions*, 98 NW. U. L. REV. 739, 763 (2004). As one example of race and arrest numbers, in New York City in 2000–2005, "about 86% of people arrested for misdemeanors . . . were nonwhite." Howell, *supra* note 137, at 281, 291.

138. WERTH, *supra* note 123, at 4.

139. *Id*.

140. *Id*.

141. Desmond & Valdez, *supra* note 42, at 120. In 1987, Portland, Oregon, was among the first cities to pass a nuisance-abatement ordinance to address drug dealing. MARTHA J. SMITH & LORRAINE MAZEROLLE, U.S. DEP'T OF JUSTICE, USING CIVIL ACTIONS AGAINST PROPERTY TO CONTROL CRIME PROBLEMS 14 (2013). Many states followed suit, and

> by 1992, 24 U.S. states had passed statutes specifically designed to control drug activities on private properties. A number of these were based on old 'bawdy house' laws designed to curb prostitution. Abatement and eviction notices have been used hand-in-hand to address drug crimes in housing. Abatement actions focus on the property holder while eviction actions focus on the leaseholder or renter, but sometimes it is necessary to provide notice of potential abatement actions to induce the owner to act against the tenant.

Id. (footnotes omitted). Of course, nuisance as a civil cause of action has a much longer history.

142. For example, in 2007, to combat gang activity, Los Angeles County "began using nuisance abatement lawsuits against both the property owners and the specific gang members who allowed or created a nuisance at a particular property," and Seattle, Washington, passed a "chronic nuisance property ordinance" in 2009. *Id.* In Los Angeles County, a chronic-nuisance property is "one where certain crimes, drug-related activities, or gang-related activities occur three times within a 60-day period or seven times within a 12-month period." *Id.* at 16.

appealing communities, increasing property values, and having a general "good effect on quality of life."[143]

A survey combining the nuisance ordinances of the twenty largest U.S. cities with an additional thirty-nine ordinances in cities that varied in location and population revealed that most nuisance ordinances are "strikingly similar."[144] They have three main features.[145] First, the nuisance designation is "based on excessive service calls [i.e. calls to police] made within a certain timeframe."[146] Second, a large and loosely defined set of activities can constitute a nuisance.[147] For instance, one city defines nuisance conduct as

> any activity, conduct, or condition occurring upon private property within the city that unreasonably annoys, injures or endangers the safety, health, morals, comfort or repose of any member of the public; or will, or tend to, alarm, anger or disturb others or provoke breach of the peace, to which the city is required to respond.[148]

Finally, like the crime-free lease addendums, nuisance ordinances demand that landlords perform third-party policing functions and "coerce property owners to 'abate the nuisance' or face fines, property forfeiture, or even incarceration."[149]

As with the crime-free lease addendum, nuisance ordinances coerce both landlords and tenants into performing third-party policing. In many cases, the tenant is not the person who actually causes the nuisance, yet the tenant is the person who will face the legal consequence of the nuisance behavior. One troubling manifestation of this aspect of nuisance ordinances occurs in the context of domestic violence. Female tenants, who have either themselves contacted police or whose neighbors, family members, or friends did so, have been evicted for violating nuisance ordinances in

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143. *Municipal Nuisances: South Dakota Municipal League Guide to Public Nuisance Enforcement and Abatement*, S.D. MUNICIPAL LEAGUE, *available at* http://sd.govoffice.com/vertical/sites/%7B2540dc39-a742-459f-8caf-7839ecf21e89%7D/uploads/%7B46e3eb3f-0a31-4411-ade5-83640bfec0d4%7D.pdf.

144. Matthew Desmond & Nicol Valdez, *Online Supplement to Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women* 2 (2013), http://scholar.harvard.edu/files/mdesmond/files/unpolicing.asr2013.online.supplement_0.pdf.

145. *Id*.

146. *Id.* Often, three or four calls a year related to drug activity will be enough to trigger the provisions. *Id*.

147. *Id.*

148. ROBBINSDALE, MINN., CODE § 927.03 (2013).

149. Desmond & Valdez, *supra* note 42, at 120.

connection with their attempts to seek assistance during home violence.[150]

II. RISK MANAGEMENT AND CRIME PREVENTION AT HOME

This Part explains how home rule ordinances configure the home as a site of risk management, crime prevention, and security production. Although homes are usually understood as private spaces, in reality, as Part II.A describes, the state makes numerous interventions into the home, and home rule ordinances are one more such incursion. Home rule ordinances configure the home as a site of security production: a place where criminality must be prevented and the goals of security advanced. Part II.B sets out the means that home rule ordinances use to accomplish these goals. Home rule ordinances compel a set of behaviors that the state believes are "necessary and desirable for the management of social order and stability."[151] These behaviors include acts of surveillance, monitoring, and isolation. This Part discusses how engaging in these compelled behaviors strains social and familial relations, impacts zones of intimacy and trust, and entails a psychic cost upon the person forced to embody the state in this way. Although the sanctions that accompany the home rule ordinances are themselves deeply problematic, the compelled acts that are required to successfully perform third-party policing in the home are perhaps even more worthy of concern.[152]

A. The Dominant Legal and Cultural Constructions of Home

Homes are generally thought of as private spaces, where one can interact with the members of one's family and intimate circle as one pleases, and where, absent domestic abuse or other harms to household members, state intervention is usually unwarranted.[153] As Professor Jeannie Suk explains:

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150. *Id*.

151. Mele, *supra* note 11, at 135.

152. *Id.*

153. SUK, *supra* note 82, at 1; Martha Fineman, *What Place for Family Privacy*, 67 GEO. WASH. L. REV. 1207, 1207 (1999). It should be noted, as Professor Martha Fineman does, that

> [s]omewhat of a dilemma is presented for those of us who view 'privacy' as essential to the concept of family while simultaneously conceding the more modern notion that privacy can conceal, even foster, situations dangerous to the individuals who comprise the family unit. The focus on the necessity of privacy for family formation and functioning arises from concern with abuses associated with state intervention and regulation of intimacy. By contrast, those who are attuned to potential abuses within the family remind us that hidden beneath the cloak of privacy are power imbalances,

> Few concepts are as ubiquitous in ordinary human experience as the home. For most people, the home has formative cultural, emotional, and psychic significance. "Home," as distinct from household or the physical structure of the house, emerged in the nineteenth century as a bourgeois ideal of domesticity and privacy, closely associated with the affective private life of the family. This still evolving concept deeply informs our sense of who we are, and our feelings of safety and belonging.[154]

The home also represents "the metaphorical boundary between private and public spheres," and serves as a nodal site where "the most basic questions about the relation between individuals and state power arise."[155] The idea of the privacy or "sanctity" of the home is recognized and protected in much constitutional jurisprudence, particularly in Fourth Amendment cases.[156] In that context, the Supreme Court has specified that homes are to be protected from excessive government oversight and that the State is not to be "omnipresent in the home."[157] In this construction, respect for the home as a special space has been "embedded in our traditions since the origins of the Republic," and absent compelling reasons, state intervention should be minimal.[158]

Yet, despite this rhetoric, the home is subject to government and institutional interventions on many fronts.[159] Most of these interventions are justified on the basis that they prevent or redress

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> perhaps even incentives for the strong to prey upon or exploit the weak. When we consult the empirical information, it seems both perspectives are warranted.

Id.

154. *Id.* at 1–2.

155. *Id.* at 3.

156. *Id*.

157. Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 IND. L. REV. 311, 326 (2013) (quoting Lawrence v. Texas, 539 U.S. 558, 562 (2003)). The privacy of the home has also been critiqued as serving as a "mask for male oppression within families" and a cloak for "the violence against women and children" that occurs in that setting. "But the private sphere ideology, with all its faults, nonetheless also established as a concept the desirability of a space into which the state, absent compelling reasons, was not free to intrude." Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 968 (1991). Privacy torts, too, support the home as a setting of "spatial intimacy," deserving of significant legal protections. Anderson, *supra*, at 318.

158. Payton v. New York, 445 U.S. 573, 601 (1980). The laws governing the harboring of fugitives also suggest the special status of homes and families. Fourteen states exempt family members from prosecution for this wrongful act. An additional four states offer reduced liability to family members for this offense. Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1160 (2007).

159. Fineman, *supra* note 153, at 1207.

harms to others, both inside and outside of the home. For instance, the state now intervenes to protect family members and intimate partners from abuse and mistreatment. Additionally, institutions like school and work have increasing authority over occurrences in the home that may harm others outside of it. To use an example from the bullying context, what a child does at home can now attract disciplinary action from the school.[160] As long as a home-based activity has some impact on school life, it can subject students to school discipline.[161] Similarly, home-based activities that affect the workplace can fall under the umbrella of activities that may subject an employee to workplace discipline.[162]

Of course, some homes have always been subject to more state intervention than others.[163] The privilege of privacy has often had less political potency when applied to housing that has a "public" dimension, like federal housing projects or Section 8 subsidized housing.[164] The one-strike policy in federal housing is a good example of homes being understood as open to public scrutiny and control. Initially, the burden of deterring the criminality of others was placed only on those with homes in federal housing projects, which are thus somehow "public." "For those deemed eligible to live in public housing," the ability to remain in residence there depended "upon [their] adherence to stricter rules and regulations" than those applied to more "private" homes.[165]

Now, crime-free lease ordinances have brought the one-strike policy into the private housing realm, and they, along with parental liability and nuisance ordinances, ensure that more households than ever are responsible for producing security through deterring crime. To deter others, parents and heads of household are expected to perform behaviors involving surveillance, monitoring, and exclusion in cooperation with state recommendations and programs. In these

160. Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669, 1698 n.142, 1702 n.163 (2012).

161. *Id.*

162. For a discussion of this issue, see Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 672 n.83 (2012).

163. To be sure, state intervention into the home has not meant the same thing historically across race and class.

164. Austin, *supra* note 11, at 273–75.

165. Mele, *supra* note 11, at 136. Those rules were "legitimated by larger political discourses on welfarism, the worthy poor, and drugs and crime." *Id.*

ways, the state is able to intervene inside the home in a rather insidious way: through one's friends and family members.

B. Compelled Compliance Behaviors

To avoid legal sanction, home rule ordinances require parents and heads of household to perform a set of conforming behaviors. These individuals must don the role of "guarantor" or "insurer" of other people's actions and assume an "affirmative obligation" to "monitor and control their own and others' choices of associations and relationships."[166] Tenants must "scrutinize the behaviors of family members, their friends, and visitors within the home and outside of it," and ward off the possibility that one of them will engage in unlawful conduct.[167] Surveillance, monitoring, and isolation are the techniques meant to be employed in this pursuit.

1. *Surveillance and Monitoring*. Surveillance and monitoring are a part of modern life. Gradually, increased surveillance, at least in the public sphere, has become normalized: "[E]ach new surveillance or discipline technique normalizes a certain amount of state intrusion and paves the way for the next program that goes a step further. . . . Step-by-step, panic-by-panic, we have weakened the boundaries that have protected a private sphere."[168] Despite this kind of "surveillance creep," the home, as a traditionally private sphere, has been relatively buffered from the monitoring going on in the outside world. Home rule ordinances, however, require the performance of surveillance and monitoring activities. Through these ordinances, cities have "slipped control, surveillance, and regulation into ordinary everyday behaviors."[169]

One example of "surveillance creep" within the home comes in the context of cyberbullying. To prevent children from being involved with cyberbullying, parents are advised to engage in a series of monitoring activities including using a cellular-phone service plan that grants parents significant control over the child's phone activities, adjusting parental control settings on the Internet, and limiting

166. *Id.* at 135 (quotation marks omitted).

167. *Id.* at 122.

168. Ahrens, *supra* note 160, at 1704. Ahrens's reference is to "a private sphere for public school students." *Id.*

169. Mele, *supra* note 11, at 122.

computer use.[170] These kinds of activities, performed at the behest of the state rather than because the parent believes it to be the best course of action for their particular child, encourage "parents to abandon their traditional role of protecting their children and join in partnership with the state in becoming risk managers."[171] The overall message to parents is that "the repression of criminal conduct must take priority over any other objectives of child rearing and that parents will be expected to accomplish this largely on their own or with what they can purchase."[172]

Performing surveillance activities often comes at a significant cost, not only in terms of personal resources, but also in terms of stress on relationships. It "is not conducive to familial relations to have loved ones forced to play vigilante with one another, constantly in a state of suspicion."[173] At the same time as parents are advised that they should implement the monitoring techniques listed above, they are also warned that they must nevertheless "be mindful that communication is a key aspect of social development and that constant surveillance of their child's Internet use may damage parent-child trust."[174] The kinds of negative impacts that accompany monitoring and surveillance help explain, for example, why a parent may wish to have a school perform drug searches on her children rather than performing them herself:

> [B]y having schools search their children, parents are permitted to maintain a better relationship with their children than they might have otherwise and are spared the effort of personally conducting the search. Parents do not have to confront their children or risk damage to parent/child trust by requesting their children subject themselves to potentially invasive or humiliating searches. If drug testing is the price for participating in school activities and allowing your principal access to your photos is the price for bringing a cell

170. Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 689 (2009).

171. Tammy Thurman, *Parental Responsibility Laws/Are They the Answer to Juvenile Delinquency?*, 5 J.L. & FAM. STUD. 99, 106 (2003).

172. SIMON, *supra* note 49, at 202.

173. Timothy E. Heinle, Comment, *Guilty by Association: What the Decision in* Boston Housing Authority v. Garcia *Means for the Innocent Family Members of Criminals Living in Public Housing in Massachusetts*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 213, 232 (2009).

174. Turbert, *supra* note 170, at 689–90.

> phone to school, then parents plausibly can shift the blame onto schools for policing techniques that are sure to enrage teenagers.[175]

Regardless of whether searches also occur in places outside the home, some courts have agreed with the state's view that parents or tenants should conduct home searches for drugs or other contraband.[176] For instance, in the Supreme Court decision that upheld the one-strike policy, *Department of Housing & Urban Development v. Rucker*,[177] it was noted in her favor that Pearlie Rucker, a sixty-three year old grandmother subject to eviction from a public housing project after her daughter was caught with cocaine a few blocks from the premises, had regularly searched her daughter's room.[178] These efforts may have factored into the housing authority's ultimate decision not to pursue Ms. Rucker's eviction.[179]

At least one court, though, has concluded that asking tenants to search their guests and family members is not an acceptable requirement.[180] In addressing a case in which a tenant was evicted based on a guest's possession of a small amount of drugs, the Ohio Municipal Court held that eviction under these circumstances was tantamount to holding that tenants could simply have no guests, or "equally implausibl[y]" that tenants "must conduct a thorough search of each guest" every time he or she visited.[181] Although this judge believed that tenants should not have to search their guests or socially isolate themselves to avoid eviction, other courts have held that guests in possession of small amounts of drugs are a valid basis for eviction.[182] Thus, heads of household concerned about facing eviction may indeed feel the need to bar guests or search the guests that they do invite to their homes.

2. *Isolation*. Home rule ordinances have isolating effects on kinship and relationship formation. An example from a sociologist's

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175. Ahrens, *supra* note 160, at 1714–15 (footnotes omitted).

176. *See, e.g.*, Dayton Metro. Hous. Auth. v. Kilgore, 958 N.E.2d 187, 192 (Ohio Ct. App. 2011) (holding a tenant strictly liable for the drug offenses of her guests under *Rucker*).

