

# Housing the Decarcerated: Covid-19, Abolition & the Right to Housing

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*The coronavirus pandemic revealed the need to advance the right to housing and abolition movements. The need for advancements in both spaces was no more painfully apparent than among the recently decarcerated population. Securing housing for the recently decarcerated is particularly difficult due to the “culture of exclusion” that has long pervaded subsidized housing policy, enabled by a patchwork of federal laws, including the Anti-Drug Abuse Act (ADA) of 1988 and the Supreme Court’s ruling in HUD v. Rucker. The culture of exclusion is arbitrated by local housing authorities and works on three levels: eligibility, enforcement, and set asides. As a result, formerly incarcerated persons are often rejected outright during the application process. In addition, persons living in subsidized housing can be evicted for merely associating with the recently decarcerated.*

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*This Article seeks to motivate a pathway toward housing the decarcerated by ending the culture of exclusion. In Part I, the Article updates the status of the prison abolition and right to housing movements and argues why they are interdependent. Part II builds on the idea that stable housing for formerly incarcerated persons is essential to the prison abolition movement’s success by reviewing pilot programs. Part III suggests that “one strike” policies have created a broader “culture of exclusion,” which the Supreme Court validated in Rucker, further burdening the reentry process for the recently decarcerated. Finally, Part IV prescribes policy changes that are essential to housing the decarcerated beyond repealing the ADA and overturning Rucker, including transcending the narrative of innocence, directing public housing authority discretion, and equalizing voucher holders through civil rights laws.*

Introduction .....	641
I. Two Freedom Movements .....	644
A. Prison Abolition Movement .....	644
1. The Negative Project.....	644
2. The Positive Project .....	648
B. Right to Housing Movement .....	650
II. A Right to Housing is Essential to Prison Abolition .....	655
A. Poverty Contributes to Recidivism.....	656
B. Housing is Economic Capital .....	658
C. Social Capital is a Bridge to Economic Capital .....	659
D. Subsidized Housing Increases Economic and Social Capital .....	661
1. Federally Subsidized Housing Vouchers .....	661
2. State-Sponsored Pilot Programs Subsidizing Housing for the Formerly Incarcerated.....	662
III. Legal Barriers to Subsidized Housing for the Decarcerated .....	664
A. Exclusion Under Federal Subsidized Housing Policy.....	665
1. “One-Strike You’re Out” .....	665
2. Department of Housing and Urban Development v. Rucker .....	666
B. PHAs: Arbiters of Exclusion.....	668
1. Eligibility.....	668
2. Enforcement .....	670
3. Prioritization.....	672
IV. Undoing the Culture of Exclusion.....	674
A. Transcending Innocence.....	674
B. Utilizing PHA Discretion to Admit, Not Deny .....	677
C. Protecting Housing for All .....	677
Conclusion.....	679

## INTRODUCTION

The coronavirus pandemic exposed an issue at the intersection of the public health, carceral, and housing crises—the lack of housing for the recently decarcerated.<sup>1</sup> As soon as the public learned that the virus was community spread in the United States, criminal law reform advocates and families of the incarcerated began to express concern about what would happen inside prisons.<sup>2</sup> Calls came to release incarcerated people and cease arrests in light of the risks posed from the inability to social distance while incarcerated.<sup>3</sup> Some states, including California, New Jersey, and Wisconsin, began releasing incarcerated people.<sup>4</sup> In March 2020, over thirty elected prosecutors from across the country issued a joint statement, acknowledging that the “current crisis create[d] an even more pressing need for elected prosecutors, public health officials, and other leaders to work together to implement concrete steps in the near-term to dramatically reduce the number of incarcerated individuals and the threat of disastrous outbreaks.”<sup>5</sup> The Black Lives Matter protests of summer 2020 amplified these calls on the streets of cities across the nation under the banner of #DefundthePolice.<sup>6</sup> Not since the 1970s had prison abolition seemed so viable.<sup>7</sup>

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1. HUM. RTS. WATCH, *AVERTING AN IMMINENT CATASTROPHE: RECOMMENDATIONS TO US LOCAL, STATE AND FEDERAL OFFICIALS TO COVID-19 IN JAILS AND PRISONS* 3 (2020), [https://www.hrw.org/sites/default/files/supporting\\_resources/c19\\_detention\\_finalreport\\_43020.pdf](https://www.hrw.org/sites/default/files/supporting_resources/c19_detention_finalreport_43020.pdf) [<https://perma.cc/ZT7Q-Y7VD>] (recommending that federal, state, and local officials ensure access to adequate housing for decarcerated individuals in light of the pandemic).

2. See Nicole Lewis, “*They Don’t Care: Families of the Incarcerated Fear the Worst as Coronavirus Spreads*,” MARSHALL PROJECT (Mar. 26, 2020), <https://www.themarshallproject.org/2020/03/26/they-don-t-care-families-of-the-incarcerated-fear-the-worst-as-coronavirus-spreads> [<https://perma.cc/2S5D-MEP6>].

3. See Press Release, Am. C.L. Union, *ACLU Demands the Release from Prisons and Jails of Communities Vulnerable to COVID-19* (Mar. 18, 2020), <https://www.aclu.org/press-releases/aclu-demands-release-prisons-and-jails-communities-vulnerable-covid-19> [<https://perma.cc/4LWL-DRTT>].

4. See Tracey Tully, *1,000 Inmates Will Be Released from N.J. Jails to Curb Coronavirus Risk*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/nyregion/coronavirus-nj-inmates-release.html> [<https://perma.cc/S87L-MG8L>]; *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL’Y INITIATIVE (Feb. 25, 2022) <https://www.prisonpolicy.org/virus/virusresponse.html> [<https://perma.cc/45TB-97T5>].

5. *Joint Statement from Elected Prosecutors on Covid-19 and Addressing the Rights and Needs of Those in Custody*, FAIR & JUST PROSECUTION (Mar. 25, 2020) [hereinafter *Joint Statement*], <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf> [<https://perma.cc/9BLZ-FM4U>].

6. See Yoana Tchoukleva, Amalee Beattie & Josh Cottle, *Defunding the Police: Brief Overview of History, Models and the Demands of the Movement*, EQUAL JUST. SOC’Y 3 (June 18, 2020), <https://equaljusticesociety.org/defundthepolicememo/> [<https://perma.cc/M9GK-9P8F>].

7. On September 9, 1971, 1,281 of Attica’s 2,200 population engaged in an uprising and took control of the prison. Joseph Lelyveld, Francis X. Clines, Michael T. Kaufman & James M. Markham, *The Attica Revolt: Hour by Hour*, N.Y. TIMES (Oct. 4, 1971), <https://timesmachine.nytimes.com/timesmachine/1971/10/04/90693143.pdf> [<https://perma.cc/AF2T-KEV9>]; Shammara Lawrence, *The Attica Prison Riot in 1971 Serves as a Reminder of the Dangers of a Failing Prison System*, TEEN VOGUE (Sept. 9, 2020), <https://www.teenvogue.com/story/attica-prison-riot-reminder-failing-prison-system-reform-og-history> [<https://perma.cc/G77Y-V7XB>]. Forty-three people inside the prison were killed, most by the state itself. *Uprising at Attica Prison Begins*, HISTORY

Concurrently, the pandemic forced a national conversation about the enormous number of unhoused people in our country.<sup>8</sup> The idea of socially distancing while living on the street was impossible.<sup>9</sup> Cities struggled with how to manage the unhoused responsibly. News outlets severely criticized Las Vegas for attempting to “house” hundreds of homeless persons in a parking lot after the city closed a shelter due to the pandemic.<sup>10</sup> New York City faced criticism over a set of measures that effectively banned unhoused persons from sheltering in subway trains and stations.<sup>11</sup> In one of the more successful though still imperfect efforts, California instituted “Project Roomkey,” which placed unhoused persons in empty hotel rooms.<sup>12</sup> The pandemic, in short, added evidence to the case for publicly funded housing for the deeply impoverished.

For many recently decarcerated persons, the pandemic’s risks were not substantially less than that of an incarcerated person because of the high likelihood of being unhoused and the risks the pandemic presented to individuals living on the street. As a result, the quests for abolition and the human right to housing are deeply connected.<sup>13</sup>

This Article argues that the prison abolition and right to housing movements are essential to each other’s successes. The success of the abolitionist

(July 21, 2010), <https://www.history.com/this-day-in-history/riot-at-attica-prison> [https://perma.cc/8C7W-MDUS]. In the end, a majority of the twenty-eight demands were met. *Id.* The Attica Rebellion was considered a flashpoint in the prison rights movement. Lelyveld, *supra*. In 1973, the Department of Justice appointed a commission to study the “American Correctional System.” See NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, *Preface* to CORRECTIONS, at vii (1973), <https://www.ojp.gov/pdffiles1/Digitization/10865NCJRS.pdf> [https://perma.cc/EV38-8QZV]. The Commission’s report concluded that U.S. prisons, juvenile detention centers, and jails had established a “shocking record of failure.” *Id.* at 597. And it recommended a moratorium on prison construction to last ten years. *Id.*

8. See Benjamin Schneider, *CityLab University: Understanding Homelessness in America*, BLOOMBERG (July 6, 2020), <https://www.bloomberg.com/news/features/2020-07-06/why-is-homelessness-such-a-problem-in-u-s-cities> [https://perma.cc/VLC9-GG72].

9. See Jenny Gathright, *How Local Homeless Shelters Are Trying to Help Residents Social Distance*, NPR (Apr. 6, 2020), <https://www.npr.org/local/305/2020/04/06/828013370/how-local-homeless-shelters-are-trying-to-help-residents-social-distance> [https://perma.cc/JGR9-SBR9] (describing challenges to maintaining social distancing in shelters).