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

178. Rucker v. Davis, 237 F.3d 1113, 1117 (9th Cir. 2001), *rev'd*, *Dep't of Hous. & Urban Dev*., 535 U.S. 125 (2002).

179. *Id.*

180. Cuyahoga Metro. Hous. Auth. v. Harris, 861 N.E.2d 179, 181 (Ohio Mun. Ct. 2006).

181. *Id.*

182. *See, e.g.*, Dayton Metro. Hous. Auth. v. Kilgore, 958 N.E.2d 187, 192 (Ohio Ct. App. 2011).

study of the mobilization of resident organizations in federal public housing dramatically demonstrates these isolating effects. Describing a public housing project in southeastern North Carolina, the sociologist recounts how just outside the projects, "a small number of African-American men would routinely assemble each morning at a street corner to wait for their girlfriends or wives, who were residents of a nearby housing project, to leave their apartments and cross the street to visit them."[183] It turned out that the men "who had been accused, arrested, or convicted of various criminal infractions, were barred from stepping foot on the project."[184] For their female companions, "the cost of permitting them to visit or stay the night was possible eviction" under the one-strike policy.[185]

For these couples, the one-strike policy altered the terms of their relationships.[186] The female tenant was allowed to keep her home only if she agreed to banish her partner from the premises.[187] For some tenants, then, social and familial isolation is the price of maintaining their homes. The difficulty of sustaining a relationship under these conditions is obvious.[188]

Children are also often banned from the premises as a solution to potential eviction in federal-housing situations.[189] Indeed, when a child's behavior is the trigger for eviction, "the matter is most often settled with an agreement that the child will no longer live in the

183. Christopher Mele & Teresa A. Miller, *Introduction*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 11, at 2.

184. *Id.*

185. *Id.* For another example of how law can directly impact intimate relationships, see King v. Smith, 392 U.S. 309, 334 (1968).

186. This is similar to the situation Professor Jeannie Suk describes in relation to protective orders and domestic law. Suk, *supra* note 81, at 14.

187. Domestic-violence law also encourages partner separation. *See id.* at 53.

188. This is particularly interesting in light of recent studies focused on the connections between marriage, class, and race. *See* CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA, 1960–2010, at 11–13 (2013); RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? 1–4 (2011). Moreover, "families headed by single mothers, and especially black single mothers," have "been blamed for a myriad of social problems, including unemployment, poor health, school drop-out rates and an increase in juvenile crime." Twila L. Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 345 (1996). Often ignored in these discussions is how such policies exert fracturing pressures on the development of intimate relationships.

189. Austin notes that "[j]ust as in slave times when commercial transactions separated mothers from their children, here too 'kinship' loses meaning since it is subject to termination in the name of property relations." Austin, *supra* note 11, at 286.

unit."[190] "Agreement" may be a strong word in this context, given that the situation reads like "a classic Catch 22. Either the family agrees to dispossess one of its children, or stays together and finds itself out on the street."[191] Such banning procedures have obvious social consequences like "divided families, the surveillance of intimacy," and "the stigma of past behavior."[192]

To avoid the risk that a loved one may engage in wrongful behavior, tenants trying to avoid the operation of crime-free lease addendums may similarly alter the terms of their relationships with others. When eviction is based not on a tenant's level of fault, but on "the relationship established between the leaseholder and covered person," the tenant is left to decide whether the relationship is worth risking her home.[193] Indeed, in the context of public housing, officials have explicitly stated that they want tenants to choose their housing over their families. One city mayor bluntly asserted that, "'[w]e want tenants to understand that if they don't control members of their families, they are going to lose their housing.'"[194] A housing authority director offered a further clarification of this sentiment: "'The head of household is responsible for family members . . . . The message is, don't risk your house; let them [family members] fend for themselves.'"[195] The lines are clearly drawn: a tenant must choose between allegiance to the state, which will require alienating a loved one, or allegiance to her family, which may require her eviction.[196]

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190. Kaplan & Rossman, *supra* note 128, at 109, 119–20. And "forty-four percent of all One Strike cases that are not cancelled or dismissed end in an agreement that the offending member of the household, often a child or grandchild, will be banished from the family home." *Id.* at 120 n.70. The experience of Gloria Franklin and her son serves as one example. Seventeen-year-old Tyran Pratt was arrested "allegedly with $10 worth of marijuana" outside of his mother's home. Although the charge against him was dismissed, the housing authority required his mother to ban him from the premises or otherwise face eviction. As a newspaper article describes,

> Franklin got choked up recalling the moment she told her son. It was one of the most difficult points in her life, she said. "I gave him a hug, shared a few tears, and I just told him, 'You have to go; I'm sorry,'" Franklin added. Since Pratt left last summer, Franklin says she hasn't seen him much. He dropped out of school and has been living on the streets. Sometimes he'll call when he's hungry, and she'll bring him food. And other times she sees him sleeping in a playground near her house, a sight she describes as "one of the most hurtful things."

Dylan Cinti, *Dismantling Families*, CHI. REP., Sept. 1, 2011, at 17.

191. Kaplan & Rossman, *supra* note 128, at 120.

192. Mele, *supra* note 11, at 2.

193. *Id.* at 128.

194. Weil, *supra* note 11, at 171 (quotation marks omitted).

195. *Id*. (quotation marks omitted).

196. For more on this kind of conflict between obligations to the family and obligations to the state, see MARKEL ET AL., *supra* note 110, at 6–8.

For tenants who do not feel that they have the ability to closely monitor or deter family members from wrongdoing, banishing these individuals and isolating their households may be the only viable option. These tenants may feel "overbearing pressure" to "close their households" as a means of safeguarding their homes against potential eviction.[197] This is particularly true because of the no-fault basis for evictions: even if the tenant makes a best-efforts attempt to deter family members, if those attempts are unsuccessful, eviction will follow. So, "[f]or instance, where a parent or grand-parent has no realistic means of controlling the conduct of their adolescent children or grandchildren at all times and at all places, the only way for the tenant to minimize the risk of eviction . . . is to exclude their children or grandchildren from the apartment altogether."[198] Such exclusion comes at a profound social and psychic cost. Through home rule ordinances, the state decides for whom families can care, and how they can care for them.

Another important type of isolation that home rule ordinances create occurs in the context of nuisance citations based in domestic violence. Nuisance ordinances discourage tenants experiencing domestic violence from calling the police because such calls lead to nuisance citations, and nuisance citations lead to eviction.[199] Many not-for-profit groups providing assistance to women suffering domestic abuse note that clients regularly state that they are not calling police for assistance, even when they desperately need it, because they fear eviction.[200] In other words, these nuisance

197. Brief for Respondents, *supra* note 133, at 92, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (No. 00-1770).

198. *Id*. These ordinances may also dissuade tenants from letting recently paroled family members or intimate partners live with them. They may fear that the paroled person "will get back in trouble," and cost them their housing. This is an additional negative impact on an already difficult reintegration process. *See* Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 426 (2011).

199. Erik Eckholm, *Victims' Dilemma: 911 Calls Can Bring Eviction*, N.Y. TIMES, Aug. 16, 2013, at A1, *available at* http://www.nytimes.com/2013/08/17/us/victims-dilemma-911-calls-can-bring-eviction.html.

200. According to one grassroots domestic-violence group in a small metropolitan area, two families accessed their emergency shelter in one month "to avoid calling police for fear of evictions." Statement of Interest: Alle-Kiski Area HOPE Center, Inc., Briggs v. Borough of Norristown (E.D. Pa. May 31, 2013) (No. 2:13-cv-2191), *available at* https://www.aclu.org/files/assets/2013_05_31_appendix_a_-_amici_statements_of_interest.pdf. Further, there is a history of police ignoring women's requests for assistance with domestic violence. In the 1970s and 1980s, police ignored "the pleas of women seeking assistance simply because their assailants were their husbands." LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 106 (2012). In *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D.

ordinances encourage battered women to isolate themselves from society and from "the 'protective arm' of the state."[201] This was illustrated in a case that the American Civil Liberties Union (ACLU) initiated on behalf of Lakisha Briggs, after the fear of eviction prevented her from calling police during a nearly lethal attack by her former boyfriend.[202] The attack required her to be airlifted to a hospital for emergency treatment, and she survived only because a neighbor called the police.[203] She did indeed face eviction proceedings upon her return from hospital.[204]

III. THE ROLE OF STRICT VICARIOUS LIABILITY

Even if one does engage in the acts of surveillance, monitoring, and isolation that the home rule ordinances require, those efforts may not be successful. This Part sets out how the strict vicarious liability standard of the home rule ordinances allows for the imposition of legal sanction, regardless of fault. Part III.A describes how the home rule ordinances are "no-fault" laws, meaning that, as a policy matter, they apply in the absence of what we normally consider to be morally culpable behavior. The unlawful act of a household member, friend, or guest, plus a relationship between that person and the parents or tenants, is enough to trigger the sanction associated with the

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Conn. 1984), a plaintiff was awarded $2.3 million after police stood by while her husband "dropped the knife that dripped with his wife's blood," kicked her "repeatedly in the head," and tried to attack her again "while she was lying on a stretcher, waiting for medical treatment." GOODMARK, *supra*, at 106.

201. Desmond & Valdez, *supra* note 42, at 138.

202. Lakisha Briggs rented under the Section 8 voucher program. Ninety percent of Section 8 households are female-headed, and 30 percent of those women are disabled; 84 percent of Section 8 households have children, with children making up 55 percent of all people assisted by Section 8. Phil Steinhaus, *Those Aided by Section 8 Not Criminals*, COLUM. TRIB. (Jan. 4, 2009), http://archive.columbiatribune.com/2009/Jan/20090104Comm008.asp.

203. One of the grounds of the lawsuit is that it violates the right to petition. Calling 911 is a citizen's "primary source of communication with the police." Desmond & Valdez, *supra* note 42; *see also* Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 FORDHAM L. REV. 837, 837 (2012) (arguing that the police practice of calling Child Protective Services when a mother experiences domestic violence violates her First Amendment right "to petition the Government for a redress of grievances").

204. Eckholm, *supra* note 199. Similarly, a landlord initiated eviction proceedings against Veronica Maffeo in Boston, Massachusetts, on the basis that "she caused a disturbance when she screamed for help" during a domestic assault perpetrated by her ex-boyfriend. Brief of Amici Curiae of the National Network to End Domestic Violence at 3, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (No. 00-1770), 2001 WL 1663790 (citing Def's Mot. To Vacate J., New Trial, Weston Assoc. v. Veronica Maffeo at ¶ 4 (Hous. Ct. Dep't, Boston Div., filed Sept. 2001) (Docket No. 01-SP-03935)).

ordinance. This reality sits uncomfortably with our usual commitment to punishment on the basis of individual culpability. Perhaps because of this discomfort, extralegal narratives of fault have sprung up around these ordinances. Those who advocate for and enforce these provisions have constructed narratives of fault to rationalize the imposition of legal sanctions in these circumstances.

In many important ways, vicarious liability in this context ends up conflating vulnerability with fault. Part III.B outlines how home rule ordinances essentially penalize parents and tenants for lacking the ability to control the behavior of others, even though it is arguably very difficult for anyone to truly control the behavior of another. Moreover, home rule ordinances tend to have the most impact upon members of vulnerable groups, such as minorities, the poor, and female-headed households, creating problematic connections between vulnerability, fault, and the inability to control others.

Further, as Part III.C discusses, the vicarious liability nature of the home rule ordinances has an additional consequence: a profound framing effect that assigns blame to both the wrongdoer and his or her social and familial relations. Left outside of this frame are larger, structural factors that are heavily correlated with crime and drug abuse, such as poverty, economic inequality, and lack of opportunity.

A. Individual Culpability and Narratives of Fault

The idea of "individual culpability for wrongdoing" is a foundational principle of the American legal system.[205] As one judge phrased it, "Our demand that responsibility be personal" is a communal value, "the result of the 'inarticulate, subconscious sense of justice of the [person] on the street.'"[206] Strict vicarious liability, in which a person is liable for another's actions even though he or she has not personally engaged in any wrongdoing, seems to fly in the

205. James Massey, Susan L. Miller & Anna Wilhelmi, *Civil Forfeiture of Property: The Victimization of Women as Innocent Owners and Third Parties*, *in* SUSAN L. MILLER, CRIME CONTROL AND WOMEN: FEMINIST IMPLICATIONS OF CRIMINAL JUSTICE POLICY 15, 15 (Susan L. Miller ed., 1998).

206. City of Maple Heights v. Ephraim, 898 N.E.2d 974, 982 (Ohio Ct. App. 2008) (alteration in original) (quoting Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 103 (1985)) (technically speaking about criminal vicarious liability). Though, given the blurring of criminal and civil lines here, the comments are applicable to these scenarios as well.

face of that.[207] It is an "exception to the usual rule that each person is accountable for his own legal fault, but in the absence of such fault, is not responsible for the actions of others."[208] Nevertheless, in a variety of contexts, we do allow strict or vicarious liability to exist without experiencing too much existential angst.[209] Strict liability is a fairly common feature of contract and tort law, and its manifestations in the form of "vicarious, corporate, and joint and several liability" are not regarded as particularly controversial.[210] For example, the doctrine of respondeat superior, which holds employers vicariously liable for the acts of their employees, is a well-accepted application of strict liability.[211] Vicarious liability is currently understood mainly as a policy device to transfer risk to the person who profits from it, is best able to avoid it, and can best financially manage it.[212]

Vicarious liability most often concerns business relationships, like "employer-employee, corporation-manager, buyer-seller, producer-consumer, and service provider-recipient."[213] But the idea of strict vicarious liability is no stranger to the domestic or family context.[214] Rather, "the tendency to include secondary social others as responsible for the crime, deviance, and the sins of family members, friends and significant others is well-established in the human experience,"[215] and "[f]amilial responsibility has been a consistent

207. Technically, strict liability and vicarious liability are not the same concept, but much of the literature on parental liability and the one-strike policy uses these terms interchangeably. Strict liability is "a concept associated principally with the law of torts" and "is popularly understood to mean liability without fault." Hornstein, *supra* note 131, at 263. Vicarious liability, on the other hand, exists when the conduct of a third party is imputed to the defendant. Vicarious liability is "a form of strict liability." *Id.* at 264.

208. DAN B. DOBBS, THE LAW OF TORTS § 333 (2000).

209. Levinson, *supra* note 69, at 361.

210. *Id*. at 421. Vicarious liability is deeply tied to the notion of agency. It can also apply when one has entrusted another with her property. For example, in *Van Oster v. Kansas*, 272 U.S. 465 (1926), the Supreme Court upheld the forfeiture of a vehicle used to illegally transport liquor by someone to whom the owner had entrusted the vehicle. SAMAHA, *supra* note 9, at 229.

211. Interestingly, the philosopher and jurist Jeremy Bentham linked this doctrine to the concept of policing. He used the metaphor of policing to describe how respondeat superior operated to ensure that that the master would act as an "inspector of police, a domestic magistrate" for a servant's torts. Kraakman, *supra* note 28, at 53 n.1. It should also be noted that this kind of liability originated in the household. Levinson, *supra* note 69, at 354 n.34.

212. *See* PAULA GILIKER, VICARIOUS LIABILITY IN TORT: A COMPARATIVE PERSPECTIVE 90 (2010).

213. SAMAHA, *supra* note 9, at 208.

214. Indeed, state statutes and ordinances in which parents are held vicariously liable for their children's wrongful actions are now relatively common. *Id.* at 230.

215. Massey et al., *supra* note 205, at 15.

theme in legal and social sanctioning regimes since ancient times."[216] Historically, many cultures have viewed clans and families, not individuals, as their primary "jural unit" or "relevant unit of moral agency and blame," and group responsibility has functioned as the dominant legal norm.[217]

Modern thought has, however, replaced the ancient notion that the "sins of the father will be visited upon the children"[218] with a focus on individual rights and responsibilities. Now, the idea of "individual culpability for wrongdoing, especially in the case of criminal behavior . . . forms the very foundation for the administration of justice in Western societies."[219] In general, we, as a society, have the sense that although a person can sometimes be justly held responsible for contributing to another person's wrongdoing, we are deeply troubled by concerns of "'punishing the innocent,' imposing 'guilt by association,' or 'failing to treat people as individuals.'"[220]

Now, when strict liability is brought into the home, it affronts our modern sense that only individuals who are themselves culpable should be held legally liable. For instance, the crime-free lease addendums would allow "eviction of an entire family if a tenant's child was visiting friends on the other side of the country and was caught smoking marijuana, even if the parents had no idea the child had ever engaged in such activity and even if they had no realistic way to control their child's actions 3,000 miles away."[221] The "principle of house-hold wide responsibility" for such a wrong can strike the modern conscience as profoundly unfair, as can the eviction of a family making best efforts to care for its members and avoid

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216. Levinson, *supra* note 69, at 411.

217. MARK S. WEINER, THE RULE OF THE CLAN: WHAT AN ANCIENT FORM OF SOCIAL ORGANIZATION REVEALS ABOUT THE FUTURE OF INDIVIDUAL FREEDOM 1, 3 (2013); Levinson, *supra* note 69, at 348.

218. This phrase, and its variations, appears in many Western canonical texts, including the Bible, Shakespeare's *The Merchant of Venice*, and Euripides. *See, e.g.*, EURIPIDES, FRAGMENTS 563, Frag. 980 (Christopher Collard & Martin Cropp eds. & trans., Harvard Univ. Press 2008).

219. Massey et al., *supra* note 205, at 15.

220. Levinson, *supra* note 69, at 348.

221. Rucker v. Davis, 237 F.3d 1113, 1117 (9th Cir. 2001), *rev'd*, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002). Most of the one-strike cases are about drug possession: one study of the one-strike policy cases in Chicago found that over 70 percent of cases involved drug possession, and less than 10 percent involved drug dealing. Angela Caputo, *One and Done*, CHI. REP. (Sept. 1, 2011), http://chicagoreporter.com/one-and-done. In 2010, 76 percent of arrests leading to eviction were for misdemeanors. *Id.*

criminality, such as when a family member is on a waitlist for a drug-treatment program.[222]

Courts and other judicial actors have often indicated difficulties with accepting as legitimate the strict-liability nature of home rule ordinances. For instance, in one case, a jury held that eviction of a mother and her children, ranging in age from sixteen to twenty-five, was unwarranted, despite facts stipulating to the son's drug use.[223] Also, a judge in the public housing context expressly noted that although she felt bound by the decision in *Rucker*, she had great difficulty trying to "reconcile fundamental principles of fairness and due process with a finding that wholly innocent persons can be punished for the criminal activity of others of which they had no knowledge and over which they had no control."[224]

Many courts have expressed similar concerns when presented with situations in which vicarious liability results in criminal sanctions.[225] Some courts have found that in minor misdemeanor cases, when the punishment at issue is only a "slight fine and not imprisonment," vicarious criminal liability does not violate due process, but other courts have held that this does violate due process, and that the consequences of a criminal conviction "cannot rest on so frail a reed" as whether someone else will "commit a mistake in judgment."[226] Nevertheless, when vicarious liability is upheld, it is often justified by the deterrent effect it is supposed to have on both the wrongdoer and the person ultimately held responsible.[227]

At its worst, vicarious liability seems to involve "the sacrifice of innocent individuals on the altar of some allegedly worthy social purpose."[228] It conflicts with the deeply held belief that unless a person "has done something to deserve and warrant punishment, the state lacks moral and political authority to move against him, at least in a democratic state committed to liberal values of individual liberty

222. The phrase "principle of household-wide responsibility" was used in the Reply Brief for the Department of Housing and Urban Development in the *Rucker* case. Weil, *supra* note 11, at 177.

223. The court issued a judgment notwithstanding the verdict. Jamie's Place I LLC v. Reyes, No. L&T252658/08, 2009 WL 4282852 (Table), at *4 (N.Y. Civ. Ct. Oct. 22, 2009).

224. Hous. Auth. of Joliet v. Chapman, 780 N.E.2d 1106, 1108 (Ill. App. Ct. 2002) (McDade, J., concurring).

225. SAMAHA, *supra* note 9, at 229.

226. Commonwealth v. Koczwara, 155 A.2d 825, 830 (Pa. 1959) (citing Francis Bowes Sayre, *Criminal Responsibility for Acts of Another*, 43 HARV. L. REV. 689 (1930)).

227. *Id*.

228. Brief for Respondents, *supra* note 133, at 56.

and autonomy."[229] In the context of home rule ordinances, where someone faces significant legal sanctions as a result of their relationship with another person somehow connected to their home, and not based on their own wrongdoing, vicarious liability seems particularly egregious.

Therefore, it is perhaps unsurprising that supporters of these kinds of ordinances have constructed narratives of fault around them. According to these narratives, those who are subject to home rule ordinances are, in some extralegal sense, blameworthy. Although not technically "at fault" in the legal sense, they are constructed as at fault in some larger moral sense. It seems that the absence of a legal fault element has created a void into which a nonlegal fault element has grown—to justify the use of strict liability and its accordant legal sanctions in this context.

1. *Failing to Govern and Be Governed*. One narrative of fault at work in the context of home rule ordinances is that the tenant or parent is at fault both in relation to her ability to *govern* and in relation to her willingness to *be governed*. The state arguably "regards the polity as a household, the occupants of which must be disciplined and directed," and must in turn discipline and direct their own households.[230] Government is, in some sense, a form of household management, and household management is, conversely, an important part of state governance.[231] The idea of a "family government" that is a microcosm for the larger state is an old one: Aristotle began his *Politics* with a discussion of household governance, and how households are the "original seed of the polis."[232] Ordered homes become the prerequisite for an ordered state, and households struggling with social issues become a threat to

229. Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1050–51 (2013).

230. Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, *in* LAW AS PUNISHMENT / LAW AS REGULATION, *supra* note 77, at 77, 80.

231. Markus Dirk Dubber, "*The Power to Govern Men and Things": Patriarchal Origins of the Police Power in American Law*, 52 BUFF. L. REV. 1277, 1277 (2004). Further, as scholars Elizabeth Burney and Loraine Gelsthorpe write, "[t]he State traditionally supports the ideal of well-functioning families, as a crucial element in the social order." Elizabeth Burney & Loraine Gelsthorpe, *Do We Need A 'Naughty Step'? Rethinking the Parenting Order After Ten Years*, 47 HOW. J. 470, 470 (2008); *see also* Noa Ben-Asher, *The Lawmaking Family*, 90 WASH. U. L. REV. 363, 363 (2012) (arguing that families create internal legal systems that govern their daily lives).

232. Dubber, *supra* note 77, at 30.

that order.[233] Indeed, the connection between home governance and state governance has a special resonance at the city level, where Western culture has long mythologized that what happens in the household has a direct impact on the city.[234]

The idea that a failure to govern one's household is wrongful and thus may justifiably attract sanctions is particularly salient in the context of parental liability ordinances. Parental liability ordinances are often justified based on the intuition that "'bad' parents should be disciplined" for their failure to govern their households correctly.[235] Essentially, the child's unlawful act demonstrates that the parents are "bad" at "ruling the roost," and it is therefore fair to impose penalties on them.[236]

Of course, the implicit assumption underlying the notion that a child's unlawful act shows that his or her parents are "bad" is that good parents generally have control over their children.[237] However, many parents and other people who have worked with or spent time with children and teenagers believe this assumption to be "unrealistic and naïve."[238] In reality, parents have quite limited means to actually control the behavior of their children, and even parents who "do everything right" may nevertheless have children who engage in misconduct.[239] This is in part because of the myriad factors that contribute to a child's behavior, of which parental influence is just

233. This is the flip side to the "notion oft heard that strong families lead to a strong nation." MARKEL ET AL., *supra* note 158, at 1189.

234. The story of Oedipus helps to illustrate this point: his murder of his father created disorder in his family and household, and thus disorder in the city, in the form of the "plague upon Thebes." Levinson, *supra* note 69, at 354.

235. Amy L. Tomaszewski, Note, *From Columbine to Kazaa: Parental Liability in a New World*, 2005 U. ILL. L. REV. 573, 579 (2005) (citing Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 SANTA CLARA L. REV. 621, 624 (1997)).

236. In other words, a child's wrongful act justifies a "role [for] politics [] where families have failed." F. FIELD, NEIGHBOURS FROM HELL: THE POLITICS OF BEHAVIOUR (2003); John Flint & Judy Nixon, *Governing Neighbours: Anti-Social Behavior Orders and New Forms of Regulating Conduct in the UK*, 43 URB. STUD. 939, 948 (2006) (quoting FIELD, *supra*).

237. Elena R. Laskin, *How Parental Liability Statutes Criminalize and Stigmatize Minority Mothers*, 37 AM. CRIM. L. REV. 1195, 1206 (2000).

238. *Id*.

239. "No doubt family environment exerts significant influence on a child's behavior. But on closer examination, scapegoating parents paints a remarkably incomplete picture. Indeed, in many families, parents may no longer be capable of influencing the behavior of their children. Many other powerful forces compete today for that role in teenagers' lives." Min Kang, *Parents as Scapegoats*, 16 J. CONTEMP. LEGAL ISSUES 15, 19 (2007).

one among many.[240] Another powerful force is enculturation, or the environment in which children grow up. Most bullying experts will readily agree that peer groups play an important—if not the most important—role in whether children engage in bullying behaviors. Parental liability ordinances, though, appear to be "based entirely on folk wisdom" that parents should be able to control their children all the time.[241] If they cannot, then they can be "coercively taught parenting skills, so they will become in control (and presumably then can be punished by harsher means if the children continue their delinquent behavior)."[242]

In addition to suggesting that a failure to govern one's household is blameworthy, home rule ordinances also blame parents and tenants for a reluctance to *be governed*. For instance, the narratives surrounding parental liability laws suggest that they will be levied when cities decide that parents are being *uncooperative* with them.[243] In the case of the Monona, Wisconsin, ordinance that holds parents liable for their children's bullying behaviors, Monona's police chief has indicated that fines will be levied only in situations in which the parents are uncooperative and do not make efforts to address the bullying.[244] This theme of uncooperativeness also occurs in parental liability laws at the state level: the proposed, but ultimately defeated, Iowa bill that sought to hold parents responsible for their children's bullying was also rooted in parental cooperation with the state.[245] The first level of intervention was to be notification of the bullying behavior and an attempt to "work[] with the family" to address it.[246] If parents resisted this intervention, the second level was court

240. "Most criminology and sociology theories, as well as empirical studies, generally indicate that not only the family, but economic status, academic achievement, racism and discrimination, peer groups, community attachment and susceptibility to media affects a child's propensity" to engage in misconduct. Tammy Thurman, *Parental Responsibility Laws: Are They The Answer to Juvenile Delinquency?*, 5 J.L. & FAM. STUD. 99, 107 (2003).

241. Chapin, *supra* note 235, at 654.

242. *Id.* (emphasis omitted).

243. Similar ideas regarding duties to cooperate can be found in the welfare and child support context. *See* Naomi Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 973–80 (1997).

244. Kuruvilla, *supra* note 97.

245. H.F. 143, 2013 Gen. Assemb. (Iowa 2013), *available at* http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&hbill=hf143.

246. Leigh, *supra* note 94.

mediation.[247] The final level was prosecution, which could result in "community service, fines, or even jail time."[248]

Penalizing parental uncooperativeness can also be seen in state laws addressing truancy. A truancy reduction program in Michigan, for example, provided that when "parents *did not cooperate with school officials*, a warrant was sought for parental prosecution under the state's compulsory attendance law. *The key phrase here was that the parents targeted were uncooperative*."[249]

This same language of cooperation was echoed in a town's reasoning regarding enacting a chronic-nuisance ordinance that was meant to apply to domestic-abuse situations:

> It's always disheartening for police officers to get calls that a boyfriend is beating up a girlfriend, and then the girlfriend drops the charges within a few days. It's more frustrating when the offenders repeat the process over and over. . . . In addition, it's a big waste of taxpayers' dollars when police have to respond to nuisance calls and then to court without the benefit of cooperation from those who complained in the first place.[250]

Cooperation also figures into the common practice of ordering women to get restraining orders against their intimate partners to avoid evictions under nuisance ordinances.[251] If they refuse to cooperate and accept this form of city governance, eviction can follow. Compliance with a state notion of best practices for home governance becomes a requirement of maintaining stable housing and

247. *Id.*

248. *Id.*

249. Justin W. Patchin, *Holding Parents Responsible for Their Child's Bullying*, CYBERBULLYING RES. CENTER (June 17, 2013), http://cyberbullying.us/holding-parents-responsible-for-their-childs-bullying (second emphasis added). Professor Patchin also noted, however, that in reality, "[o]nly 3 parents out of the nearly 300 families involved in the program fell into [the uncooperative] category." *Id.* Most parents seem willing to help tackle their children's bullying behaviors, as attested to by the fact that the informational brochure entitled "What If My Child Is The Bully?" is "one of the most frequently downloaded handouts on the website." A. Pawlowski, *Community Will Ticket Parents of Chronic Bullies*, TODAY (June 3, 2013, 1:59 PM), http://www.today.com/moms/community-will-ticket-parents-chronic-bullies-6C10172548.

250. Rebecca Licavoli Adams, Note, *California Eviction Protections for Victims of Domestic Violence: Additional Protections or Additional Problems?*, 9 HASTINGS RACE & POVERTY L.J. 1, 12 (2012) (quoting Ron Gower, *Police Calls: Responsibility Will Be Required in Coaldale*, TIMES NEWS, Mar. 13, 2006, at 1).

251. For a discussion of this issue, see Suk, *supra* note 81, at 7.

avoiding legal penalty.[252] Failure to cooperate or to be governed in this regard is portrayed as blameworthy, and thus able to legitimately attract legal sanctions.

2. *Failing to Control Criminality*. In the nuisance context, the failure to govern one's household is linked to another powerful narrative of blame: the failure to control another's violence or criminality. In addition to placing blame on parents and tenants for failing to govern their households, when nuisance is based in domestic violence, a story is told in which an individual's failure to control another's criminality is blameworthy. In this narrative, those who experience domestic violence are specifically faulted for failing to control their partner's behavior.[253] According to this story, their failure to control the abuse *is* blameworthy and *should* attract the sanction of eviction.

Many nuisance citations and evictions come from domestic-violence incidents.[254] Indeed, a recent groundbreaking study analyzing all the nuisance citations issued in Milwaukee, Wisconsin, in 2008 and 2009 found that nearly a third of these citations were generated by

252. For example, Lakisha Briggs, the Pennsylvania woman who was evicted after her boyfriend nearly killed her, was, prior to her eviction, "ordered to obtain assistance from the justice system [in the form of a Protection from Abuse order] as a condition to maintaining her housing, regardless of her fears of future and escalated violence." Brief of Amicus Curiae of the Pennsylvania Coalition Against Domestic Violence, et al. at 20, Briggs v. Norristown (E.D. Pa. May 31, 2013) (No. 2:13-cv-2191).