10. See Dan Levin, *Las Vegas Places Homeless People in a Parking Lot, 6 Feet Apart*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/03/31/us/las-vegas-coronavirus-homeless-parking-lot.html> [https://perma.cc/5CT6-VP2T].

11. See Stephen Nessen, *Governor Cuomo and Mayor De Blasio Agree: Subway Homeless Must Go*, GOTHAMIST (Apr. 28, 2020), <https://gothamist.com/news/governor-cuomo-and-mayor-de-blasio-agree-subway-homeless-must-go> [https://perma.cc/SPGK-E9WM].

12. See Office of Governor Gavin Newsom, *At Newly Converted Motel, Governor Newsom Launches Project Roomkey: A First-in-the-Nation Initiative to Secure Hotel & Motel Rooms to Protect Homeless Individuals from COVID-19* (Apr. 3, 2020), <https://www.gov.ca.gov/2020/04/03/at-newly-converted-motel-governor-newsom-launches-project-roomkey-a-first-in-the-nation-initiative-to-secure-hotel-motel-rooms-to-protect-homeless-individuals-from-covid-19/> [https://perma.cc/2VS7-M77P].

13. See John Washington, *What Is Prison Abolition?*, NATION (July 31, 2018), <https://thenation.com/article/archive/what-is-prison-abolition/> [https://perma.cc/762R-BZ28] (describing how ensuring access to housing is one of the goals of the abolitionist movement).

movement requires housing for the newly decarcerated to facilitate other steps towards full citizenship. And the right to housing movement cannot be actualized as long as human beings “live” on the street or in cages. Thus, deconstructing those policies that result in the recently decarcerated being homeless should be central to both platforms.

Part I describes the modern prison abolition and right to housing movements, up to and through the pandemic. Part II reviews the literature suggesting that stable housing for recently decarcerated persons is essential to reducing recidivism. Housing provides economic and social capital that can prevent slipping into deep poverty and sending previously incarcerated persons back to prison. Part II also summarizes results from pilot programs in New York, Washington, and Maryland that offer promising evidence of the correlation between subsidized housing and successful community reentry for the recently decarcerated.

Part III argues that “one strike” laws such as the Anti-Drug Abuse Act and the Supreme Court’s opinion in *Department of Housing and Urban Development v. Rucker* currently create insurmountable barriers to federal plans to house a majority of recently decarcerated persons. Part III also establishes subsidized housing as a site of mass incarceration as it relates to policies designed to evict tenants who allow persons with contacts to the criminal legal system, including the recently decarcerated, to reside with them “unauthorized.”

Part IV assumes the ultimate repeal of the federal laws, which have provided the scaffolding for the culture of exclusion, is on the horizon as public opinions regarding innocence evolve. Considering repeal prefigurative in this moment, Part IV prescribes what are likely to be equally transformative policy changes that can aid the abolitionist turn and the evolution of the human right to housing more immediately, including (1) redirecting the discretion afforded to public housing authorities (PHAs) towards admission; (2) making permanent untimed, fully subsidized direct payments for all who are income eligible and equalizing treatment of vulnerable persons, away from eviction, including the recently decarcerated, similar to what was provided for through the over \$46 billion appropriated in the American Rescue Plan to create Emergency Rental Assistance (ERAP) programs; and (3) enlarging civil rights protections for tenants in federally subsidized housing to include source of income protections and protections for those with criminal records. The Article concludes by recognizing that ultimately for recently decarcerated persons to access full citizenship post-release, complete transcendence on the definition of innocence that has defined the contours of modern federal and local housing policy is required.

## I.

## TWO FREEDOM MOVEMENTS

This Section offers descriptive accounts of two freedom movements—the prison abolition and right to housing movements. It also seeks to center housing the decarcerated in both movements.

*A. Prison Abolition Movement**1. The Negative Project*

Prison is dehumanizing and violent.<sup>14</sup> Overcrowding and poor conditions are commonplace.<sup>15</sup> Incarcerated people are also generally neglected in terms of medical care, including with managing their disabilities and addictions.<sup>16</sup> Along with all of this abuse, a toxic mix of racism and misogyny produces a culture where sexual assault is normalized.<sup>17</sup>

Conditions inside of prisons have long prompted protestation. The most prominent uprising in protest of state penitentiary conditions took place over four

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14. See NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT at 1 (June 2009), <https://www.ojp.gov/pdffiles1/226680.pdf> [<https://perma.cc/R874-GCCJ>] (summarizing the National Prison Rape Elimination Commission’s findings on the pervasive sexual abuse of incarcerated people); see also Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301–30309 (requiring prisons maintain and enforce a zero-tolerance policy towards sexual assault inflicted on inmates).

15. Take California’s Valley State Prison for Women, for example, which opened in 1995 and was designed to provide for 1,980 incarcerated people and ease overcrowding in other state prisons. See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 13 (2003). By 2002, there were 3,570 incarcerated people there (almost double the number for which it was built), and the other two women’s prisons in California were still similarly overcrowded. *Id.* Beyond overcrowding trends, which create public health concerns, prison poses the risk of serious violence to incarcerated people, including being beaten, stabbed, raped, and/or killed. See *Alabama’s Prisons Are the Deadliest in the Nation*, EQUAL JUST. INITIATIVE (Dec. 3, 2018), <https://eji.org/news/alabamas-prisons-are-deadliest-in-nation/> [<https://perma.cc/4D22-FW5L>]. A report of the Equal Justice Initiative found that Alabama had the deadliest prison system in the country with a “rate of over 34 homicides per 100,000 people incarcerated[, which] is more than 600 percent greater than the national average from 2001 to 2014.” *Id.*

16. See JAMELIA MORGAN, AM. C.L. UNION, CAGED IN: SOLITARY CONFINEMENT’S DEVASTATING HARM ON PRISONERS WITH PHYSICAL DISABILITIES 4 (Jan. 2017), [https://www.aclu.org/sites/default/files/field\\_document/010916-aclu-solitarydisabilityreport-single.pdf](https://www.aclu.org/sites/default/files/field_document/010916-aclu-solitarydisabilityreport-single.pdf) [<https://perma.cc/AKU2-B67J>]. This report represents the

first-ever national ACLU account of the suffering prisoners with physical disabilities experience in solitary confinement. It spotlights the dangers for blind people, Deaf people, people who are unable to walk without assistance, and people with other physical disabilities who are being held in small cells for 22 hours a day or longer, for days, months, and even years. Solitary confinement is a punishing environment that endangers the well-being of people with physical disabilities and often violates the Americans with Disabilities Act. The report’s revelations about the particular harms of solitary on people with physical disabilities shows the urgent need for far better accounting of the problems they face and the development of solutions to those problems.

*Caged In: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities*, AM. C.L. UNION (Jan. 12, 2017), <https://www.aclu.org/report/caged-devastating-harms-solitary-confinement-prisoners-physical-disabilities> [<https://perma.cc/T6HP-8QC7>].

17. See DAVIS, *supra* note 15, at 27, 83.

days at the Attica Correctional Facility in western New York in 1971.<sup>18</sup> Nearly 1,300 inmates seized control of the facility and took thirty-nine guards and employees hostage in exchange for better living conditions.<sup>19</sup> Forty-three people died during the rebellion at Attica.<sup>20</sup> The Attica Rebellion spurred landmark prison reform despite the bloodshed.

Post-Attica, inmates throughout the country continued to organize, including, and importantly, inside women's prisons.<sup>21</sup> In *Powell v. Ward*, the incarcerated individuals of Bedford Hills, a women's prison ninety miles outside of New York City, organized themselves to challenge the use of solitary confinement.<sup>22</sup> The women held inside Bedford Hills also challenged the harsher treatment of queer and gender nonconforming individuals, especially Black lesbians and Spanish-speaking women.<sup>23</sup> All of these conditions were unconstitutional. Conditions inside of prisons became appreciably worse with the privatization of prisons in the 1990s. The cruel and unusual provision of the Eighth Amendment of the Constitution requires prison and jail officials to protect the incarcerated from physical harm and, by extension, sexual assault. But many prisons nationwide have fallen well short of constitutional requirements, which has only led to louder and more urgent calls for abolishing prisons altogether.

Carceral abolitionism is not new. Black scholar activists such as W. E. B. DuBois, D.E. Tobias, and Mary Church Terrell studied and documented the devastating effects of the prison leasing system.<sup>24</sup> Douglas Blackmon argued in *Slavery by Another Name* that it is a myth to suggest that slavery ended with legal emancipation. Blackmon has detailed the history of free people forced into industrial servitude, working in coal mines and on railroads, bound by chains,

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18. See Lelyveld et al., *supra* note 7. Prisoners held in Attica had previously presented a list of twenty-seven grievances on topics ranging from medical care, work conditions, censorship, diet, parole procedures, and religious expression. *Id.* Specifically, there was severe overcrowding. Bryan Burrough, *Last Stand at Attica*, WALL ST. J. (Aug. 22, 2016), <https://www.wsj.com/articles/last-stand-at-attica-1471908194> [<https://perma.cc/VR82-8695>]. Inmates notoriously received only one roll of toilet paper per month, were allowed to shower only once per week, were given slim meals, and often went to bed hungry. Lawrence, *supra* note 7. Further, prison officials deemed Islam an illegitimate religion, and any letters written in languages other than English were discarded. HEATHER ANN THOMPSON, *BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY* 53 (2017). The prison failed to respond to the inmates' grievances. *Id.* at 363. There had been previous work strikes to draw attention to these issues, but it was the unplanned action on September 9, 1971, that created the lasting change. Several inmates found themselves trapped in a tunnel connecting their cells to the prison yard and stormed the door to get out. *Id.* at 147.

19. Lawrence, *supra* note 7.

20. *The Attica Uprising, September 9-13, 1971*, N.Y. STATE LIBR., <https://www.nysl.nysed.gov/mssc/attica/> [<https://perma.cc/HUD7-SWX2>].