253. This narrative falls into the gendered tradition of holding women responsible for men's criminality. This tradition is most obvious in the context of sexual assault, where "to some extent criminal justice officials (and others) have always considered female victims of sexual assault and rape as responsible for failing to minimize the opportunities for the offense." Sharyn L. Roach Anleu, *The Role of Civil Sanctions in Social Control: A Socio-Legal Examination*, *in* CIVIL REMEDIES AND CRIME PREVENTION 21, 34 (Lorraine Green Mazerolle & Jan Roehl eds., 1998).

254. Dekalb, Chicago, offers an example of the number of nuisance citations connected to domestic violence. The city reported that in 2013, it notified landlords of 489 calls to police that could trigger eviction. Katie Dahlstrom, *DeKalb's Crime Free Housing Program Gets Mixed Reviews*, DAILY CHRONICLE (Feb. 27, 2014, 3:36 PM), http://www.daily-chronicle.com/2014/02/26/dekalbs-crime-free-housing-program-gets-mixed-reviews/ajjphlv/?page=1. The reasons for the calls to police were varied. "100 were for disorderly house complaints—loud parties or noise late at night. Another 97 were domestic battery and 45 were for possession of marijuana. The remainder ran the gamut from underage drinking to mob action." *Id.* Of those, 56 resulted in eviction, 31 resulted in individuals being barred from a particular residence, and 18 tenants left "voluntarily." *Id.*

domestic violence.[255] The same study quoted many instances in which both landlords and the police who worked with them to evict tenants under the nuisance ordinances blamed female tenants for the "nuisance" associated with domestic abuse incidents.[256] Landlords and police explicitly "assigned to battered women the responsibility for curbing the abuse" and often viewed eviction as the natural and *fair* consequence of a failure to do so.[257] One Milwaukee landlord (described as "a middle-aged white man who owns 114 units, mostly in poor black neighborhoods"), offered his views on nuisance citations related to domestic violence at his properties:

> Like I tell my tenants: You can't be calling the police because your boyfriend hit you again. They're not your big babysitter. It happened last week, and you threw him out. But then *you let him back in*, and it happens again and again. Either *learn from the first experience or, you know, leave*. Don't take him back and get hit because you tell him, I don't know, "I don't want to sleep with you."[258]

Another landlord warned his tenant in a letter:

> Because the numerous calls from this address, the police has [*sic*] identified the property as a nuisance property. . . . Many of the calls involved physical altercations with another individual, identified as your boyfriend and ex-boyfriend who appears to be living at the unit. . . . This is *your notice to cease this behavior and to cure these problems*. . . . If these activities continue, your lease will be terminated.[259]

And in a letter to the Milwaukee Police Department, from whom most of the eviction directives originated,[260] one landlord wrote:

> The Tenants have been required to vacate the unit or terminate the causes via a 30-day [eviction] notice. It does not matter if they are

255. Desmond & Valdez, *supra* note 42, at 118. It should be noted that the study excluded public housing "[b]ecause the nuisance property ordinance focuses on the private housing market." *Id.* at 123.

256. *Id.*

257. *Id*. at 134.

258. *Id*. at 131 (emphasis added).

259. *Id*. at 134 (alterations in original) (emphasis added).

260. The nuisance ordinances are usually enforced in the following manner: a city official who has received a report from the police regarding an incident sends a letter to the landlord, indicating that the landlord must evict or face a series of escalating sanctions. The landlord is often requested to write a letter in response indicating what actions have been or will be taken. *Id*. at 122.

> the cause of the problems or not. It is their responsibility to prevent the problems at all times.[261]

And in yet another example of a letter to the police, another local landlord wrote:

> First, we are evicting Sheila M., the caller for numerous help [*sic*] from police. . . . She has been beaten by her "man" who kicks in doors and goes to jail for 1 or 2 days. . . . *We suggested she obtain a gun and kill him in self-defense, but evidently she hasn't. Therefore, we are evicting her*.[262]

Leaving aside the profoundly disturbing suggestion in the above quote—that a woman suffering domestic abuse must engage in the compliance behavior of shooting her husband to avoid eviction—these examples suggest that landlords and police construct their own notions of a tenant's fault, one rooted in the failure of abused women to control their intimate partners and stop the violence directed at them.[263] This narrative, and the sentiments behind it, were echoed in the comments to a *New York Times* article about domestic violence and nuisance evictions. One landlord wrote, "'*if the tenant is unwilling to make better judgments about the men they allow to live with their children*, then we feel we have to act.'"[264] According to this narrative, female tenants who experience domestic abuse are at fault for not exercising better judgment, for not leaving, and for failing to control the violence of their intimate partners.[265]

B. Vulnerability as Fault

Arguably, the real "nuisance" being targeted in these domestic-violence instances is a person's vulnerability. A call to 911 is a call for

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261. *Id*. at 135 (alteration in original) (emphasis added).

262. *Id.* (emphasis added) (quotation marks omitted).

263. Other examples include a landlord who "noted that a tenant's 911 abuse calls had to do with a 'domestic violence issue that *she seems to have no ability to control*.' The landlord continued, 'Her lease is up at the end of May and she has been counseled that *if her behavior does not change* she will also be non-renewed.'" *Id*. (emphasis added).

264. Max Liboiron, *Twenty-First Century Nuisance Law and the Continued Entanglement of Race, Gender, Property, and Violence*, DISCARD STUD. (Aug. 19, 2013), http://discardstudies.wordpress.com/2013/08/19/twenty-first-century-nuisance-law-and-the-continued-entanglement-of-race-gender-property-and-violence (emphasis added).

265. This is particularly troubling when one considers that domestic violence itself is "a crime of control." Adams, *supra* note 250, at 4 (citing John C. Nelson, Ronald B. Adrine, Elaine Alpert, Sara Buel & Corinne Graffunder, *Domestic Violence in the Adult Years*, 33 J.L. MED. & ETHICS 28, 29 (2005)).

help, an expressed *need for assistance*. Under the nuisance ordinances, this call is also the basis for eviction.[266] One explicit rationale behind nuisance ordinances is the idea that the residents in these properties are overusing the limited resources of police and emergency personnel; the need that is prompting these visits is cast as excessive.[267]

Indeed, there are important links between vulnerability and home rule ordinances at large.[268] Although home rule ordinances potentially implicate all parents and tenants that reside in cities that have passed these ordinances, in practice, "the burden falls disproportionately on a select few."[269] Due to the demographics of parents and renters, as well as the manner in which home rule ordinances are enforced, the "select few" are often members of vulnerable groups.[270] The results of the Milwaukee study, for instance, suggest that nuisance ordinances are heavily inflected with issues of gender, class, and race.[271] The study authors found that "[p]roperties in black neighborhoods disproportionately received citations," and

266. A similar slippage occurs in the nuisance context. The ACLU lawyer representing Lakisha Briggs told the *New York Times:* "The problem with these ordinances is that they turn victims of crime who are pleading for emergency assistance into 'nuisances' in the eyes of the city." Liboiron, *supra*, note 264. One academic offers an insightful analysis of this quote, suggesting that it taps into a long-running historical vein that connects race with nuisance. As he notes, this "turn of phrase, whereby people—women, and usually black women—are *turned into both a form of pollution and a force that precludes the enjoyment of one's property*," is "part of a long historical trend." *Id.* (emphasis added).

267. Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1181–82 (2008).

268. In legal scholarship, group-based ideas of vulnerability are often understood to be in conflict with "universality-based" ideas of vulnerability. "On the one hand, vulnerability is often used to analyze specific populations; on the other hand, Martha Fineman has developed a vulnerability thesis that is expressly universal in its scope and 'post-identity.'" Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: The Promise of An Emerging Concept in European Human Rights Convention Law*, 11 INT'L J. CONST. LAW 1056, 1060 (2013). Here, "vulnerable groups" is meant to convey the idea that certain identity-based groups have historically been subjected to discrimination, and that although "people are differently vulnerable," vulnerability is "partially constructed depending on economic, political, and social processes of inclusion and exclusion." *Id.*

269. Buerger, *supra* note 54, at 110. A significant portion of the population is parents or guardians, and over one hundred million tenants live in rental properties nationwide. "According to the U.S. Census Bureau's 2009 American Housing Survey (AHS), there are 38.6 million occupied rental properties in the United States, which more than 100 million tenants call home." Hawkins, *supra* note 14, at 66.

270. Rental housing often conjures up associations with "urban 'concrete jungles.'" In truth, though, "the majority of renters live outside city centers, in 'suburban or nonmetropolitan areas.'" Hawkins, *supra* note 14, at 66.

271. Desmond & Valdez, *supra* note 42, at 136–39.

those located in more integrated black neighborhoods had the highest likelihood of being deemed nuisances.[272] The empirics of the study were as follows: "[o]f the 503 properties deemed nuisances, 319 were located in black neighborhoods."[273] The next largest number, 152, came from mixed neighborhoods, but of these mixed-neighborhood properties, 124 deemed nuisances were in neighborhoods "in which the proportion of black residents exceeded that of white or Hispanic residents."[274] Only 18 properties were deemed nuisances in white neighborhoods and 14 properties were deemed nuisances in Hispanic neighborhoods.[275]

Nuisance laws also affect other vulnerable group members, particularly the poor and disabled.[276] The *New York Times* article setting out the case of Lakisha Briggs also included a brief vignette about William Zarnoth, a sixty-two year old Milwaukee bartender.[277] He was evicted after too many 911 calls arising from a dispute between his roommates and another tenant in the building.[278] The eviction record made it difficult for him to find another apartment, leaving him in an eighty-dollar-per-week room without cooking facilities.[279]

Parental liability ordinances also have their greatest impact on vulnerable groups, particularly single-parent households, most of which are headed by women.[280] Households with single mothers are more prevalent than households with two parents and households with single fathers—leaving single mothers as the persons most likely to be affected by parental liability ordinances.[281] In situations where "the father-figure leaves the household or was never part of it," the

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272. *Id*. at 117.

273. *Id*. at 125.

274. *Id.*

275. *Id*.

276. For an examination of the impact of the one-strike policy in federal public housing upon the disabled, see generally Anne C. Fleming, *Protecting the Innocent: The Future of Mentally Disabled Tenants in Federally Subsidized Housing After* HUD v. Rucker, 40 HARV. C.R.-C.L. L. REV. 197 (2005).

277. Eckholm, *supra* note 199.

278. *Id.*

279. *Id.*

280. *See* Dimitris, *supra* note 11, at 676 ("Opponents [of parental liability ordinances] argue that parental responsibility statutes impose fines and imprisonment on parents who already have problems controlling their child in large part due to their financial shortcomings and lack of being physically proximate to the child.").

281. *Id*. at 675.

mother will be the one subject to the ordinance because it is she, rather than the absent parent, who will be regarded as "failing to control" the child."[282] In fact, single motherhood itself is often associated with fault. It is commonly perceived as being associated with, or perhaps even causative of, juvenile delinquency.[283] It is "presented as having a devastating impact on the institution of the family in the first instance and the fate of society in the long run."[284]

Socioeconomic status also plays a significant role in bullying. Countries with the highest wealth disparity also have the highest bullying rates.[285] Further, although bullies can be found at every layer of social strata, they are slightly more likely to come from middle-to low income backgrounds.[286] Also, bullying ordinances may tend to have their largest impact upon racial minorities, as Carson City, California, recognized in its decision to not enact an antibullying parental liability ordinance.[287]

Also, although parental liability ordinances subject all parents to the potential for fines and other escalating legal sanctions, parents who rent may face the additional consequence of eviction under the crime-free program. Crime-free lease addendums link the burden of security with home ownership because only homeowners can rest assured that they will not be displaced if their friends or family members engage in unlawful activities.[288] Freedom from displacement becomes a perk of home ownership, whereas those who choose to rent or must rent for financial reasons are subject to a different set of interventions.

Often, socioeconomic, gender, and racial divides separate home renters from homeowners. Vulnerable groups like racial minorities,

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282. *Id*.

283. Fineman, *supra* note 157, at 960.

284. *Id.* at 959 (quoting Martha Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 287 (1991)).

285. Pernille Due et al., *Socioeconomic Inequality in Exposure to Bullying During Adolescence: A Comparative, Cross-Sectional, Multilevel Study in 35 Countries*, 99 AM. J. OF PUB. HEALTH 907, 913 (2009).

286. Neil Tippett & Dieter Wolke, *Socioeconomic Status and Bullying: A Meta-Analysis*, 104 AM. J. OF PUB. HEALTH 48, 48 (2014).

287. Part of the opposition to the bill was based in the idea that it could be used in a racially discriminatory manner, to "further criminalize Black and Brown youth." Muhammad, *supra* note 88.

288. Professor David Garland posits that there are increasing and "developing divisions between property-owning classes and those social groups who are deemed a threat to property." Garland, *supra* note 44, at 463. Home rule ordinances may be such a distinction.

women, and the disabled are more likely to live in rental housing, and are therefore most often subject to these ordinances.[289] For instance, in Illinois, where over one hundred municipalities have adopted crime-free programs, the percentage of "non-Hispanic white households" that rent is only 25%.[290] In contrast, "59.1% of African-American households, 47.4% of Hispanic households, and 38.3% of Asian households rent."[291] In terms of gender, "[f]emale-headed households are more than twice as likely to rent as the general population."[292] And, on a national basis, "41.8% of households with a nonelderly person with a disability rent, as compared to just 31.6% of households that rent overall."[293] These households are asked to shoulder the burden of preventing criminal activity in a way that members of other groups and homeowners are not. Ironically, these groups are also the least likely to have the resources available to engage in robust and successful third-party policing.

Some have argued that "[t]he poor (and perhaps particularly the working poor) frequently are seen as being at fault, and are found to be negligent or irresponsible if not wholly criminal in their actions."[294] There is arguably an element of this in some of the narratives surrounding home rule ordinances. For instance, there exists a curious slippage, or a sort of conflation, of the actual wrongdoer with the person held vicariously liable for that wrongdoing. Rather than portraying the parent or tenant as the means to an end (that end being deterrence), parents and tenants are themselves configured as wrongdoers in a way that connects to vulnerability. In *Rucker*, for example, after suggesting that deterrence and enforcement justifications supported the one-strike policy's strict-liability nature, the Court offered a final justification for the imposition of strict liability: "*Regardless of knowledge, a tenant who cannot control drug crime, or other criminal activities by a household member which*

289. WERTH, *supra* note 123, at 5. These populations were also the most affected by the precursor to the crime-free lease addendum, the one-strike policy in federal housing. Austin, *supra* note 11, at 275–76. For more discussion of the ways in which policies connected to the war on drugs particularly impact women, see generally Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. GENDER, RACE, & JUST. 277 (2002).

290. WERTH, *supra* note 123, at 5 n.13.

291. *Id*.

292. *Id.*

293. *Id*.