21. See generally Amber Baylor, *Centering Women in Prisoners' Rights Litigation*, 25 MICH. J. GENDER & L. 109 (2018) (situating the organizing and uprising at the Bedford Hills Correctional Facility for Women within the broader struggle for prisoners' rights).

22. *Powell v. Ward*, 542 F.2d 101, 102 (2d Cir. 1976).

23. See Baylor, *supra* note 21, at 145.

24. See ANGELA DAVIS, *THE ANGELA Y. DAVIS READER* 77, 80 (Joy James ed., 1998).

living in subhuman conditions and routinely subject to physical torture.<sup>25</sup> Convict leasing was “legal” until at least the 1950s.<sup>26</sup> DuBois brought contemporaneous attention to the manner in which the state participated in the criminalization of Blacks so that their labor might be extracted through the mechanism of the prison leasing system.<sup>27</sup>

Recent studies have confirmed what prison abolitionists have been asserting since the 1930s—that prisons neither rehabilitate prisoners nor make the public safer.<sup>28</sup> Through these studies, awareness has been raised surrounding the collateral consequences of incarceration not just on the individual level, but at the community level as well.<sup>29</sup> Thousands of communities, particularly those of color, had been deprived of citizens who would otherwise contribute to their social networks through parenting, working, and participating in civic engagement.<sup>30</sup> Moreover, mass incarceration financially burdened taxpayers at a level that is untenable.<sup>31</sup> In the face of meager benefits and exorbitant human, social, and economic costs, the modern prison system was once again widely held to be “unsustainable.”<sup>32</sup>

With respect to negative abolition (drawing down prison numbers) in the aughts, a broad coalition of advocates, policymakers, and politicians emerged calling on federal and state governments to drastically decrease the size of jail and prison populations.<sup>33</sup> The abolitionist turn started to accelerate. Connecticut,

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25. *See id.* at 80.

26. Jaron Browne, *Rooted in Slavery: Prison Labor Exploitation, Race Poverty & Environment* 42 (Spring 2007), [https://reimaginerpe.org/files/RPE14-1\\_Browne-s.pdf](https://reimaginerpe.org/files/RPE14-1_Browne-s.pdf) [<https://perma.cc/VRH8-ZTMQ>].

27. W.E.B. DuBois, *The Spawn of Slavery: The Convict-Lease System in the South*, 14 MISSIONARY REV. WORLD 737, 737–745 (1901).

28. *See, e.g.*, Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 48S (2011) (finding little evidence that prisons reduce recidivism).

29. *See* Marc Mauer & Meda Chesney-Lind, *Introduction* to INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 4 (Marc Mauer & Meda Chesney-Lind eds., 2002) (“Mass imprisonment has had a particularly insidious impact on communities of color due to the curious intersection of criminal justice and political policy making.”).

30. *See id.*

31. *See* CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 10 fig.4 (Jan. 2012), <https://shnny.org/uploads/Price-of-Prisons.pdf> [<https://perma.cc/8HNL-HW39>].

32. Colleen Hackett & Ben Turk, *Shifting Carceral Landscapes: Decarceration and the Reconfiguration of White Supremacy*, 1 ABOLITION J. 23, 23 (2018), <https://journal.abolitionjournal.org/index.php/abolition/article/view/26/5> [<https://perma.cc/4E4N-NW9T>].

33. *See* NAZGOL GHANDNOOSH, THE SENT’G PROJECT, U.S. PRISON POPULATION TRENDS: MASSIVE BUILDUP AND MODEST DECLINE 2 (Sept. 17, 2019), <https://sentencingproject.org/publications/u-s-prison-population-trends-massive-buildup-and-modest-decline/> [<https://perma.cc/VSP2-ZVK2>] (“Growing recognition of the scale and urgency of mass incarceration is now reflected in the work of leaders as diverse as Sen. Cory Booker and former House Speaker Newt Gingrich. A growing number of policy experts and advocacy organizations are now calling for a 50 percent reduction in the U.S. prison population within the next 15 years. These include the ACLU and JustLeadership USA.”).

Rhode Island, Mississippi, and South Carolina reduced their prison populations by 14–25 percent between 2007 and 2016.<sup>34</sup> Michigan’s Department of Corrections closed Muskegon Prison in March 2018 after the population there reached a twenty-year low.<sup>35</sup> California’s 2011 “realignment” plan has led to the release of thirty thousand incarcerated people back into the population.<sup>36</sup> More states followed.<sup>37</sup> In 2017, the first revisions to the Model Penal Code were made at the federal level, adding a “‘second look’ provision” to reexamine all sentences after fifteen years.<sup>38</sup> Taken together, these steps would have significantly, even if gradually, reduced the number of incarcerated citizens over the subsequent twenty to fifty years.<sup>39</sup>

Early in the pandemic, the pace of these efforts quickened still. In spring 2020, as Covid-19 spread across the country, criminal law reform advocates and families of the incarcerated<sup>40</sup> began to express concern about the safety of incarcerated people given the physical conditions of prison.<sup>41</sup> Abolitionists called for the release of incarcerated people and cessation of arrests in light of the health risks posed by the inability to social distance while incarcerated. Thousands of jailed people were released.<sup>42</sup> More followed.<sup>43</sup> Simultaneously,

34. DENNIS SCHRANTZ, STEPHEN T. DEBOR & MARC MAUER, THE SENT’G PROJECT, *DECARCERATION STRATEGIES: HOW 5 STATES ACHIEVED SUBSTANTIAL PRISON POPULATION REDUCTIONS* 7 (Sept. 2018), <https://sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/> [https://perma.cc/ED6Z-MCUJ].

35. Paul Egan, *Michigan Prison Closing After State’s Inmate Population Drop*, DET. FREE PRESS (Jan. 29, 2018), <https://www.freep.com/story/news/local/michigan/2018/01/29/muskegon-heights-prison-closing-inmates/1074773001/> [https://perma.cc/L2SB-RAD5].

36. A.B. 109, 2011 Cal. Stat. Ch. 15; see Robin Respaut, *California Prison Reforms Have Reduced Inmate Numbers, Not Costs*, REUTERS (Jan. 5, 2016), <https://www.reuters.com/article/us-california-prison-budget-insight/california-prison-reforms-have-reduced-inmate-numbers-not-costs-idUSKBN0UK0J520160106> [https://perma.cc/LZG7-RSG5].

37. See ADAM GELB, JOHN GRAMLICH & PHILLIP STEVENSON, PEW CHARITABLE TRS., *STATE REFORMS REVERSE DECADES OF INCARCERATION GROWTH 1* (Mar. 21, 2017), [https://www.pewtrusts.org/-/media/assets/2017/03/state\\_reforms\\_reverse\\_decades\\_of\\_incarceration\\_growth.pdf](https://www.pewtrusts.org/-/media/assets/2017/03/state_reforms_reverse_decades_of_incarceration_growth.pdf) [https://perma.cc/GL3X-E7ND].

38. Steven Zeidman, *Several Roads to Decarceration, All of Which Should Be Taken*, GOTHAM GAZETTE (Dec. 6, 2018), <https://www.gothamgazette.com/opinion/8123-several-roads-to-decarceration-all-of-which-should-be-taken> [https://perma.cc/G64J-P26P].

39. See Udi Ofer & Nicole Zayas Fortier, *Unveiling a State-by-State Plan to End Our Mass Incarceration Crisis*, AM. C.L. UNION (Oct. 18, 2019), <https://aclu.org/news/smart-justice/unveiling-a-state-by-state-plan-to-end-our-mass-incarceration-crisis/> [https://perma.cc/DWT4-XS4F].

40. Lewis, *supra* note 2.

41. See Press Release, Am. C.L. Union, *supra* note 3.

42. *Reducing Jail and Prison Populations During the Covid-19 Pandemic*, BRENNAN CTR. FOR JUST. (Feb. 16, 2021) [hereinafter *Reducing Jail and Prison Populations*], <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic> [https://perma.cc/23X2-AGRK]; see also Tracey Tully, *2,258 N.J. Prisoners Will Be Released in a Single Day*, N.Y. TIMES (Nov. 9, 2020), <https://www.nytimes.com/2020/11/04/nyregion/nj-prisoner-release-covid.html> [https://perma.cc/S87L-MG8L].

43. See *Reducing Jail and Prison Populations*, *supra* note 42; Erika D. Smith, *2020 Was the Year America Embraced Black Lives Matter as a Movement, Not Just a Moment*, L.A. TIMES (Dec. 16,

in the wake of George Floyd's murder, the Black Lives Matter movement's platform amplified calls for abolition, including a call for defunding the police and uplifting reconstructive practices that could transform the political, social, and economic lives of Black people.<sup>44</sup> On March 18, 2020, the American Civil Liberties Union began working with local affiliates<sup>45</sup> to release or keep new individuals out of prison.<sup>46</sup> Even some prosecutors argued that the "[Covid-19] crisis create[d] an even more pressing need for elected prosecutors, public health officials, and other leaders to work together to implement concrete steps in the near-term to dramatically reduce the number of incarcerated individuals and the threat of disastrous outbreaks."<sup>47</sup>

## 2. *The Positive Project*

Drawing down numbers is precursory.<sup>48</sup> Post-Emancipation, W.E.B. DuBois argued that the outlawing of slavery was itself a necessary, though not sufficient, task for the liberation of enslaved people. In *Black Reconstruction*, DuBois asserted "[t]he abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States."<sup>49</sup> Equally fundamental to literal abolition was "the creation of new democratic forms in which the institutions and ideas that previously implicated in slavery would be remade to incorporate those formerly enslaved."<sup>50</sup> Congress established the Freedmen's Bureau on March 3, 1865 to do this work.<sup>51</sup> The objective of the Freedmen's Bureau was to undertake the relief effort, including the social reconstruction that would bring the four million newly freed Black

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2020) <https://www.latimes.com/california/story/2020-12-16/black-lives-matter-protests-george-floyd-coronavirus-covid-2020> [<https://perma.cc/UM45-LD6U>].