294. Tyler & Segady, *supra* note 11, at 89.

threaten health or safety of other residents, is a threat to other residents and the project."[295]

Thus, according to the Court, the tenant herself *is* at fault. She cannot control drug or other crime, and thus becomes a "threat" herself, endangering the security of the other tenants and the community at large.[296] Whereas earlier in the opinion the Court held that "control" merely meant "permitted access to the premises," when considering the strict-liability nature of the one-strike policy, the Court redefined "control" to mean the ability to govern or impose one's will upon others—and the lack of control was itself blameworthy.[297] In other words, it is the tenant's lack of control of others, her lack of power, or her *vulnerability* that renders her a threat to security.[298]

C. The Framing Effect

Vicarious liability also performs a powerful framing function for home rule ordinances. It suggests that the blame for criminal or drug-related behavior falls upon the individual wrongdoer and his or her social or familial others, to the exclusion of everything else. As with the dominant criminal law narrative, the focus in this narrative is very narrow. The criminal law tends to tell stories of "individuals, as opposed to complex systems and institutions,"[299] and explains crime as a "problem of individual criminal pathology."[300] It "obscures the economic and sociological conditions" connected to crime, and

295. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002) (emphasis added) (quotation mark omitted).

296. "Ultimately, according to *Rucker*, families who are unable or unwilling to control household members who engage in criminal activities threaten the health and safety of other residents in the development." Rodney, *supra* note 137, at 746. The court in *Dayton Metropolitan Housing Authority v. Kilgore*, 958 N.E.2d 187 (Ohio Ct. App. 2011), made a similar point. *Id.* at 190.

297. *Kilgore*, 958 N.E.2d at 189 (quoting *Rucker*, 535 U.S. at 131).

298. The disease metaphors that surround the social problems of bullying, drugs, and criminality also contribute to the idea of a shared blameworthiness. These "social ills" are described as "epidemic, pandemic, and contagious," and as "viral." Ahrens, *supra* note 160, at 1675, 1688. Those words make it easy to imagine members of the same household sharing the same affliction.

299. Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 468 (2006)

300. Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 624 (2009).

thereby "relieves 'pressure on the government and society'" to address these underlying factors.[301]

Vicarious liability in the home rule ordinances widens this frame ever-so-slightly, so that a wrongdoer's social or familial others are also included in the picture. However, additional complex contributors remain invisible and outside the borders of this new framing. Social dynamics are erased and recast as "characteristics of individuals," and the larger, structural factors that are correlated with crime and drug abuse—like poverty, economic inequality, and lack of opportunities—are ignored in favor of a simpler tale, according to which the individual wrongdoer and his or her family are the entire problem, and that problem can be solved through displacement.[302]

IV. SANCTIONING NONCOMPLIANCE

This Part explores how the vicarious liability nature of home rule ordinances pulls not just primary wrongdoers into the orbit of criminalization, but also their familial or social relations. Part IV.A discusses how those familial or social others then become subject to the same kinds of stigma that often follow those actually convicted of crimes. Further, those familial or social others become subject to the legal sanctions provided for in the ordinances, such as fines and, more significantly, eviction. Part IV.B addresses the significant negative consequences associated with employing eviction as a remedy. Eviction is a difficult event for anyone, but for low-income tenants, it can be devastating. Indeed, the end result of eviction for low-income tenants is often homelessness. Imposing eviction—and the resultant homelessness—on those who are unable to prevent their intimate others from engaging in wrongful acts implies that their failure has rendered them unworthy of a home, and thereby creates a "home rule" regarding who can maintain stable housing.

A. Criminalization and Stigmatization

The crime-free lease addendums and nuisance ordinances technically make tenants "*civilly* liable for the alleged *criminal*

301. *Id.* (quotations marks omitted).

302. JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY AND LAW 73 (2011) (quoting Renée Römkens, *Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women*, 13 YALE J.L. & FEMINISM 265, 285 (2001).

conduct" of others.[303] The parental liability ordinances go further and may make parents criminally liable for the alleged unlawful conduct of their children. All three ordinances have the same effect: tenants and parents are implicated in the criminality of those in their social circles and family groups. Crime thus becomes framed as a problem that results not just from individual pathology *but also from the failure of family and friends to prevent the behavior*. The ordinances "extend responsibility (and more importantly, liability) for 'community safety'" into the home and onto the shoulders of tenants and parents, and link the wrongful act with a failure of responsibility on their part.[304] Thus, through vicarious liability, social and familial relations become implicated in the wrongful act itself. Indeed, this is the very definition of vicarious liability: it imputes a wrongful act from one person to another, based on the relationship between them.[305] In the home rule ordinance narrative, then, individual wrongdoers as well as their social and familial relations are responsible for any unlawful acts.

Grouping primary wrongdoers with their familial or social others places all parties beneath the "criminal" umbrella, under which no one is "innocent."[306] Friends and family members often suffer "secondary stigma and ostracism" because of their relationship to those convicted of crimes.[307] Home rule ordinances magnify this stigma, lumping friends and family into the category of "criminal" despite a lack of individual wrongdoing (and even though the underlying bad act may not even have constituted a crime in the strict sense).[308] This is a significant event: "As Professor Alexandra Natapoff recently observed, for a person who has been publicly transformed from law-abiding citizen into criminal, a significant psycho-social line has been crossed."[309] Families become subject to "othering," a common practice of social control that systematically

303. Mele, *supra* note 11, at 124.

304. *Id*. at 129.

305. SAMAHA, *supra* note 9, at 229.

306. As one proponent of the crime-free lease addendum asserted, there "is no innocent resident." *Chaos to Calm with Crime Free Multi Housing*, CTR. FOR PROBLEM-ORIENTED POLICING, http://www.popcenter.org/library/awards/goldstein/2011/11-08.pdf (last visited Jan. 16, 2015).

307. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1108 (2013).

308. *See supra* text accompanying note 134.

309. *Id.* at 1112 (quotation marks omitted).

denies certain groups "full participation in civil society" and labels them with "pariah status."[310]

B. Eviction

Although the parental liability ordinances that specify fines as their attendant sanction are problematic, the stigmatizing and disenfranchising impact of the eviction sanction renders it an especially devastating event, particularly for low-income tenants.[311] Homes serve more than just a functional purpose. In addition to providing physical shelter, homes "can serve as a 'person's security, self-identity, and center for social interaction.' A home represents a family's safe haven, . . . 'a place of privacy and security.'"[312] Furthermore, "[i]n terms of self-identity, a home can reflect its occupant's sense of self. It provides space to develop and express an identity."[313] It provides a place to nurture oneself and others.[314] It is the site for most familial and many social interactions, a center for interacting with others. In essence, home is "a means for the physical and social location of a person, his private life and his social relationships."[315]

Given all the practical, psychic, and social attachments to home, it is not surprising that moving is commonly cited as the third most stressful life event, after death and divorce.[316] Eviction, or forced moving, is even more so, as it lacks the hope or upward mobility associated with most voluntary moves. Eviction is "a severely consequential and traumatic event. Researchers have linked eviction

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310. Mele & Miller, *supra* note 183, at 22 (quotation marks omitted).

311. Fines can be very difficult for low-income families to pay. Such sanctions are "insidious in part because they often are assessed with little to no attention paid to the defendant's circumstances," and therefore, they often result in "severe consequences" for individuals and families. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 281 (2014).

312. Heinle, *supra* note 173, at 229.

313. *Id.* at 229 n.104 (quoting Megan J. Ballard, *Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy*, 56 SYRACUSE L. REV. 277, 285 (2006)).

314. *Id.* at 229.

315. HCJ 7015/02 Ajuri v. IDF Commander [2002] (Isr.).

316. Jeff Wuorio, *Make Your Move Less Stressful*, USA TODAY (Jan. 17, 2014, 10:31 AM), http://www.usatoday.com/story/life/weekend/living/2014/01/17/make-your-move-less-stressful/4531323.

to homelessness, material hardship, increased residential mobility, job loss, depression, and even suicide."[317]

Although eviction is stressful for anyone, those with enough socioeconomic resources are usually able to find equivalent housing. For low-income tenants, however, "[t]he mark of eviction on one's record often prevents tenants from securing affordable housing in a decent neighborhood, and it disqualifies them from many housing programs."[318] Thus, "[f]or many, if not most, low-income tenants, eviction leads to immediate homelessness."[319] In part, this is because of the stigmatization associated with evictions:

> Evictions carry a stigma. Many landlords will not rent to persons who have been evicted, and an eviction can also ban a person from affordable housing programs. Tenants who are evicted often lose not only their homes but their possessions as well, stripping them of the few assets they had. Once evicted, tenants often find themselves forced to move from one undesirable location to another.[320]

Crime, mediated through the civil law, serves as the trigger that sets a household on this downward spiral.[321] Just as in the one-strike

317. Desmond & Valdez, *supra* note 42, at 137. Eviction also has a significant negative impact upon children. It can lead to poorer school performance, increased truancy, and an increased risk of dropping-out. Matthew Desmond, Weihua An, Richelle Winkler & Thomas Feriss, *Evicting Children*, 92 SOC. FORCES 303, 303 (2013). Further, "increased residential mobility has also been linked to higher rates of adolescence violence and children's health risks." *Id.* These health risks are exacerbated when evictions force families to relocate to substandard homes. *Id.* Indeed, eviction also negatively impacts entire communities. It can "contribute to neighborhood disadvantage," "unravel the fabric of a community," and thwart "efforts to establish and maintain social capital, local cohesion and community investment. Eviction, then, can result in negative consequences, not only for children of evicted households, but also for *all* children who live in high-eviction neighborhoods." *Id.* (citations omitted).

318. *Id*. Gentrification is also hinted at in the eviction policies. "As a process, gentrification entails often-intentional displacement of poor residents, class conflict, and, at times, violence." Kaplan-Lyman, *supra* note 41, at 187. It has been suggested that the one-strike policy is performing similar work in Chicago. One study found that "the number of one-strike cases across the city increased sharply in CHA developments where demolition was eminent," and also rose dramatically in the mixed-income units created to replace those housing units. Caputo, *supra* note 221. As one community organizer stated, "These policies are intended to push people out." *Id.*

319. Levy, *supra* note 12, at 564.

320. Matthew Desmond, *Poor Black Women are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MACARTHUR FOUND. 2 (Mar. 2014) http://www.macfound.org/media/files/HHM_Research_Brief_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf.

321. Indeed, even things that are only "crimelike" serve as triggers. One Las Vegas landlord describes what triggered a family's eviction in her building: "Because of our Block Watch efforts, we helped police find a juvenile who was shooting an air gun in the neighborhood. . . . Within a couple of days a suspect was apprehended by police from information received from

policy context, the ability or inability to control crime has become an "an unacknowledged way" of determining who is or is not worthy of having a home.[322] Home rule ordinances serve as a sorting tool, but one that only applies to certain portions of the population. This raises questions of "equity across economic class lines," for while a renting family subject to a crime-free lease addendum might find itself homeless following one member's "simple possession or use of a small quantity of cocaine," for a home-owning middle-class family, that same offense might result only in judicially mandated drug treatment.[323]

Despite the significance of eviction, and the fact that it is often a precursor to homelessness for low-income tenants, courts have held that eviction is not technically a "punishment."[324] For civil crime-free and nuisance ordinances to be considered "punishment," the test is "'whether the statutory scheme was so punitive either in purpose or effect . . . as to transform what was clearly intended as a civil remedy

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Stanford Court's Block Watchers. The Crime Free Lease Addendum was used to evict the family from the community." *Crime Free Multi-Housing Program: Landlord Training Manual*, LAS VEGAS METRO. POLICE DEP'T, http://www.lvmpd.com/ProtectYourself/CrimeFreeMultiHousing/tabid/110/default.aspx (last visited Jan. 16, 2015).

322. SIMON, *supra* note 49, at 196.

323. Weil, *supra* note 11, at 177, 178. Not surprisingly given the demographic of renters and those affected by home rule ordinances,

> [t]he most common family composition in the homeless population is a female with a child or children. Forty percent of the homeless population is made up of families with children. Of those families, eighty-four percent are female-headed. Families of color are particularly likely to be homeless, and more than fifty percent of the homeless population is African American or Latino. This population is demographically similar to the population living in subsidized housing, although an even greater percentage of those living in subsidized housing are families with children.

Madeline Howard, Note, *Subsidized Housing Policy: Defining the Family*, 22 BERKELEY J. GENDER L. & JUST. 97, 103 (2007) (footnotes omitted).

324. Levy, *supra* note 12, at 558 n.121 (citing City of New York v. Wright, 618 N.Y.S.2d 938, 939 (N.Y. App. Term 1994)). The dissent at the intermediate appellate level in *Rucker* made a similar observation:

> [E]victions in these circumstances are not punitive. They are remedial. A civil sanction is punitive when it serves "either retributive or deterrent purposes." Eviction serves the classic purpose of a contractual remedy—it returns the parties to "as good a position as that occupied . . . before the contract was made." The remedy of eviction alone is not punitive.

Rucker v. Davis, 237 F.3d 1113, 1141 (9th Cir. 2001), *rev'd*, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (citations omitted). The fact that the city often requires landlords to evict on the basis of crime-free lease addendums could, however, change this analysis. *See infra* note 334.

into a criminal penalty.'"[325] Whether a sanction can be classified as a "punishment" has significant legal consequences, but "[s]uch legal distinctions . . . likely mean very little" to those upon whom the sanctions are visited.[326] For example, to "a mother who loses her apartment due to the actions of her son . . . eviction feels clearly punitive."[327] Paying attention to those who, like the mother referenced above, are "at the receiving end of these exercises of state power" reminds us that the "blurring of boundaries" between civil regulation and criminal punishment is not merely a problem of conceptual incoherence for legal scholars, but also one of perceptual legitimacy for those subject to such sanctions.[328]

V. CHALLENGING HOME RULE ORDINANCES AND CREATING NEW POSSIBILITIES

Some of "those who are at the receiving end of these exercises of state power" have begun challenging home rule ordinances in the courts.[329] Part V.A offers a brief outline of the emerging legal landscape challenging home rule ordinances. Part V.B examines the shortcomings of the evidence supporting home rule ordinances, and suggests alternative approaches the municipalities could consider instead. These alternative approaches arguably both better target the social problems motivating the home rules ordinances, and avoid the negative impacts that the ordinances impose.

A. Challenging Home Rules

Advocates have launched three main avenues of challenge. The first line of argument is that home rule ordinances exceed the bounds of the home rule authority grant. The second major basis for challenging these laws is that they conflict with state laws. The third ground is that the ordinances violate federal or state constitutions, or other remedial statutes. In this regard, advocates have had some

325. Levy, *supra* note 12, at 558 n.121 (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)).

326. *Id.*

327. *Id*. The eviction policies bear an uncanny resemblance to the "move along" policies initially employed to force undesirables out of public spaces. Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 372 (2001).

328. Austin Sarat, Lawrence Douglas & Martha Merill Umphrey, *On the Blurred Boundary Between Regulation and Punishment*, *in* LAW AS PUNISHMENT / LAW AS REGULATION, *supra* note 77, at 1, 7.

329. *Id*.

success arguing that parental liability ordinances violate substantive due process, crime-free ordinances violate procedural due process, and nuisance ordinances violate both due process and the First Amendment.

1. *Exceeds Grant of Home Rule Authority*. Because home rule ordinances usually rely upon the grant of home rule authority for their existence, they are vulnerable to arguments that they exceed the bounds of that authority. For example, in Cedar Rapids, Iowa, a group of landlords successfully challenged a mandated crime-free lease addendum.[330] Landlords, like evicted tenants, are often unhappy with these ordinances for a variety of reasons. First, landlords must invest both time and money when evicting tenants: the process can be long and legal expenses can total in the hundreds or thousands.[331] Second, the landlord must serve as a de facto "criminal prosecutor" in proceedings in which they bear the burden of proving, on a balance of probabilities, that the "tenant or tenant's guest performed a criminal act."[332] This role requires a significant amount of legwork, including gathering evidence like witness testimony, records, and documents.[333] More fundamentally, landlords may resent having to perform these activities and evict people whom, either as a matter of business judgment or for personal reasons, they do not wish to evict.[334]

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330. Landlords of Linn Cnty. v. City of Cedar Rapids, Iowa, No. EQCV069920, *available at* http://landlordsoflinncounty.org/wp-content/uploads/downloads/2011/07/Chapter-29-Ruling-7-6-11.pdf.

331. Editorial, *Landlord-Tenant Ordinance Fails the Test*, GAZETTE (Apr. 3, 2014, 3:09 PM), http://thegazette.com/2011/07/16/landlord-tenant-ordinance-fails-the-test. Indeed, because crime-free lease addendums (and nuisance ordinances) increase a landlord's cost of doing business, they may result in reducing low-income rental housing. Letter from Katherine E. Walz, Jeremy Bergstrom & Emily Werth, Sargent Shriver Nat'l Ctr. on Poverty Law to Rockford City Council (Jan. 15, 2013), *available at* http://povertylaw.org/sites/default/files/webfiles/Letter%20to%20Belleville%20City%20Council%20on%20Crime%20Free%20Housing%20Ordinance.pdf.

332. Richard Magnone, *Crime Free Addendums in Illinois*, CHICAGOEVICTION.COM (July 7, 2011), http://chicagoeviction.com/2011/07/crime-free-addendums-in-illinois.

333. *Id.*

334. Indeed, while the one-strike policy allowed housing authorities to evict tenants who failed to prevent the wrongful actions of others, it did not require that they do so. Housing authorities were free to use the "innocent tenant" defense if they felt it appropriate. Rachel Hannaford, Comment, *Trading Due Process Rights for Shelter:* Rucker *and Unconstitutional Conditions in Public Housing Leases*, 6 U. PA. J. CONST. L. 139, 140 (2003). In contrast, cities often require private landlords to evict on the basis of crime-free lease addendum violations, or face a series of escalating sanctions.

The Cedar Rapids landlord association, a nonprofit corporation, alleged that the ordinance mandating crime-free lease addendums violated the city's home rule powers. The home rule grant at issue gave cities a broad power to "exercise any power and perform any function . . . appropriate to protect and preserve the rights, privileges, and property" of the city and "to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents," but explicitly excluded "the power to "enact private or civil law governing civil relationships."[335] The association argued that the ordinance fell within the exclusion, and the court agreed. The judge held that this sort of limitation to the freedom of contract between a landlord and a tenant was indeed an attempt to "enact private or civil law governing civil relationships."[336]

2. *Conflicts with State Law*. In addition to the finding that the city ordinance exceeded home rule authority, the court in *Landlords of Linn County v. City of Cedar Rapids* also held that the ordinance was in conflict with the Iowa law setting out grounds for eviction.[337] The state law provided that "clear and present danger presented by a tenant" was a basis for eviction.[338] The court found that the city's expansion of this standard to encompass "all criminal law violations, including simple misdemeanors," and to include not only a tenant's own violations, but also those committed by guests, even without the tenant's knowledge, "was not reconcilable" with this state standard.[339]

335. IOWA CODE ANN. § 364.1 (West 1999 & Supp. 2014). Over one hundred years ago, American cities were granted home rule authority. This authority allows them "to legislate on a broad range of social and economic policies without prior state legislative approval." Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1100 (2012). The range of acceptable legislative areas typically includes those of "local" or "municipal" concern, and often excludes certain areas like taxing and spending powers, or areas of private or civil law. DAVID J. MCCARTHY, JR. & LAURIE REYNOLDS, LOCAL GOVERNMENT LAW IN A NUTSHELL 26 (5th ed. 2003).

336. Landlords of Linn Cnty. v. City of Cedar Rapids, Iowa, No. EQCV069920, *available at* http://landlordsoflinncounty.org/wp-content/uploads/downloads/2011/07/Chapter-29-Ruling-7-6-11.pdf. Although the contractual nature of the relationship in this instance rendered the eviction policy void, the contractual nature of the landlord–tenant relationship led to the opposite result in *Rucker*, 535 U.S. 125 (2002). There, the Supreme Court held that because the government was acting as a landlord, and the basis for eviction was a contractual violation, as a matter of the private law between landlord and tenant, a strict-liability standard was acceptable. *Id.* at 136.

337. *Landlords of Linn Cnty.*, No. EQCV069920, at 3.

338. *Id.*

339. *Id*.

Crime-free lease addendums have caused similar state–city tension in Wisconsin. At one point, Wisconsin rejected the possibility of cities mandating crime-free lease addendums based in strict liability and created a statutory ban that voids such lease terms.[340] Under that statute, tenants could not be evicted on a vicarious liability standard for criminal activity on or near the premises.[341]

A parental liability ordinance in a suburb of Cleveland, Ohio, was also recently struck down on the grounds that it conflicted with a state law.[342] The ordinance did "not require a showing that the parent specifically knew about or contributed to the child's violation or criminal wrong," and provided that a third offense could result in a 180-day jail term for the violating parent.[343] Under the ordinance, parents could raise the defense that they had taken reasonable steps to control the child, but the Ohio Court of Appeals held that this was not enough to reconcile the ordinance with a state statute that required there to be an underlying "act or omission as a predicate for culpability."[344]

3. *Constitutional and Other Concerns*. Municipal parental liability ordinances have also been challenged on another basis: substantive due process. In *State v. Akers*, a statute was found to be invalid for similar reasons to the Ohio suburb ordinance: it "did not

340. S.B. 466, Wisconsin Landlord Omnibus Bill, § 704.44 (9) (Wis. 2011). *See* Tim Ballering, *WI Landlord Omnibus Bill, Leases and Criminal Activity*, JUST A LANDLORD (Mar. 23, 2012), http://justalandlord.com. Initially, the statute provided that "a residential rental agreement is void and unenforceable if it does any of the following . . . allows the landlord to terminate the tenancy of a tenant if a crime is committed in or on the rental property, even if the tenant could not reasonably have prevented this crime." *Id.* This was later modified to void lease terms that "[a]llow[] the landlord to terminate the tenancy of a tenant based solely on the commission of a crime in or on the rental property if the tenant, or someone who lawfully resides with the tenant, is the victim . . . of that crime." *See* Tim Ballering, *The New Wisconsin Landlord Tenant Law, Criminal Activity and Leases*, JUST A LANDLORD (Oct. 22, 2013), http://justalandlord.com/2012/03/23/wi-landlord-omnibus-bill-leases-and-criminal-activity.

341. *Id*.

342. Maple Heights v Ephraim, No. 90237, slip op. (Ohio Ct. App. Sept. 11, 2008).

343. *See* Collins et al., *supra* note 15, at 1340.

344. *Id*. It should also be remembered that parents of children who are bullied might have an available remedy in tort law. For instance, in the Georgia-based case of *Boston v. Athearn*, 764 S.E.2d 582 (Ga. Ct. App. 2014), parents of a seventh-grader whose classmate created a fake Facebook page about her brought an action against the classmate and his parents. In Georgia, parents can be liable for negligence when they "fail[] to exercise reasonable care to prevent a child under his control from creating an unreasonable risk of harm to third persons, where he has knowledge of facts from which [they] should reasonably anticipate that harm will otherwise result." *Id.* at 586 n.5 (quoting Assurance Co. of Am. v. Bell, 134 S.E.2d 540, 541 (Ga. Ct. App. 1963) (quotation marks omitted)).

impose liability on the basis of any act or omission committed by a parent but instead imposed liability solely because of an individual's status as a parent," and was therefore found to have "violated the due process clause of the state constitution."[345] A parental liability ordinance in Trenton, New Jersey, was also struck down on substantive due-process grounds. There, the court noted that rather than being an "overriding cause of juvenile misconduct," parental influence was simply one factor in a constellation of factors leading to such behavior.[346] However, in *Williams v. Garcetti*,[347] the court rejected an argument that a similar state parental responsibility law violated due process.[348]

Although there is certainly an argument to be made that crime-free lease ordinances violate substantive due process,[349] most of the successful challenges have sounded in procedural due process. In one case, *Javinsky-Wenzek v. City of St. Louis Park*,[350] two landlords who were ordered by the city to terminate a tenancy when a small amount of marijuana was discovered on the premises brought a Section 1983 action against the City.[351] In a proceeding seeking a preliminary injunction against the municipality, the court found that the landlords were "likely to prove that the City violated their procedural due process rights," but were not likely to prove the substantive due process claim. The court concluded that the ordinance in question "did not appear sufficiently irrational or outrageous to violate

345. *See* MARKEL ET AL., *supra* note 110, at 68

346. Doe v. City of Trenton, 362 A.2d 1200 (N.J. Super. Ct. App. Div. 1967). The court also noted that, "[w]hile Euripides reminds us that the gods often visit the iniquities of the fathers upon the children, we are not yet prepared to say that the converse ought to be so." *Id.* at 1203..

347. Williams v. Garcetti, 853 P.2d 507 (Cal. 1993).

348. *Id.* at 577.

349. Privacy and autonomy rights may be implicated, as "[t]he right of an individual to conduct intimate relationships in the intimacy of his or her own home seems . . . to be the heart of the Constitution's protection of privacy." Bowers v. Hardwick, 478 U.S. 186, 208 (1996) (Blackmun J., dissenting), *quoted in* Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 IND. L. REV. 311, 311 (2013). Also, "the Supreme Court has enshrined several family-oriented rights in its jurisprudence, including rights to determine when and where to bear a child; rights to the care, custody, and control of one's children; and the right to marry the person of one's choice." Kerry Abrams, *What Makes the Family Special*, 80 U. CHI. L. REV. 7, 23 (2013).

350. Javinksy-Wenzek v. City of St. Louis Park, 829 F. Supp. 2d 787 (D. Minn. 2011).

351. The marijuana was discovered during a search of the tenant's home, which was conducted after their adult son, who was "not on the lease and allegedly did not reside at the property . . . purportedly stole a number of items from a drug dealer, including drugs." *Id.* at 790.

substantive due process," and that the ruling in *Rucker* likely would stand as a rational basis for it.[352]

Procedural due process has also successfully been raised against nuisance ordinances. In *Cook v. City of Buena Park*,[353] the court held that a nuisance ordinance violated procedural due process.[354] There, the city had ordered a landlord to evict all the occupants of a rental unit after a tenant's roommate had been cited for "possession of drug paraphernalia."[355] The roommate successfully completed a drug-treatment program, which resulted in no criminal conviction, but the city nevertheless wished to proceed with an eviction.[356] The court found that the ordinance at issue was constitutionally infirm because "the notice requiring the landlord to institute unlawful detainer proceedings provided insufficient information to prosecute the action," "the 10-day period was inadequate for the landlord to garner evidence to support its eviction action," and "the ordinance required the landlord to prevail in the eviction action or face fines, penalties, a lien on his or her property, and even misdemeanor punishment."[357]

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352. *Id.* at 796. The argument that the one-strike policy "violates the substantive due process norm of individual guilt, which is fundamental to our concept of justice, and deeply embedded in our nation's history and traditions" was rejected in *Rucker*. *See* Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Northern California, in Support of Respondents at 3, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (Nos. 00-1770, 00-1781), 2001 WL 1699135, at *7.

353. Cook v. City of Buena Park, 23 Cal. Rprtr. 3d 700 (Cal. Ct. App. 2005).

354. *Id.* at 701.

355. *Id.*

356. *Id.*

357. *But see* City of Peoria v. Danz, 2011 Ill. App. LEXIS 100819, at *1 (upholding a differently worded nuisance ordinance). In the nuisance context, it has been noted that cities have been attempting to indirectly accomplish through landlords what due process precludes them from doing directly. For instance, as attorney Sara Rose noted in the Lakisha Briggs case, "It was clear even to Norristown that a government entity cannot unilaterally kick someone out of their home without due process . . . so instead, they are trying to kick people out of their homes without due process by penalizing landlords if they don't evict." Anna Stolley Persky, *Ordinance That Evicts Tenants for Seeking Police Aid Is Putting Abused Women out on the Street*, A.B.A. J. (Sept. 1, 2013, 8:50 AM), http://www.abajournal.com/magazine/article/ordinance_that_evicts_tenants_for_seeking_police_aid_is_putting_abused_wome. Indeed, in the accompanying legal proceedings, the city acknowledged that the evictions would be unconstitutional if they attempted to do them directly. Debra Cassens Weiss, *Do Laws That Encourage Eviction for Repeated 911 Calls Violate First Amendment? ACLU Presses Case*, A.B.A. J. (Sep. 19, 2013, 1:26 PM), http://www.abajournal.com/news/article/do_laws_that_encourage_eviction_for_repeated_911_calls_violate_first_amendm. The ordinances thus appear to provide cities with a way "to exploit the apparently 'private' sphere in order to engage in unquestionably illegal activity," a phenomenon that has been identified in the rendition context at the international level, and appears to be repeating here at the smaller, local level, as well.

A concurring judge in *Cook v. Buena Park* suggested that the ordinance might also violate substantive due process. The judge noted that in addition to the procedural due-process claim, there were "other, more fundamental" constitutional concerns, including the ordinance's "sweeping requirement that all occupants of the premises must be evicted for the sins of one," the "disparate treatment of property owners and renters" (particularly since the court's "record reflect[ed] no nuisance abatement efforts against the owners of property for similar crimes"), and the "Damoclean substantive due process issue" looming "over this statutory scheme."[358]

In addition to the due-process concerns identified in *Cook v. Buena Park*, nuisance ordinances have also attracted challenges on other constitutional grounds related to domestic violence.[359] In East Rochester, New York, two female victims of domestic violence sued the city on the basis that the nuisance ordinance stopped them from calling police for assistance, out of fear of being evicted.[360] The impugned ordinance required landlords to evict tenants if there were three calls to police requesting assistance at the premises within twelve months, and explicitly included calls made for domestic violence, with no exception made for calls initiated by the person victimized by the behavior.[361] The plaintiffs claimed that their First Amendment "right to petition for a redress of grievances" was violated, and the suits were settled with a one hundred thousand dollar payment and a change to the ordinances.[362]

The case that the ACLU brought against Norristown, Pennsylvania, on behalf of evicted tenant Lakisha Briggs, also resulted in a settlement. Like the plaintiffs in East Rochester, the ACLU argued that the ordinances violated Lakisha Briggs's due-process rights and her First Amendment "right to petition for a

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Fiona de Londras, *Privatized Sovereign Performance: Regulating in the 'Gap' Between Security and Rights?*, 38 J.L. & SOC'Y 96, 97 (2011).

358. Cook v. City of Buena Park, 126 Cal. App. 4th 1, 23 (Cal. Ct. App. 2005) (Besworth, J., concurring). "Damoclean" is a reference to a figure in Greek mythology. Damocles was forced to sit with a sword suspended above his head, held only by one hair.

359. Both landlords and tenants have potential claims against nuisance ordinances. Landlords may argue that the "threats of fines, property seizure, and jail time" imposed by the ordinances violate the Fourth Amendment. Desmond & Valdez, *supra* note 42, at 138.