44. See Smith, *supra* note 43; *BLM Platform*, BLACK LIVES MATTER, <https://blacklivesmatter.com/blm-demands/> [<https://perma.cc/74DB-4LV3>].

45. See Press Release, Am. C.L. Union, *supra* note 3.

46. See *id.*; Tully, *supra* note 4.

47. See *Joint Statement*, *supra* note 5.

48. It is well-settled that the first step on the road to prison abolition is organizing to reduce the number of people incarcerated in this country. That organizing began in "[t]he 1970's . . . (which) were marked by intense organizing within, outside and across prison walls," calling for prison reform or abolition, writes Angela Davis. DAVIS, *supra* note 15, at 54. For further insight into the prison abolition movement, see SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON (Lawrence Hill Books 1994) (1970); THOMAS MATHIESEN, THE POLITICS OF ABOLITION (1974); WILLEM DE HAAN, THE POLITICS OF REDRESS: CRIME, PUNISHMENT AND PENAL ABOLITION (1990); FAY H. KNOPP, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS (1976).

49. W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 170 (Transaction Publishers 2013) (1935).

50. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1162 (2015).

51. See Freedman's Bureau Act, H.R. 51, 39th Cong. (1865), [https://www.senate.gov/artandhistory/history/resources/pdf/Freedmens\\_Bureau\\_Act\\_3-3-1865.pdf](https://www.senate.gov/artandhistory/history/resources/pdf/Freedmens_Bureau_Act_3-3-1865.pdf) [<https://perma.cc/333P-JDST>].

people into full citizenship.<sup>52</sup> Through its fifteen field offices, the Bureau issued food and clothing; operated hospitals and temporary camps; helped locate family members; promoted education; helped freedmen legalize marriages; provided employment, supervised labor contracts; provided legal representation; settled freedmen on abandoned or confiscated lands; and worked with African American soldiers and sailors and their heirs to secure back pay, bounty payments, and pensions.<sup>53</sup>

The Bureau was not to last. It was disbanded and most of its projects were abandoned before they were anywhere near completed. Slavery and freedom, it soon became clear, were not binary. Professor Katherine Franke helped us to understand this in her book, *Repair: Redeeming the Promise of Abolition*, where she wrote “[t]he badge of being *freed* has produced intergenerational forms of disadvantage for which reparation remains past due.”<sup>54</sup> In the Bureau’s stead, states erected *de facto* and *de jure* laws to exclude Black people from the social fabric of this country through economic and political violence.<sup>55</sup>

The murky space between Black bondage and Black freedom persists today. This is no more present than in the carceral system. Beyond the release of people from prisons, modern abolitionists call for a positivistic project that incorporates Black people into the social order.<sup>56</sup> Abolition as used here means to confront the structures that give rise to penal suffering. And abolition demands social change projects be erected as bridges between the decarcerated and liberation, a process abolitionists call “prefiguration.”<sup>57</sup> According to abolitionist Harsha Walia, fundamental change requires “the imagining and generating of alternative institutions and relations . . . [and] resistance that is responsive to dismantling current systems of colonial empire and system hierarchies, while also prefiguring societies based on equity, mutual aid, and self-determination.”<sup>58</sup>

Housing is increasingly recognized as one linchpin resource that provides the opportunity for successful participation in other resources essential to full citizenship, such as employment and healthcare.<sup>59</sup> Abolitionist organizations

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52. *See id.*

53. *See id.*

54. KATHERINE FRANKE, REPAIR: REDEEMING THE PROMISE OF ABOLITION 8–9 (2019). The Freedman’s Bureau was ended abruptly and prematurely. *See generally* W.E.B. DUBOIS, THE PHILADELPHIA NEGRO: A SOCIAL STUDY (Univ. Pa. Press 1996) (1899).

55. *See* DUBOIS, *supra* note 49, at 31–44.

56. *See id.* at 15–17.

57. *See* McLeod, *supra* note 50, at 1162.

58. HARSHA WALIA, UNDOING BORDER IMPERIALISM 249 (2013).

59. *Id.* (DuBois first coined the term “abolition democracy”); *see* Veronica Gaitán, *How Housing Can Determine Educational, Health, and Economic Outcomes*, HOUS. MATTERS (Sept. 19, 2018), <https://housingmatters.urban.org/articles/how-housing-can-determine-educational-health-and-economic-outcomes> [https://perma.cc/AA96-FD8E].

such as Critical Resistance<sup>60</sup> and the Prison Moratorium Project<sup>61</sup> have centered housing in their work on behalf of ex-inmates, alongside food, employment, and education.

### B. Right to Housing Movement

America right now has a nation of unhoused and barely housed people within the nation. Our current housing crisis is unsurprising given the ballooning number of American families living in deep poverty starting in the late 1970s. The last time unhoused individuals were counted, in January 2020 just before the onset of the Covid-19 pandemic, 580,466 people were homeless. 70 percent of these were individuals and 30 percent were families with children.<sup>62</sup> Since 2016, the unsheltered homeless population has surged upward of 30 percent, which wiped out gains that had been made in the immediately preceding decade. Point-in-time counts that measure the number of people in shelter and on the streets only tell part of the story. Housing insecurity is also a significant part of the picture. Housing insecurity refers to any number of housing-related challenges, including trouble paying rent, overcrowding, moving frequently, staying with relatives, and spending the bulk of income on housing.<sup>63</sup> Households that spend over 30 percent of their income on housing are cost-burdened.<sup>64</sup> Those that spend over 50 percent of their income on housing are severely cost-burdened.<sup>65</sup> In 2014, 21.3 million American households were cost-burdened. Of those, 11.4 million were severely cost-burdened.<sup>66</sup> That means almost one-fourth of all American households are cost-burdened and housing insecure.

Federal subsidies serve to reduce the cost burden on households. Between 1977 and 1994 the number of HUD-assisted households grew by 2.6 million, reflecting a high level of need.<sup>67</sup> And between 1977 and 1983 the federal

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60. Critical Resistance seeks to build an international movement to end the Prison Industrial Complex by challenging the belief that caging and controlling people makes us unsafe. *About Critical Resistance*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/> [<https://perma.cc/65ZN-KYNP>]. They believe that basic necessities such as food, shelter, and freedom are what really make our communities secure. *Id.* They see their work as part of the global struggle against inequality and powerlessness. *Id.*

61. The Prison Moratorium Project believes that prisons create more problems than they solve. *About the Prison Moratorium Project*, NO MORE PRISONS, <http://www.nomoreprisons.org/about-us/> [<https://perma.cc/98QQ-KMFT>].

62. *State of Homelessness: 2021 Edition*, NAT'L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2021/> [<https://perma.cc/EE5H-HUPK>].

63. *Housing Instability*, HEALTHY PEOPLE 2020, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/housing-instability> [<https://perma.cc/WHH2-YLVW>].

64. *Id.*

65. *Id.*

66. *Id.*

67. U.S. DEP'T OF HOUS. & URB. DEV., NEW FINDINGS ON HOUSING AFFORDABILITY IN AMERICA (Sept. 23, 1999).

government responded to an increase in need for government subsidized housing by increasing assisted households by 204,000, annually.<sup>68</sup> But starting in 1984 this trend reversed. Each year between 1984 and 1994, Congress only appropriated enough funds to support the addition of 107,000 new subsidized households.<sup>69</sup> From 1995 until 1998, Congress provided no new funds for assisted housing.<sup>70</sup> After 1999, Congress slowly began to increase appropriations again to a meager 50,000.<sup>71</sup>

The raw number of subsidies is of course only one way to address the housing shortage. And focusing on it exclusively camouflages a second troubling trend—the lack of affordable housing stock. The affordable market has become illusory in the same time that the need has increased and subsidies decreased. Right to housing advocates called this trifecta out in real time. In 1989, the Institute for Policy Studies assembled a working group on housing that crafted a detailed housing program, *The Right to Housing: A Blueprint for Housing a Nation*.<sup>72</sup> The report provided an analysis of the private market and government programs and concluded with a detailed plan including preserving affordable housing, protecting government-funded housing stock and subsidies, and financing new affordable housing. They estimated the costs in the first year would be \$28–88 billion, but that it could be offset by taking back the \$54 billion tax deduction that was offered to middle-class homeowners. The group coined the phrase decommodification. The *Blueprint* was put before the 101st Congress in the form of H.R. 1122.<sup>73</sup> It did not pass, and progress on a national right to housing platform since then has been modest even as the housing crisis grows to a seemingly intractable magnitude.

In the last decade income instability has continued to steadily increase among the working class. This has been due to a combination of the foreclosure crisis, diminishing affordable housing stock, and gentrification.<sup>74</sup> With respect to the latter, in his book *How to Kill A City: Gentrification, Inequality and the*

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68. *Id.*; see also Michael A. Stegman, *The Fall and Rise of Public Housing*, REGUL. 64 (Summer 2002), <https://communitycapital.unc.edu/wp-content/uploads/sites/340/2000/09/FacingNewSubHsgCrunch.pdf> [<https://perma.cc/CW7V-NCAS>] (discussing policy changes and the numbers involved with public housing).