360. Persky, *supra* note 357.

361. Second Amended Complaint at 1, Grape v. Town/Village of East Rochester, No. 07 CV 6075 CJS (F), *available at* http://www.nhlp.org/files/Grape%20WDNY%20nuisance%202d%20compl.pdf (last visited Jan. 16, 2015).

362. Persky, *supra* note 357.

redress of grievances."[363] The case settled for $495,000, the repeal of the offending ordinances, and a promise not to enact a similar law in the future.[364]

This advocacy led to the repeal of nuisance ordinances in additional Pennsylvania cities, such as Mount Oliver and Forest City.[365] Indeed, raising awareness of this issue ultimately led to a statewide law in Pennsylvania. Like laws prohibiting landlords from evicting tenants for reasons related to domestic violence that have been enacted in California, Colorado, Minnesota, Wisconsin, Washington, and New Mexico,[366] the Pennsylvania law provides "protection for any resident, tenant, or landlord who faces penalty under a local ordinance because police or emergency services were called or responded to a situation where intervention was needed in response to abuse, crime, or an emergency."[367] This state law also "authorizes residents and landlords to seek remedies in court against any municipality that violates these protections."[368]

The Norristown case also attracted action at the federal level. The federal government brought a complaint against Norristown, alleging that the city's nuisance ordinance violated the Fair Housing Act "by discriminating against domestic violence survivors, the vast majority of whom are women."[369] The complaint resulted in a conciliation agreement "that requires training and ongoing monitoring of Norristown's activities."[370]

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363. *Id*.

364. Michaela Wallin, *Victims of Crime No Longer Have to Fear Calling 911 in Pennsylvania*, ACLU (Nov. 3, 2014), https://www.aclu.org/blog/womens-rights/victims-crime-no-longer-have-fear-calling-911-pennsylvania.

365. *Id.*

366. Justin Henry Lubas, *The Lack of Protection Available to Victims of Domestic Violence in Private Housing*, 13–18 (Seton Hall Law eRepository, Student Scholarship, Paper No. 264, 2013). New York is also poised to pass a similar law. Wallin, *supra* note 364.

367. Wallin, *supra* note 364.

368. *Id.*

369. *Id.*

370. *Id.* The Violence Against Women Act (VAWA) may also provide an avenue of challenge. It forbids "evicting tenants from federal housing for lease violations or criminal activity related to domestic abuse," and some state and local laws have extended this protection to private housing as well. Desmond & Valdez, *supra* note 42, at 139. Consistent with VAWA, the statute authorizing the use of the one-strike policy contains an exception for domestic violence victims. After the *Rucker* decision, the statute was amended to provide protections to domestic violence victims. However, a lease can nevertheless be terminated if "the domestic violence poses an actual or imminent threat to others." Robert Hornstein, *Teaching Law Students to Comfort the Troubled and Trouble the Comfortable: An Essay on the Place of*

Given these successes on the state and federal level, it seems likely that the use of carve-outs for domestic violence in nuisance and crime-free ordinances will increase.[371] The question then becomes whether this carve-out will end up strengthening or weakening the remaining home rules edifice.[372] Although there is a possibility that any domestic-violence exclusions could ironically serve to strengthen home rules, the increasing public awareness about these ordinances and the associated problems could ultimately lead to their disuse and demise.[373] Despite the domestic-violence exclusion in the nuisance and crime-free ordinance context, the many problems with home rule ordinances in general remain, including their reliance on vicarious liability standards that offend notions of fundamental justice, their distributional impact on vulnerable populations, and their overall destabilizing and disruptive impact on families.[374] Some courts have begun to denounce these ordinances, and as the public becomes more aware of them and begins to understand that they are "not an easy panacea for local problems but rather are fundamentally problematic

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Poverty Law in the Law School Curriculum, 35 WM. MITCHELL L. REV. 1057, 1074 n.86 (2009) (citing 42 U.S.C. § 1437d(t)(6)(A)–(E) (2012)).

371. Although only four of the municipalities examined in the Milwaukee study excluded domestic violence from the list of qualifying nuisance activities (Chicago, Madison, Phillipsburg, and the Village of East Rochester), and thirty-nine ordinances included "assault, sexual abuse, battery, or domestic violence among their list of nuisance activities," the advocacy successes on this front will likely result in a shift in these numbers. Desmond & Valdez, *supra* note 144, at 3.

372. A domestic-violence exclusion is obviously a positive step towards mitigating the impact of these ordinances on victims of domestic violence, but it is not a perfect one. Emily Werth notes that,

> [b]ecause of the complex ways in which domestic abuse plays out, many cases involving victims remain likely to fall through the cracks of such protective language. E.g., often when a victim of abuse calls for police help, her abuser gets arrested for crimes that are not self-evidently related to domestic violence or the victim herself even winds up being arrested; the protections incorporated in ordinances usually do not account for these realities. Victims whose immediate focus is on safety for themselves and their children may not be able to take advantage of protective language even if it clearly would apply to their situation.

Emily Werth, *Stemming the Tide of Crime-Free Rental Housing and Nuisance-Property Ordinances*, 47 J. POVERTY L. & POL'Y 349, 350 n.5 (2014).

373. Several advocacy groups, including the ACLU and the Shriver Center, have "launched a national campaign called I am Not a Nuisance, aimed at raising awareness of the collateral damage caused by such ordinances and pressuring more states and municipalities to add additional protections for [domestic violence] victims." Rebecca Burns, *Under Local Laws, 911 Calls Turn Domestic Abuse Victims into 'Nuisances*,' AL JAZEERA AM. (Dec. 8, 2014, 5:00 AM), http://america.aljazeera.com/articles/2014/12/8/nuisance-ordinancesdomesticviolencevictims.html. Also, public awareness recently played a role in defeating an antibullying parental liability ordinance in Carson City, California. *See* Muhammad, *supra* note 88.

374. For an argument that the Fair Housing Act preempts crime-free and nuisance ordinances, see Wroe, *supra* note 16.

policies that can generate a host of harmful effects" for tenants, families, and communities, municipalities may start turning away from home rule ordinances and towards alternative methods of addressing social problems.[375]

B. Creating New Possibilities

1. *Questioning the Efficacy of Home Rules.* Municipalities should ask two questions when considering home rule ordinances: "'are these policies just' and 'will they work.'"[376] Ideally, the answer to both questions should be yes, but in the case of the home rule ordinances, the answer to both is arguably no. In any event, the fact that home rule ordinances are at least questionable in the first category means that they stand "in need of substantial justification" and the "will they work" question thus assumes special importance.[377] Unfortunately, there is a dearth of information as to the effectiveness of home rule ordinances. Although some anecdotal evidence exists, the kind of sustained scientific studies that ideally anchor new laws and policies have not yet been conducted.[378]

In regard to parental liability laws, the lack of research means that it is virtually "impossible to speak about whether they are a good tool or not."[379] No reliable research assessing the efficacy of parental liability statutes has been conducted, so we simply do not know much about their impact.[380] We do, however, know that there is a link between poor parenting and juvenile misconduct. One study found that a "lack of parental supervision, parental rejection and parent-child involvement, [were] among the most powerful predictors of juvenile conduct problems and delinquency."[381] However, other

375. Werth, *supra* note 372, at 25.

376. Garnett, *supra* note 57, at 1112.

377. *See* MARKEL ET AL., *supra* note 110, at xiii.

378. This is part of a troubling trend in governance. As Garland notes, "there is now a recurring gap between research-based policy advice and the political action which ensues." Garland, *supra* note 44, at 462. A similar gap between policy and empirics can be seen in the broken-windows policing literature. *See* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 8 (2001) (discussing the fact that "the famous broken windows theory has never been verified").

379. Patchin, *supra* note 249.

380. *Id.*

381. Ralph Loeber & Magda Stouthamer-Loeber, *Family Factors as Correlates and Predictors of Juvenile Conduct Problems and Delinquency*, *in* 7 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 29–149 (M.H. Tonry & N. Morris eds., 1986) (quotation mark omitted).

powerful predictors that do not involve parenting have also been identified. A "high cost of living, poor standards of education, inadequate recreation, and slums," as well as peer groups, have also been acknowledged as powerful predictors of problematic youth behavior.[382] There is no compelling evidence that choosing to target parenting instead of these other contributing factors will resolve the issue of youth misconduct. Nor is there evidence that punishing parents is an effective means of improving parenting skills.[383]

Anecdotally, though, Silverton, Oregon, has claimed that after enacting its parental liability law, the town "experienced a 44.5-percent reduction in juvenile crime and reduced levels of truancy."[384] On the other hand, an older U.S. Department of Health, Education and Welfare study comparing the juvenile crime rate in sixteen states with civil parental liability laws against the crime rate in states without them found that the juvenile crime rate in those sixteen states was "slightly higher than the national average."[385] Without a definitive empirical study supporting the proposition that parental liability laws decrease youth crime, dueling anecdotal evidence does not seem to justify the imposition of parental liability ordinances.[386]

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382. Weil, *supra* note 11, at 181.

383. JOHN HOWARD SOC'Y OF ALTA., *supra* note 96. "'We find no evidence that punishing parents has any effect whatsoever on the curbing of juvenile delinquency . . . . Imprisonment means breaking up the family; fining means depriving the child and family of sustenance.'" Gilbert Geis & Arnold Binder, *Sins of Their Children: Parental Responsibility for Juvenile Delinquency*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 319 (1991) (alteration in original) (quoting Paul Alexander, *Tort Responsibility of Parents and Teachers for Damage Caused by Children*, 16 U. TORONTO L.J. 165 (1965)). Judge Alexander presided over more than a thousand cases of contributing to juvenile delinquency in the 1930s and 1940s. *Id.*

384. *Parental Responsibility Laws*, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES 1994-1996, http://www.ojjdp.gov/pubs/reform/ch2_d.html (last visited Jan. 16, 2015).

385. *Id.* (citing Toni Weinstein, *Visiting the Sins of the Child on the Parent: The Legality of Criminal Parental Responsibility Statutes*, 64 S. CAL. L. REV. 863, 878 (1991).

386. *See id.* Interestingly, one study of juveniles in detention centers focused on how those juveniles perceived parental responsibility. Eve M. Brank & Jodi Lane, *Punishing My Parents: Juveniles' Perspectives on Parental Responsibility*, 19 CRIM. JUST. POL'Y REV. 333, 333–34 (2008). The demographics of the study suggest who is most likely to be impacted by parental liability ordinances: the sample of 147 children "was mostly African American (44%)," and "prior to living at the juvenile facility, 50.3% lived with their mother as the only parental figure." *Id.* at 338–39. The next largest category was Caucasian (35%), followed by "Hispanic (not Cuban) at 8%," and biracial or multiracial kids at 7%. *Id.* at 338. 20.4% lived with both parents, and 6.8% lived with just their fathers. *Id.* at 339. The youths were asked "how responsible do you think your parent(s) were for your activities that led to the arrest" and 75.5% responded with "not at all responsible." *Id.* at 342. However, 87.8% said that they would have been "less likely" to commit a crime if they knew that their parent(s) "would also be punished" for it. *Id.*

The efficacy of crime-free lease addendums and nuisance ordinances suffers from a similar lack of knowledge. First, it should be noted that proponents of crime-free housing ordinances often justify them on the basis that they are an appropriate response to the pressing social problem of high-crime rates in rental housing. However, these ordinances are sometimes passed as a means of crime prevention, rather than crime reduction, meaning that they are enacted in communities where crime is a rare occurrence. Instead, these communities enact these laws using the specter of a potential crime problem that could arise in the absence of these laws. For instance, Orland Park, a suburb of Chicago that enjoys a very low crime rate, recently adopted a crime-free ordinance. The mayor explained the reasons for its enactment: "It's not so much that there's major problems, but there are some problems, and we want to avoid problems in the future."[387] One landlord expressed skepticism that the purpose of the ordinance was at all connected to crime, pointing out that Orland Park's particular ordinance "defines room sizes and how many beds are allowed per room. 'There are things in there that I don't think are relative to being crime-free,' she said. 'I mean, how much crime do we really have in Orland Park?'"[388] Further, although Orland Park specifically acknowledged that crime was not a pressing social problem for its community, it should be noted that many cities claiming to suffer from heavy crime associated with rental housing rarely offer any statistics regarding the amount of crime on rental properties versus owner-occupied properties.[389]

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387. Carmen Greco Jr., *Orland Park Ordinance Requires Eviction of Troublesome Tenants*, CHI. TRIB., Jan. 23, 2009, http://articles.chicagotribune.com/2009-01-23/news/0901210789_1_ordinance-landlords-problem-tenants.

388. *Id.*

389. For example, in Belleville, Illinois, "the program was implemented to help reduce crime in rental housing," but "figures for criminal incidents in rental property were not immediately available." Jacqueline Lee, *How is the Belleville Crime-Free Program Doing?* BELLEVILLE NEWS, Jan. 28, 2014, http://www.bnd.com/so14/01/29/3029378/committee-will-meet-to-evaluate.html. Once the program started, there were 260 rental incidents in a two-month period, "ranging from loud music to marijuana possession to failure to register as a sex offender," and of those incidents, "12 resulted in evictions." *Id.* An article on Orland Park had a similar combination of a belief in high-crime rates for rental housing along with a lack of actual evidence to support that claim. Greco, *supra* note 387. The article describes how city "[o]fficials say crimes such as drug offenses, domestic disturbances and weapons violations come mainly from the village's 2,100 rental properties, although the village did not cite statistics." *Id.* Similarly, the United Kingdom has "made tackling anti-social behavior a priority," even though "the actual evidence from the Survey of English Housing and the British Crime Survey about the extent to which vandalism, graffiti, nuisance neighbours and teenagers 'hanging around' have become more serious problems in neighborhoods over the past 10 years is inconclusive."

Nevertheless, at least some communities do seem to experience higher crime rates associated with rental properties. Unfortunately, it is difficult to assess whether crime-free and nuisance ordinances help to reduce the crime associated with these residential units.[390] Although some anecdotal evidence exists, it suffers from two significant flaws. First, the most commonly used metric is not actually a reduction in crime. Instead, it is a reduction in the number of calls for police assistance. For instance, in Collinsville, Illinois, a Crime Free Housing Program Coordinator reported that "results from the first year of the program show a 30 percent reduction in calls to police in 'hotspots' or troubled property areas." However, during that same time period, the overall crime rate in "Collinsville increased by 4.2 percent," suggesting that calls for police assistance and actual crime rates may be divergent phenomena.[391] Similarly, the study of nuisance ordinances in Milwaukee raised the possibility that measures like home rule ordinances simply encourage less reporting of crime, rather than less actual crime.[392]

Second, the anecdotal evidence does not isolate the impact of eviction policies on the crime rate. The crime-free program is a multipronged approach, involving landlord training, environmental changes, and other interventions. Because much of the anecdotal evidence does not separate out the strands of a multipronged approach, it is very difficult to say which portion of any decrease in crime rates is attributable to the eviction policy and which portion is attributable to other interventions. Although some cities report having significant success with the program, these variations and flaws

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John Flint & Judy Nixon, *Governing Neighbours: Anti-Social Behavior Orders and New Forms of Regulating Conduct in the UK*, 43 URB. STUD. 939, 939 (2006).

390. It is also unclear whether individuals and families living in neighborhoods that most suffer the harms associated with crime support these kinds of ordinances. Some anecdotal evidence suggests they do. It is entirely possible, however, that something similar to the "urban frustration argument" that Richard Brooks described is occurring. He argued that the belief that the Chicago antigang ordinance was supported by the most impacted minority communities was false. As he writes:

> [C]laims of strong community support for Chicago's gang-loitering ordinance have been challenged by Albert Alschuler and Stephen Schulhofer: "The truth is that the anti-loitering ordinance was intensely controversial, . . . and that to the extent one can identify any predominant view, Chicago's anti-loitering ordinance was opposed by the very groups . . . identif[ied] as its principal supporters."

Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1233 (2000) (footnotes omitted).

391. Livanos, *supra* note 16, at 108.

392. Desmond & Valdez, supra note 42, at 136.

in methodologies and metrics make it difficult to draw any conclusions from the anecdotal data.[393] In the absence of reliable empirical research demonstrating that home rule ordinances are an effective means of targeting the problems of bullying, criminality, and drug abuse that prompted them, it is difficult to justify the use of these ordinances.

2. *Alternative Approaches*. In the face of this lack of evidence regarding the effectiveness of home rule ordinances, there is a body of research suggesting that not only may they be ineffective, they may actually be counterproductive. Sociological and criminological studies suggest that

> dense and robust networks of community ties and mutual trust, among individuals and at the community level, leads to lower levels of criminality. Basic social ties—family, friends, school, and employment—form the building blocks of informal social control, and at the individual level, robust social, familial, and economic ties

393. Discrepancies in anecdotal reporting are common, and because each city uses different variables to measure any reduction in crime rates, it is difficult to compare statistics. One source alleges that Mesa, Arizona, (where the program began) had a drop in crime or calls to police of approximately 40 percent. DIANNA GRAVES, U. REGINA CMTY. RES. UNIT CRIME-FREE MULTI-HOUSING PROGRAM: RESEARCH SUMMARY 5 (Apr. 2011), *available at* http://ourspace.uregina.ca/bitstream/handle/10294/3427/CFMH%20Summary.pdf?sequence=1. However, another source states that the drop in crime in Mesa, Arizona, was closer to 75 percent. Josie Lee Villa, *The Relationship Between Police and Citizen Collaboration Regarding Crime in Multi-Family Rental Complexes* 29 (2011) (unpublished M.S. thesis, University of Missouri–Kansas City). Two Canadian cities, New Westminster and Victoria, reported a reduction in crime of approximately 40 percent, but each used a different metric. New Westminster used certain kinds of "priority calls," and Victoria used a number of different categories. GRAVES, *supra*, at 5. In other anecdotal reporting, one newspaper article suggests that crime-free lease addendums were effective in lowering calls to police in Des Moines, Washington. Keith Daigle, *Des Moines Rescinds Charges to Rental Property Owners for Crime Free Housing Program*, HIGHLINE TIMES, Feb. 25, 2010, http://www.highlinetimes.com/2010/02/25/news/des-moines-rescinds-charges-rental-property-owners-crime-free-housing-program. The article states that "there was a 48 percent decrease in calls to rental properties between 2004 and 2008 [the ordinance was enacted in 2005], as compared to a 36 percent increase in citywide calls. Also, between 2004 and 2008, serious and violent crimes . . . went down 41 percent, compared to a 14 percent citywide decrease." *Id.* Also, San Leandro says it experienced "a huge drop in crime at these communities." CTR. FOR PROBLEM-ORIENTED POLICING, *supra* note 306. And Champlin, a city of 23,000 people in Minnesota, attests that the result there was a 36 percent "overall reduction to calls for service and crimes." *Crime Free Program Testimonials*, INT'L CRIME FREE ASSOC., http://www.crime-free-association.org/testimonials.htm (last visited Jan. 16, 2015).

> are causally related to an individual's avoidance of criminal behavior.[394]

Home rule ordinances, while trying to leverage those bonds, actually stress and weaken the "familial and social ties that work to curb criminal behavior."[395] Further, the end result of many evictions under these ordinances is homelessness, a status that has been directly correlated to an increase in criminality and to a negative impact upon communities.[396]

If strong familial and social bonds and a stable home work to curb criminal behavior, then ordinances and policies should be initiated with this in mind. One appellate court noted that society has an interest in "safeguarding the family unit from unnecessary fractional pressures," and individuals should not be made to choose between familial devotion or legal fealty.[397] Instead of reflexively implementing laws like home rule ordinances, cities should first focus on targeting social problems through means and methods that do not involve penalizing people for the actions of others.

For instance, in the context of bullying, rather than implementing parental liability ordinances, cities could direct their resources to "assist[ing] parents in need."[398] Instead of chalking up juvenile misconduct to "bad" parenting, an innovative city might try embracing a multipronged approach that targets some of the broader issues underlying juvenile misconduct, like a "lack of parenting skills, resources and community support."[399] This kind of approach could include things like "parenting skills programs, readily accessible daycare and access to social programs," and it could have a much

394. Levy, *supra* note 12, at 569–70 (footnotes omitted).

395. *Id.* at 570.

396. Research indicates that homelessness is also directly linked to reincarceration of people who have served jail or prison sentences. For instance, homeless individuals on parole have been shown to be seven times more likely to abscond after the first month of release than those located in more permanent housing. Access to affordable housing has also been linked to decreased crime rates in low-income communities where people with criminal records often reside. Although reconnection with family members and establishing community connections can help reduce reincarceration, legal bars to allowing a family member back into the home after a conviction often make this impossible. N.Y. STATE BAR ASS'N SPECIAL COMM. ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY 219 (2006), *available at* http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26857.

397. MARKEL ET AL., *supra* note 110, at 43.

398. *Parental Liability Laws*, *supra* note 96.

399. *Id.*

more positive effect than the punitive consequences of parental liability ordinances.[400] Rather than simply blaming parents, tackling some of the broader, structural issues through investment in "adequate housing for low-income families, quality kindergarten programs, support for single parent families, community centres," child care, and after-school programs would enhance the goal of community security while creating an environment more conducive to human flourishing.[401]

Programs that offer group counseling and mentoring to youths could also be useful in reducing juvenile crime and violence. A recent controlled study of a program that used group counseling and "nontraditional sports activities to strengthen adolescents' social-cognitive skills" found that the intervention "improved school performance and engagement" and resulted in a 36 percent reduction in arrests.[402] Further, the program had an "extremely high" return on investment: its benefits were estimated to be up to thirty-one times the cost of its implementation, depending on how the societal benefit was measured.[403]

In the context of crime more broadly, interventions that use focused direct deterrence, supplemented with family support, job training, and other forms of assistance have been remarkably successful at curbing crime in a number of cities.[404] For instance, many cities with high homicide rates were able to lower those rates after

400. *Id.* Of course, as more cities move toward bankruptcy, these possibilities may become more difficult. *See generally* Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1120 (2014) (discussing the financial difficulties cities have experienced following the 2008 recession and the subsequent reduction in services).

401. *Parental Liability Laws*, *supra* note 96. Although these measures would likely be appropriate for the majority of households, there may be a residual category of parental behavior that could be effectively addressed through a modified parental liability ordinance. When a parent's behavior actively enables or encourages the bullying or wrongful act, some sort of minor civil penalty could be appropriate. Such an approach should, for the most part, track the approach used toward secondary liability in the criminal law. *See generally* GABRIEL HALLEVY, THE MATRIX OF DERIVATIVE CRIMINAL LIABILITY (2012) (discussing the development and theoretical grounding of criminal law's treatment of personal and derivative forms of liability).

402. William Harms, *Study: Chicago Counseling Program Reduces Youth Violence, Improves School Engagement*, UCHICAGO NEWS (July 13, 2012), http://news.uchicago.edu/article/2012/07/13/study-chicago-counseling-program-reduces-youth-violence-improves-school-engagemen.

403. *Id.*

404. David Kennedy describes how such an intervention can work in DAVID KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA (2012).

law enforcement personnel held meetings with offenders and their families during which law enforcement indicated that any further involvement in crime would result in heavy penalties, and that job-training support, housing help, and other forms of community assistance were immediately available to help transition to a crime-free life.[405]

Similarly, lessons from the public housing context suggest that a primary focus on fostering opportunities and targeting the underlying factors associated with misconduct, criminality, and drug abuse may be effective in some instances. Public housing authorities that have successfully transitioned from sites of extreme crime and violence to sites of decent housing have used evictions only sparingly and instead relied mainly on initiatives like "educational, anti-drug, resident participation, recreation, and scholarship programs," and "renovation of housing units, increased security, and youth [and] tutoring" programs to accomplish their transformations.[406]

Renovating housing units and improving the physical environment of buildings and neighborhoods has been associated with reduced crime rates. After upgrading the lighting and landscaping for one large apartment building that had been riddled with "youth gang violence, vandalism and drug trafficking," and building a playground, basketball court, and community center for the complex, there was a significant decrease in crime in the area.[407] Likewise, literally "cleaning up" the streets of a neighborhood often cleans up the streets in terms of crime reduction as well. Examples abound in which neighborhoods that invest in repairing streets, clearing debris, weeding, and better maintaining lots and alleys experience a subsequent drop in crime.[408]

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405. *Id.*; *see also* TRACEY MEARES ET AL., HOMICIDE AND GUN VIOLENCE IN CHICAGO: EVALUATION AND SUMMARY OF THE PROJECT SAFE NEIGHBORHOODS PROGRAM 3 (Jan. 2009).

406. As Weil explains, "public housing success stories" from cities like Chicago, Omaha, and Pawtucket, Rhode Island, show that "strict eviction policies alone are not responsible" for helping those sites improve. Instead, "increased spending on security and social programming," along with environmental upgrades like "provision of twenty-four hour foot patrols, police substations, improved lighting, identification card systems and single security entrances to buildings" were a crucial part of the success achieved. Weil, *supra* note 11, at 186.

407. *Safer Neighborhoods Through Community Policing: Volume 1: Successful Initiatives in 72 Cities*, U.S. CONFERENCE OF MAYORS 23–24 (2001), http://www.usmayors.org/bestpractices/community_policing_0401/safe_neighborhoods_1.pdf.

408. *Id.*

Cities can do better than home rule ordinances rooted in vicarious liability. Local governments are currently imposing third-party policing through vicarious liability as a one-size-fits-all solution to social problems that have diverse causes and factors, and likely need diverse, nuanced solutions. Fortunately, cities have previously demonstrated their capacity to address social problems through creative innovations, and they should once again harness that energy to come up with new solutions, rather than implementing ordinances that further marginalize and destabilize already vulnerable groups.[409] Cities have rightly identified the home as an important site in the fight against bullying, criminality, and drug abuse. However, cities should explore and implement policies that strengthen familial, social, and community ties, and promote stable housing, rather than policies that lead to increased destabilization, disruption, and broken familial and social connections.

CONCLUSION

The Supreme Court has held that the "right to maintain control" over one's home, and "to be free from governmental interference" is a "private interest of historic and continuing importance."[410] Now, however, home rule ordinances are transforming the *right* to control one's home into a *duty* to control all the people connected with that home, and deter them from engaging in wrongful conduct. That duty is supported by legal sanctions that apply if one fails to properly perform her third-party policing role. Although "even in the freest of societies, coercion may be a necessary evil," one must nevertheless "guard against instinctive prescription of coercive solutions to every problem or crisis that emerges."[411] Ideally, proposed policies should be carefully and critically examined to determine their efficacy and social meaning, and most importantly, to determine "how they create

409. At the very least, municipalities should drastically circumscribe the current scope of these home rule ordinances. The laws should include broad exceptions for victims of crime, should only apply to people demonstrably under a tenant's control, should require a conviction or finding of fact that the prohibited activity actually occurred, should only apply to conduct that presents a "substantial and direct threat to health and safety," and should limit the geographical scope to the leased premises. Most importantly, the fault level should be increased from vicarious liability to something more akin to active participation. Letter from Sargent Shriver National Center on Poverty Law to Belleville City Council on Crime Free Housing Ordinance (Apr. 2, 2013) (http://www.povertylaw.org/advocacy/housing/pubs/letter-to-belleville).

410. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–54 (1993).

411. Ayling & Grabosky, *supra* note 62, at 435.

us as modern subjects."[412] Home rule ordinances appear to be proliferating without due attention to their negative impact upon families and social groups, and without adequate analysis of whether they are actually effective in bringing about the goal of security they seek to achieve.

Placing responsibility for the wrongful acts of children, family members, and friends onto parents and heads of household constructs the home as a site of deviance and control. The web of third-party policing created by parental liability statutes, crime-free lease addendums, and nuisance ordinances subjects the normally private sphere of the family to intense internal surveillance and monitoring. These ordinances appear to encourage a form of microgovernance within the home that mimics or reproduces larger forms of law and order, and punishes those who fail to replicate these systems within their homes. The home or "the social space of the household becomes fully implicated in systems of surveillance and social control."[413]

Social problems such as bullying, drug abuse, and criminality need to be addressed, and creative and effective solutions need to be explored. Security is also a laudable goal, particularly in neighborhoods and buildings plagued by crime. However, as one federal judge stated, "[t]he city cannot simply start throwing innocent people out of private property to reduce crime in a troubled neighborhood."[414] The high costs of third-party policing must be taken into account when considering responses. Third-party policing may be appropriate in other contexts,[415] but it may be less appropriate when aimed at intimate, familial, and close social relationships. The dystopic effect of these types of third-party-policing ordinances is hard to ignore:

> [I]t is chillingly apparent that compliance . . . has a direct bearing on . . . familial relations—that parents, children, and siblings are compelled, at the very least, to "modify" how they interact and associate with each other. Regulation and social control are deeply insinuated in the most ordinary of microsocial relations—who visits for dinner or overnight? What is his or her conduct on or off the

412. HARCOURT, *supra* note 378, at 242.

413. Mele, *supra* note 11, at 131–32.

414. Armendariz v. Penman, 31 F.3d 860, 872 (9th Cir. 1994) (Trott, J., concurring in part, dissenting in part), *vacated in part on reh'g en banc*, 75 F.3d 1311 (9th Cir. 1996). Judge Robert L. Trott was referring to a series of housing-code sweeps in San Bernardino, California, where the city "faked a housing code emergency" and closed ninety-five buildings, evicting the tenants.

415. *See supra* text accompanying note 8.

> premises?—and the management of risks and their consequences becomes the responsibility of mothers, fathers, and teenagers. Likewise, otherwise innocuous visits from after-school friends, caregivers, and babysitters are fraught with risk. Here we see social regulation and control deeply insinuated in the most ordinary of behaviors.[416]

Indeed, if we think of home building as an "ideological enterprise[]," then the questions of who can access and maintain homes, and what rules may be state-enforced there, become even more significant.[417] Further, as the city emerges as a major source of rules governing homes and intimate spaces, its role in using these technologies of governance may become more pronounced, and may therefore warrant greater attention than local-government law tends to attract. In particular, the practical impact of these kinds of ordinances, alongside their symbolic participation in problematic histories of race, gender, and socioeconomic discrimination, raises concern over the narratives of responsibility and the meaning of "home" that they create, and the city's role in their construction.

416. Mele, *supra* note 11, at 132–33.

417. Rana Jaleel, *A Queer Home in the Midst of a Movement? Occupy Homes, Occupy Homemaking*, WHAT DEMOCRACY LOOKS LIKE, http://what-democracy-looks-like.com/a-queer-home-in-the-midst-of-a-movement-occupy-homes-occupy-homemaking (last visited Jan. 16, 2015).