69. U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 67.

70. *Id.*

71. *Id.*

72. INST. POL'Y STUD., *THE RIGHT TO HOUSING: A BLUEPRINT FOR HOUSING A NATION* (Oct. 1, 1989).

73. National Comprehensive Housing Act, H.R. 1122, 101st Cong. (1989–1990).

74. Matthew Desmond, *The Tenants Who Evicted Their Landlord*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/10/13/magazine/rental-housing-crisis-minneapolis.html> [<https://perma.cc/KM85-7K3C>]. The connection between public health and housing has also come into the public awareness in recent years. A 2015 report by the Yale Global Health Leadership Institute supported the direct relationship between housing interventions and health outcomes, especially within low-income or otherwise-vulnerable populations. *Housing and Health: An Overview of the Literature*, HEALTH AFFS. (June 2018), [https://www.healthaffairs.org/doi/10.1377/hpb20180313.396577/full/HPB\\_2018\\_RWJF\\_01\\_W.pdf](https://www.healthaffairs.org/doi/10.1377/hpb20180313.396577/full/HPB_2018_RWJF_01_W.pdf) [<https://perma.cc/7XM8-M94Z>].

*Fight for the Neighborhood*, P.E. Moskowitz, drawing on Neil Smith’s “rent gap” theory, suggested that cities do not just gentrify, but do so when<sup>75</sup> the “process is profitable for real estate developers.” Cities use tax credit programs, among other tools, to woo developers, millennials, major companies, millionaires, and billionaires.<sup>76</sup> These wealthy newcomers have squeezed out the poor who inhabited the city before it was profitable. The effects of gentrification on the poor have been deleterious in recent decades. In his book *Evicted: Poverty and Profit in the American City*, Matthew Desmond revealed how our “cities have become unaffordable to our poorest families,” and that has resulted in a persistent eviction crisis.<sup>77</sup> In 2013, one in eight poor renting families nationwide were unable to pay their rent and a similar number thought they would be evicted imminently.<sup>78</sup> Desmond also detailed the fallout of eviction—homelessness, depression, illness—especially among women of color and their children.<sup>79</sup> Among Milwaukee renters, the backdrop against which *Evicted* is set, for example, over one in five Black women reported having been evicted in their adult life, compared to one in twelve Latinx women and one in fifteen White women.<sup>80</sup> Most evicted households across the country have children living in them.<sup>81</sup> In his final analysis, Desmond proposed “significantly expanding our housing voucher program so that *all* low-income families could benefit from it.”<sup>82</sup>

Interestingly, also in the years immediately preceding Covid-19, cities began passing “right to counsel” in eviction cases, which is widely thought to be a building block to a right to housing.<sup>83</sup> Cities have been otherwise slow to readjust priorities to head off the most recent affordable housing crisis.<sup>84</sup> Part of the delay is attributable to private citizens’ reluctance to agree to low-income

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75. P.E. MOSKOWITZ, *HOW TO KILL A CITY: GENTRIFICATION, INEQUALITY, AND THE FIGHT FOR THE NEIGHBORHOOD* 37 (2018).

76. *Id.* at 37–43.

77. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 297 (2016).

78. *Id.* at 5.

79. *Id.* at 300.

80. *Id.* at 299.

81. *Id.*

82. *Id.* at 308. Desmond notes that housing vouchers are not the only path forward. *Id.* In theory, public housing, tax credits, incentivizing homeownership, or incentivizing development could also solve the affordable housing crisis. Many of these alternatives have been tried and failed. *Id.* For instance, public housing concentrated poverty and segregated people of color in ways that research suggests may be imprudent. *Id.* They also each have problems of scale. Even if financing were not an issue, it would take longer than we have, frankly, to build enough social housing to meet the need. On the other hand, vouchers can be scaled almost immediately. *Id.*

83. *Id.* at 303–05.

84. See Patrick Sisson, Jeff Andrews & Alex Bazeley, *The Affordable Housing Crisis, Explained*, CURBED (Mar. 2, 2020), <https://archive.curbed.com/2019/5/15/18617763/affordable-housing-policy-rent-real-estate-apartment> [<https://perma.cc/6RZF-H844>].

newcomers in neighborhoods where affordable housing is planned to be sited.<sup>85</sup> In some cases, however, the public sector itself has taken actions directly exacerbating the affordable housing and eviction crises, primarily through policies that provide opportunities for unchecked gentrification.<sup>86</sup> Tenants were harmed as a result and began to organize against their displacement.

At the end of 2019, working-class renters were organizing to essentially demand a right to housing. For example, in November 2019, several members of a collective of unhoused and insecurely housed Black women activists called “Moms4Housing” moved into an empty house in West Oakland with their children.<sup>87</sup> They expressed frustration at the inability to raise their children safely in the shelter system and needing to find a better way. The vacant house they ultimately occupied presented itself as such an option. Shortly after moving in, the moms received an eviction notice from Wedgewood, the speculative real estate group that owned the property.<sup>88</sup> They challenged the notice by arguing that housing is a human right, as codified in the 1948 Universal Declaration of Human Rights promulgated by the United Nations.<sup>89</sup> The moms lost in court.<sup>90</sup> But public outcry ensued. In May 2020, with assistance from state and local government, the Oakland Community Land Trust purchased “Mom’s House” for \$537,000 for the benefit of low-income residents.<sup>91</sup> Additionally, Wedgewood announced that it would provide the right of first refusal to Oakland’s Housing and Community Development Department and the Oakland Community Land Trust for any properties it planned to sell in the city.<sup>92</sup> In another example in Minneapolis, IX, a tenants’ organization, managed to successfully purchase their building from their unscrupulous landlord after several years of intense negotiations.<sup>93</sup> The tenants were rising up and calling for a right to be housed.

The coronavirus pandemic accelerated this type of collective tenant organizing. As local governments scrambled to keep poor people housed during quarantine, some made unsavory decisions early on that caused public alarm. In early March 2020, Las Vegas (home to 147,000 hotel rooms) made homeless people sleep in a parking lot on the ground after a local shelter temporarily closed

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85. See *How to Beat Affordable Housing’s NIMBY Problem*, ATLANTIC, <https://www.theatlantic.com/sponsored/fannie-mae-2019/how-to-beat-affordable-housings-nimby-problem/3190/> [<https://perma.cc/P8NB-QVLG>] (detailing how Minneapolis used citywide zoning to get past oppositionist neighbors); see also, Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L. J. 495, 495–496 (1994).

86. Gerrard, *supra* note 85, at 500.

87. Rachel Hahn, *These Moms Fought for a Home – and Started a Movement*, VOGUE MAG. (May 12, 2020), <https://www.vogue.com/article/moms-4-housing> [<https://perma.cc/5Y83-72GR>].

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. See Desmond, *supra* note 74.

due to Covid-19.<sup>94</sup> Even cities that tried to set aside funds to address housing found the amount of aid they had allocated was not nearly enough. Houston dedicated \$15 million to rent relief, which was exhausted in two hours.<sup>95</sup> Eventually, every state passed a rent moratorium due to the pandemic, which prevented tenants from being evicted for a certain time period.<sup>96</sup> As the pandemic raged on, however, those initial moratoria expired and many states chose not to extend them.<sup>97</sup> In May 2020, tenant groups around the country coordinated a national rent strike.<sup>98</sup> Twenty thousand renters in New York City and Los Angeles pledged to collectively withhold rent.<sup>99</sup> In July, renters in New Orleans blocked entrances to a courthouse after the eviction moratorium expired.<sup>100</sup> Organizations like the Audre Lorde Project worked with advocates across the country to demand governments cancel rent that had gone unpaid during the pandemic.<sup>101</sup> In Philadelphia a homeless encampment was erected on Benjamin Franklin Parkway outside of the Philadelphia Housing Authority's offices to draw attention to homelessness in the city.<sup>102</sup> The organizers of Occupy PHA moved over fifty unhoused families into empty publicly owned properties and ultimately came to an agreement with the city for the people to be housed there permanently.<sup>103</sup>

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94. Lois Beckett, *After Outrage over Homeless Sleeping in Parking Lot, Vegas Now Touts Tented Covid-19 Center*, GUARDIAN (Apr. 16, 2020), <https://www.theguardian.com/us-news/2020/apr/16/las-vegas-homeless-coronavirus-parking-lot-center> [<https://perma.cc/38C3-PW2K>].

95. Elizabeth Trovall, *\$15 Million in Rent Relief Claimed in Less Than 2 Hours, as Tenant Demand Creates Lag in Response*, HOUS. PUB. MEDIA (May 15, 2020), <https://www.houstonpublicmedia.org/articles/news/houston/2020/05/13/369448/houstons-15-million-rent-relief-fund-drained-in-under-two-hours/> [<https://perma.cc/C2PU-NY6Y>].

96. None of the moratoria were consistent and many were not comprehensive. Professor Emily Benfer with Matthew Desmond's Eviction Lab designed a Covid Policy Scorecard to evaluate state eviction protections during the pandemic. *Covid-19 Housing Policy Scorecard*, EVICTION LAB, <https://evictionlab.org/covid-policy-scorecard/> [<https://perma.cc/DL4K-98KM>] (last visited Apr. 6, 2022).

97. *See id.*

98. Desmond, *supra* note 74.

99. *Id.*

100. *Id.*

101. Kerbie Joseph, *Know Your Housing Rights During Covid-19 Pandemic*, AUDRE LORDE PROJECT (Apr. 3, 2020), <https://alp.org/news/know-your-housing-rights-during-covid-19-pandemic> [<https://perma.cc/G7Q2-J2XZ>]; JABOA LAKE, *THE PANDEMIC HAS EXACERBATED HOUSING INSTABILITY FOR RENTERS OF COLOR I* (Oct. 30, 2020) (“During the coronavirus pandemic, disparities by race have persisted: Renters of color report having less confidence in their ability to pay rent and experiencing greater difficulties staying current on rent compared with their [W]hite counterparts. It is clear that the coronavirus pandemic is affecting renters of color differently, exacerbating past inequality, and leading the path to a future of worsening inequality.”).

102. Apoorva Tadepalli, *A Radical Movement to Take Back Our Cities*, NEW REPUBLIC: SOLD/SHORT (Aug. 11, 2020), <https://newrepublic.com/article/158842/abolition-park-protest-defund-the-police-homelessness-housing-crisis> [<https://perma.cc/VD5H-B83X>].

103. Nate File, *Philly's Housing Encampments of 2020 Led to a Nationally Celebrated Deal. Then It All Began to Unravel*, PHILA. MAG. (Oct. 9, 2021), <https://www.phillymag.com/news/2021/10/09/parkway-encampments-housing-agreement/> [<https://perma.cc/E4DA-HYQU>].

In response to calls by renters for protection from eviction in the pandemic, in November 2020, the Centers for Disease Control (CDC), initiated a federal moratorium on evictions, the “Temporary Halt on Residential Evictions to Prevent the Further Spread of Covid-19,” which created a short-term right to housing in effect.<sup>104</sup> The CDC’s moratorium prohibited new and previously filed evictions of tenants who provided their landlords with a signed declaration stating that they met certain criteria.<sup>105</sup> According to research undertaken by the Aspen Institute before the CDC moratorium was lifted, thirty to forty million renters were expected to face eviction absent other actions being taken suggesting that more people became housing insecure during the pandemic.<sup>106</sup> Additional federal action was taken, fortunately. In December 2020, the federal government allocated \$25 billion towards emergency rental assistance to wipe out the back-owed rent of those in deep financial need. Then, in March 2021, the government appropriated another \$21.55 billion through the American Rescue Plan to be distributed to tenants and landlords to cover unpaid rents and prevent widespread evictions nationally.<sup>107</sup> These federal monies and the expansive manner in which they were distributed (available without regard to any consideration other than need) represent a perhaps unwitting leap towards what the *Blueprint* outlined over thirty years ago—essentially a right to housing. The federal government’s pandemic-era housing policy should be normalized, bringing an expansive view to national policy about how and who should be housed. The only way to truly manifest the right to housing is to house every American in need without exception, including all of the persons covered by the current special programs, but also the decarcerated and beginning on the first night they leave jail or prison.

## II.

### A RIGHT TO HOUSING IS ESSENTIAL TO PRISON ABOLITION

Homelessness prior to and after incarceration has been solidly linked to reoffending.<sup>108</sup> At least 14 percent of decarcerated individuals were homeless in

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104. Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

105. *Id.*

106. Emily Benfer, David Bloomrobinson, Stacy Butler, Lavar Edmonds, Sam Gilman, Katherine Lucas Mckay, Lisa Owens, Neil Steinkamp, Diane Yentel & Zach Neumann, *The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America Are at Risk*, ASPEN INST. (Aug. 7, 2020), <https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/> [<https://perma.cc/WW9X-X75A>].

107. In the first two weeks of his administration, President Biden placed universal vouchers at the center of the HUD’s agenda. Matthew Yglesias, *Joe Biden’s Surprisingly Visionary Housing Plan, Explained*, VOX (July 9, 2020), <https://www.vox.com/2020/7/9/21316912/joe-biden-housing-plan-section-8> [<https://perma.cc/ES9B-EV5F>].

108. Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 IND. L.J. 422, 432–33 (2018).

the year prior to incarceration.<sup>109</sup> Research reveals that formerly incarcerated people are ten times more likely to be homeless than the general public.<sup>110</sup> The rates of homelessness are highest among people who have been incarcerated more than once, recently released persons, persons of color, and women.<sup>111</sup> Among recently incarcerated persons that are not actually on the street, significant numbers only have temporary housing and are living in hotels, motels, and transitional housing like shelters.<sup>112</sup> We also know that homelessness increases the likelihood of the formerly incarcerated coming into additional contact with the criminal legal system: law enforcement punishes actions such as sleeping in public, panhandling, and public urination.<sup>113</sup> Studies have found that the presence of state-sponsored resources to offset the symptoms of poverty, including homelessness, dramatically reduced the likelihood of formerly incarcerated persons reoffending.<sup>114</sup>

Access to housing for recently decarcerated persons enables abolitionism by reducing poverty and thereby decreasing the likelihood that the decarcerated will return to prison once released. This ends a dreadful cycle that sends the same people to prison over and over again not because they are dangerous, but because they do not have the economic and social resources to exist outside. This Section briefly reviews the literature on recidivism, which strongly suggests that access to housing lessens the burdens of reentry and explores the correlation between economic and social capital, stable housing, and poverty. Taken together, the research cited in this Section indicates that access to subsidized housing provides a platform for formerly incarcerated persons to rejoin society effectively by aiding in their access to social networks, employment, and education. Additionally, as a policy matter, success in these areas is helpful in defeating arguments regarding the impracticality of decarceration.

#### A. Poverty Contributes to Recidivism

Recidivism refers to a person's relapse into criminal behavior and is measured by criminal acts that result in rearrest, reconviction, or return to prison

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109. LUCIUS COULOUTE, PRISON POL'Y INITIATIVE, NOWHERE TO GO: HOMELESSNESS AMONG FORMERLY INCARCERATED PEOPLE (Aug. 2018), <https://prisonpolicy.org/reports/housing.html> [<https://perma.cc/8USY-K3YQ>]; see also DORIS J. JAMES, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, PROFILE ON JAIL INMATES, 2002, at 9 (July 2004), <https://www.bjs.gov/content/pub/pdf/pji02.pdf> [<https://perma.cc/9U8F-Y87E>] (profiling incarcerated people held in local jails in 2002 and comparing them to those held in 1996); Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness, and Mental Health: A National Study*, 59 PSYCHIATRIC SERVS. 170, 170 (Feb. 1, 2008), <https://ps.psychiatryonline.org/doi/pdf/10.1176/ps.2008.59.2.170> [<https://perma.cc/N69Y-ME8N>] (investigating the rate and correlation of homelessness and mental illness among adult incarcerated people).

110. See COULOUTE, *supra* note 109.

111. *Id.*

112. *Id.*

113. *Id.*

114. Kristy Holtfreter, Michael D. Reisig & Merry Morash, *Poverty, State Capital, and Recidivism Among Women Offenders*, 3 CRIMINOLOGY & PUB. POL'Y 185, 185 (2004).

with or without a new sentence.<sup>115</sup> Nationally, recidivism data could appear discouraging.<sup>116</sup> The Marshall Project reported in 2014 that approximately three quarters of incarcerated people released from state prisons were rearrested within five years and about half were incarcerated again.<sup>117</sup> The “2018 Update on Prisoner Recidivism,” conducted by the Bureau of Justice Programs, found that 68 percent of released incarcerated people were arrested within three years, 79 percent within six years, and 83 percent within nine years.<sup>118</sup> Recidivism rates like these lead opponents to argue that abolitionism will negatively impact public safety. Recidivism may not be as related to dangerousness as it might first seem.

Indeed, poverty may be a more significant predictor of recidivism than dangerousness. In an extensive review of studies designed to determine whether efforts to reduce prison sentences and the prison population would impact crime, public policy analyst David Roodman found that decarceration has “zero net impact on crime outside of prison” and that “at least as much evidence suggests that decarceration reduces crime as increases it.”<sup>119</sup> According to Roodman, “while imprisoning people temporarily stops them from committing crime outside prison walls, it also tends to increase their criminality after release.”<sup>120</sup> The argument that decarceration is unlikely to increase crime is built on the premises that “deterrence is minimal; incapacitation is real, and that the aftereffects of prison are harmful.”<sup>121</sup> Some scholars suggest that poverty may

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115. See *Recidivism*, NAT’L INST. OF JUST., <http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx> [<https://perma.cc/KDU4-XQT6>]. More specifically, research on recidivism can be divided into four categories: (1) how differences in crime translate into different recidivism rates; (2) how the deterrent effect of prison affects recidivism rates; (3) how differences in incentive structures faced by prisoners translate into differences in recidivism; and (4) how institutional factors in the environments to which ex-offenders return that may impact the likelihood of recidivism.

116. One explanation for the discrepancy between what we know about prison and what we understand about recidivism is that the parole system itself may play a significant role in overall high recidivism rates. See Shelley Johnson Listwan, Christopher J. Sullivan, Robert Agnew, Francis T. Cullen & Mark Colvin, *The Pains of Imprisonment Revisited: The Impact of Strain on Inmate Recidivism*, 30 JUST. Q. 144, 147–48 (2013). In New York, the rate of overall recidivism remained consistently discouraging from 1996 through 2010. Dana Goldstein, *The Misleading Math of ‘Recidivism,’* MARSHALL PROJECT (Dec. 4, 2014), <https://www.themarshallproject.org/2014/12/04/the-misleading-math-of-recidivism> [<https://perma.cc/A8K4-6K4K>]. The New York State Department of Corrections, though, found that between 1985 and 2010, which covered the same relative period of time the overall recidivism rates were stable, there was a decrease by 10 percent in the number of former inmates returning to prison because of felony convictions for new offenses. *Id.* 78 percent of most of the returns to prison in New York during that time were triggered, not by new offenses, but by parole violations, such as failing drug tests or skipping meetings with parole officers. *Id.* These numbers suggest a system that creates a cycle of recidivism and the absence of correlating danger to the public. *Id.*

117. See Goldstein, *supra* note 116.

118. MARIEL ALPER, MATTHEW R. DUROSE & JOSHUA MARKMAN, U.S. DEP’T OF JUST.: BUREAU OF JUST. STAT., 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) 4 (2018).

119. David Roodman, *The Impacts of Incarceration on Crime*, OPEN PHILANTHROPY 2 (Sept. 25, 2017), <https://www.openphilanthropy.org/blog/impact-incarceration-crime> [<https://perma.cc/JY9L-CT87>].

120. *Id.*

121. *Id.*

actually be a better predictor of recidivism than factors like “dangerousness,” which are commonly used in actuarial risk assessment tools.<sup>122</sup> For example, one study of 134 recently decarcerated women in Minneapolis, St. Paul, and one county in Oregon found that poverty status increased the odds of rearrest by a factor of 4.6 percent and the odds of supervision violations by 12.7 percent. Once poverty was taken into account, risk scores failed to predict recidivism. And among poor women offenders, the study (also) found that State-sponsored financial support to address short-term needs (e.g., housing) reduced the odds of recidivism by 83 percent.<sup>123</sup> This all suggests that poverty drives recidivism and reducing poverty could increase successful community reentry for the recently decarcerated. What we know is that housing security reduces poverty.<sup>124</sup> If we can increase housing security and reduce poverty, we might also reduce recidivism.

### B. *Housing is Economic Capital*

One way of thinking about housing is as “economic capital.” Economic capital is a term for tangible resources like job training and educational opportunities and housing contribute to a person’s financial wellbeing. Possession of some economic capital tends to lead to additional economic capital. For instance, education leads to employment. Conversely, without education it is difficult to gain employment. And without employment it is near impossible to gain access to additional economic capital like healthcare and housing.<sup>125</sup> Conversely, in the absence of housing, a person will find that educational and employment opportunities are elusive. As aforementioned, there is limited affordable housing stock available anywhere.<sup>126</sup> The lack of private market, affordable housing makes subsidized housing an essential resource—i.e., economic capital—for poor people not only to access adequate stable housing on the market, but also other economic capital resources.<sup>127</sup> Demand for subsidized housing, however, currently exceeds supply.<sup>128</sup> To the extent that being housing insecure or homeless severely affects the recently decarcerated, access to federally subsidized housing vouchers will substantially increase that group’s economic capital, the likelihood of them integrating fully into society, and ultimately help them avoid recidivating.

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122. Holtfreter, *supra* note 114, at 185.

123. *Id.*

124. *See id.*

125. *Id.* at 200.

126. Jocelyn Fontaine & Jennifer Biess, *Housing as a Platform for Formerly Incarcerated Persons*, URB. INST. 6 (Apr. 2012), <https://urban.org/sites/default/files/alfresco/publication-pdfs/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.pdf> [<https://perma.cc/Ry6H-SHR2>].

127. *See id.*

128. Danya E. Keene, Alana Rosenbergb, Penelope Schlesingerb, Monica Guoa & Kim M. Blankenship, *Navigating Limited and Uncertain Access to Subsidized Housing After Prison*, 28 HOUS. POL’Y DEBATE 199, 199–200 (2018).

### C. *Social Capital is a Bridge to Economic Capital*

Social capital can be a bridge to economic capital. Social capital is a term used to describe how intangible social contacts optimize productivity and achieve favorable outcomes for individuals, entities, and even countries.<sup>129</sup> Sociologist Robert Putnam refers to “social capital” as “features of social life—networks, norms, and trust—that enable participants to act together more effectively to pursue shared objectives.”<sup>130</sup> Social capital includes the simple fact of having immediate, extended family, and neighborhood support networks and participating in religious and civic organizations in the first place.<sup>131</sup> Decarcerated persons often will need to rely on this type of social capital to re-launch them into the marketplace, including through the sharing by their kin networks of temporary or permanent housing immediately upon release. Despite their intangible nature, evidence suggests strong social networks can result in favorable outcomes for obtaining tangible economic resources, such as employment, compensation, and promotions.<sup>132</sup>

Some scholars questioned the existence of strong kin networks (i.e., social capital) in neighborhoods where many recently decarcerated persons are likely to return.<sup>133</sup> Citing the cumulative effects of structural economic change such as chronic unemployment, poverty, and crime in these neighborhoods, these scholars argued that the social institutions and networks that had previously

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129. Robert D. Putnam, *Bowling Alone: America's Decline in Social Capital*, 6.1 J. DEMOCRACY 65, 67 (1995).

130. Robert D. Putnam, *The Strange Disappearance of Civic America*, 24 AM. PROSPECT 54, 664–65 (1996).

131. Sociologists predict that as America becomes more diverse, we are going to see extended families become more common. Michela Zonata, *Housing the Extended Family*, CTR. FOR AM. PROGRESS 3 (2016). But also, the rise of non-biological kin in family arrangements, or “forged” families, over the last several years is worth considering here. David Brooks, *The Nuclear Family Was a Mistake*, ATLANTIC (Mar. 2020), <https://www.theatlantic.com/magazine/archive/2020/03/the-nuclear-family-was-a-mistake/605536/> [<https://perma.cc/YY8E-V3ML>]. Single mothers can find other single mothers interested in sharing a home. *Id.* There are co-housing projects, in which groups of adults live as members of an extended family, with separate sleeping quarters and shared communal areas. *Id.* Common, a real estate development firm, operates twenty-five of these co-housing communities in six cities for singles and recently opened a subsidiary, Kin, for families. *Id.* Kin provides each young family its own living quarters, but the facilities also have shared play spaces, child-care services, and family-oriented events and outings. *Id.* In Oakland, a co-housing community called Temescal Commons houses twenty-three residents ages one to eighty-three in nine housing units. *Id.* They share a courtyard and an industrial-size kitchen where residents prepare communal meals. *Id.* In Salt Lake City, an organization called the Other Side Academy provides serious felons with an extended family. *Id.* Or in Chicago, *Becoming a Man* helps disadvantaged youth. *Id.* It is essential that newly decarcerated persons be able to participate in these types of non-kin familial arrangements as well.

132. Jason Mazzone, *Towards a Social Capital Theory of Law: Lessons from Collaborative Reproduction*, 39 SANTA CLARA L. REV. 1, 31 (1995) (citing studies of the benefits of shared child-rearing to children and communities).

133. Dina Rose & Todd Clear, *Incarceration, Reentry and Social Capital: Social Networks in the Balance*, in “FROM PRISON TO HOME” CONFERENCE (2002), <https://www.urban.org/sites/default/files/publication/60671/410623-Incarceration-Reentry-and-Social-Capital.PDF> [<https://perma.cc/9JYX-RSBV>].

provided these neighborhoods with a sense of community, despite the economic marginality of the neighborhoods, had since broken down.<sup>134</sup> These scholars asserted this breakdown of “social organization” reduced residents’ ability to maintain effective social control and realize common goals, such as improving or maintaining the quality of a neighborhood or voting for politicians that will pursue their interests.<sup>135</sup>

To be sure, mass incarceration impacts social networks, especially in communities of color.<sup>136</sup> The damage ultimately reverberates throughout the community with cyclical impacts.<sup>137</sup> Nevertheless, social capital and organizations, even if reduced in number, do still exist in the Black and Brown neighborhoods that many incarcerated persons call home.<sup>138</sup> Bonds remain. Moreover, when recently decarcerated persons return back to their communities, their presence deposits more social capital. This is critical because Black and Brown communities with strong deposits of social capital are the transformative conditions that are essential to abolition.

The point here is that the opportunity to reside with members of their kin networks who already live in subsidized housing can dramatically increase social capital and economic capital, thereby ultimately reducing the risk recidivism. All this is possible in many cases without requiring the agency to contribute more than it already is subsidizing for the current family members. This would be similar to what the New York City Housing Authority (NYCHA) did in its pilot program described below. If PHAs ceased terminating tenant families for depositing social capital in the recently decarcerated in the form of even short-term housing upon their release an impact on recidivism might be felt. By incentivizing current families to turn recently decarcerated kin away lest they jeopardize the voucher for the entire family, PHAs are withdrawing a significant (and in some cases the only) social capital many recently decarcerated persons may have in the immediate days after release.

Importantly, recently decarcerated persons are themselves social capital as it relates to their kin networks, especially their children. There is good reason beyond making facilitating access to economic capital to promote the entry of recently decarcerated persons back into communities where they have kin networks—reunification. Post-release, the recently decarcerated supported by

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134. Jeffrey D. Morenoff & David J. Harding, *Incarceration, Prisoner Reentry, and Communities*, 40 ANN. REV. OF SOCIO. 411, 411 (2014).

135. *Id.*

136. Saneta deVuono-powell, Chris Schweidler, Alicia Walters & Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, WHO PAYS (2015), <http://whopaysreport.org/executive-summary/> [<https://perma.cc/LFS9-KM5V>].

137. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1282 (“Mass incarceration strains the extended networks of kin and friends that have traditionally sustained poor African American families in difficult times, weakening communities’ ability to withstand economic and social hardship.”).

138. See Daniel M. Fetsco, *Reentry Courts: An Emerging Use of Judicial Resources in the Struggle to Reduce Recidivism of Released Offenders*, 13 WYO. L. REV. 591, 596 (2013).

social capital and outfitted with economic capital can positively contribute to re/building their communities into the future and bring abolitionism full circle.

#### D. *Subsidized Housing Increases Economic and Social Capital*

This Section describes the federally subsidized housing program. It then argues that as decarceration hastens economic and social capital—in the way of access to subsidized housing—should be funneled to the recently decarcerated in order that they attain full citizenship. These efforts will contribute to permanently lowering the number of people in prison and jail by reducing recidivism rates among the recently decarcerated and facilitating the abolitionist turn.

##### 1. *Federally Subsidized Housing Vouchers*

In 1974, Congress passed the Housing and Community Development Act, which created the Housing Choice Voucher Program (voucher program or Section 8). Section 8 is funded by the Department of Housing and Urban Development (HUD) and administered by local public housing authorities.<sup>139</sup> Different than public housing, which is owned by the government, the voucher program is intended to offer low-income tenants the choice to live in privately owned market housing. In some cases, the voucher program also allows these individuals to relocate to “higher opportunity” neighborhoods where they can access high-performing schools and more job opportunities.<sup>140</sup> Section 8 tenants pay 30 percent of their income for rent and the federal government pays the remaining balance to the private landlord through the PHA.<sup>141</sup> The voucher holder must agree to abide by a set of tenant obligations, including prohibitions on drug use and criminal activity.<sup>142</sup> Prohibitions on criminal activity extend to associates of the subsidized tenants on or off the subsidized property.<sup>143</sup> At the

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139. *An Overview of Section 8 Housing Assistance*, BENEFITS.GOV (Jan. 23, 2020), <https://www.benefits.gov/news/article/388> [<https://perma.cc/6S8F-RYFJ>].

140. Barbara Sard & Douglas Rice, *Realizing the Housing Voucher Program’s Potential to Enable Families to Move to Better Neighborhoods*, CTR. ON BUDGET & POL’Y PRIORITIES (Jan. 2016), <https://www.cbpp.org/research/housing/realizing-the-housing-voucher-programs-potential-to-enable-families-to-move-to> [<https://perma.cc/6NFS-GHMA>].

141. *Housing Choice Vouchers Fact Sheet*, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/programs/hcv/about/fact\\_sheet](https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet) [<https://perma.cc/U3YG-NTZC>].

142. 24 C.F.R. § 982.551(l) (2020).

143. *The Journal*, the New York City Housing Authority’s monthly tabloid newspaper, which is delivered to 178,000 apartments, includes an entire feature on exclusion: the Not Wanted List. Manny Fernandez, *Barred from Public Housing, Even to See Family*, N.Y. TIMES (Oct. 1, 2007), <https://www.nytimes.com/2007/10/01/nyregion/01banned.html> [<https://perma.cc/R99E-UPXK>]. It lists names of former residents who are “permanently excluded” from Housing Authority buildings and from even visiting family members. *Id.* The people on the Not Wanted list are barred for a wide variety of reasons, some of them for criminal arrests and others for being nuisances. *Id.* In *The Journal*’s September 2007 issue, “Peter Kilpatrick from Hammel Houses in Queens—‘formerly associated with the second

tail end of the Obama Administration, HUD revised rules to permit those who have had contact with the criminal legal system to access subsidized housing.<sup>144</sup>

## 2. *State-Sponsored Pilot Programs Subsidizing Housing for the Formerly Incarcerated*

State-sponsored housing grows economic and social capital for the recently decarcerated.<sup>145</sup> Recognizing this, several PHAs have experimented with programs that provided recently decarcerated persons with access to state-sponsored housing either on their own or living with family.

These programs produced promising results. For example, in November 2013, the NYCHA, in partnership with city and state corrections agencies, the New York City Department of Homeless Services, and intermediaries including Vera Institute and the Corporation for Supportive Housing, launched the Family Reentry Pilot Program (FRPP).<sup>146</sup> FRPP was open to 150 formerly incarcerated people who had been released from prison, jail, or a juvenile correction facility within three years of their application and who were seeking to reunite with their families in NYCHA apartments.<sup>147</sup> These individuals were, therefore, seeking to build on social capital. Vera researchers found that effective collaboration between NYCHA, reentry service providers, and corrections agencies was crucial to helping the pilot's participants gain stable housing and reconnect with their families, as well as to accomplish other goals such as securing work and continuing their education.<sup>148</sup> Of the eighty-five participants accepted into the program, only one was convicted of a new criminal charge during the course of

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floor” was first on the list. *Id.* Next was “Tyrone Taylor, ‘formerly associated’ with the fourth floor of Lincoln Houses in Manhattan.” *Id.* A dozen more names followed. *Id.*

144. *Addressing Housing Needs of Formerly Incarcerated Individuals, An Interview with Kymian Ray*, EDGE, <https://www.huduser.gov/portal/pdredge/pdr-edge-trending-050216.html> [perma.cc/W5L3-T4JP].

145. See CATHERINE BISHOP, NAT’L HOUS. L. PROJECT, AN AFFORDABLE HOME ON RE-ENTRY: FEDERALLY ASSISTED HOUSING AND PREVIOUSLY INCARCERATED INDIVIDUALS 112–15 (2018), <https://www.nhlp.org/wp-content/uploads/2018/08/Reentry-Manual-2018-FINALne.pdf> [https://perma.cc/W2D6-3EL4] (describing PHA reentry pilot programs undertaken in nearly a dozen communities). For instance, the Housing Authority of New Orleans revised its application process to eliminate consideration of criminal history as an automatic bar to admission. Katy Reckdahl, *Housing Authority Eliminates Ban for Ex-Offenders*, SHELTERFORCE (July 6, 2016), <https://shelterforce.org/2016/07/06/housing-authority-eliminates-ban-of-ex-offenders/> [https://perma.cc/PTY5-KKYJ]. Other cities, including Baltimore, Cleveland, Chicago, Los Angeles, and Oakland, began piloting programs that were designed to assist applicants with criminal histories in returning to public housing. BISHOP, *supra*, at 112–15 (2018).

146. John Bae, Margaret diZerega, Jacob Kang-Brown, Ryan Shanahan & Ram Subramanian, *Coming Home: An Evaluation of the New York City Housing Authority’s Family Reentry Pilot Program*, VERA INST. JUST. 12 (Nov. 2016), <https://www.vera.org/publications/coming-home-nycha-family-reentry-pilot-program-evaluation> [https://perma.cc/GR9G-UWFS].

147. *Id.* at 10. Applicants who were seeking to reunite with a family member in a senior building must have met the age requirement of sixty-two themselves. *Id.*

148. *Id.* at 12.

the program.<sup>149</sup> 50 percent of the participants that were interviewed reported that they would have been homeless or in a shelter without the program.<sup>150</sup>

Maryland is another example of an attempt to pilot a subsidized housing program for the recently decarcerated. The Maryland Opportunities Through Vouchers Experiment (MOVE) was a randomized housing-mobility program for incarcerated people designed to test whether residential relocation far away from former neighborhoods, incentivized through the provision of a housing subsidy, would reduce recidivism.<sup>151</sup> In the first iteration of the experiment, treatment-group participants received six months of free housing away from their home jurisdiction and control-group participants received free housing back in their home jurisdiction.<sup>152</sup> In the second iteration of the experiment, the treatment group remained the same. The control condition was redesigned to represent the status quo, and the group did not receive free housing.<sup>153</sup> The study found an astounding 0 percent rearrests for participants who received a voucher regardless of whether they used it in their previous neighborhood or not.<sup>154</sup> This suggested that it was housing that made the difference in recidivism and not neighborhood or “dangerousness.” In the comparison group, which was given no voucher, 22 percent of the participants were rearrested. A second iteration of the MOVE experiment found just 25 percent of the participants that moved were rearrested whereas 57 percent of those in the control group receiving no subsidy were rearrested.<sup>155</sup>

In 2009, Washington State passed Senate Bill 5525, which provided state-paid vouchers to participants in the Department of Corrections Earned Release Date (ERD) Housing Voucher Program.<sup>156</sup> The ERD program focused on providing housing for those who would remain incarcerated beyond their earned early release date only due to a lack of suitable housing.<sup>157</sup> 31 percent of ERD’s participants were homeless or transient before incarceration.<sup>158</sup> ERD program participants were provided rental vouchers for up to three months if it would result in the approval of an otherwise unapproved release plan.<sup>159</sup> The voucher had to operate in conjunction with other support programming including

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149. *Id.* at 21.

150. *Id.* at 22.

151. David S. Kirk, Geoffrey C. Barnes, Jordan M. Hyatt & Brook W. Kearley, *The Impact of Residential Change and Housing Stability on Recidivism: Pilot Results from the Maryland Opportunities Through Vouchers Experiment (MOVE)*, 14 J. EXPERIMENTAL CRIMINOLOGY 213, 213 (Dec. 15, 2017).

152. *Id.*

153. *Id.*

154. *Id.* at 221.

155. *Id.*

156. S.B. 5525, 61st Leg., Reg. Sess. (Wash. 2009).

157. *Id.*

158. EMILY YETTE & MIKE EVANS, WASH. STATE DEP’T OF CORR., OFFENDERS ON THE “EARNED RELEASE DATE HOUSING VOUCHER” PROGRAM 6 (Mar. 28, 2011), <https://www.doc.wa.gov/docs/publications/reports/200-SR006.pdf> [<https://perma.cc/T93T-9X38>].

159. *Id.*

educational programming, employment programming, substance abuse treatment, and mental health treatment.<sup>160</sup> In the first six months, 16 percent of the participants in ERD were released within thirty days.<sup>161</sup> In the following ten months, 57 percent were released within thirty days.<sup>162</sup> Notably, while 45 percent of the ERD program participants were reincarcerated at least once during the follow-up, only 1.3 percent were convicted of new crimes.<sup>163</sup>

In each of the aforementioned examples, the success of the programs illustrates how the provision of subsidized housing to the recently decarcerated can be an avenue to reduce homelessness and recidivism, thus aiding the right to housing movement and the abolitionist turn.

### III.

#### LEGAL BARRIERS TO SUBSIDIZED HOUSING FOR THE DECARCERATED

In this Section, the Article explores the legal impediments, at the federal and local levels, to attaining access to subsidized housing for the decarcerated. It details a “culture of exclusion” in subsidized housing that takes three forms: eligibility, enforcement, and prioritization. Public housing authorities, in particular, use their broad discretion to create rules that make formerly incarcerated persons ineligible for subsidized housing immediately upon release.<sup>164</sup> In addition, subsidized tenants that have any contacts with the criminal legal system or have household members or guests who do, whether on or off federally subsidized property, can be evicted from their housing.<sup>165</sup> Eviction from subsidized housing can often result in criminal charges, which feeds the mass incarceration pipeline.<sup>166</sup> As I have argued in an earlier article, in this way, public housing authorities weaponize subsidized housing program rules and act as extensions of the police state in the homes of poor women of color.<sup>167</sup>

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160. S.B. 5525, 61st Leg., Reg. Sess. (Wash. 2009).

161. YETTE & EVANS, *supra* note 158, at 5 tbl.2.

162. *Id.*

163. *Id.*

164. Roberta Meyers & Victoria Palacio, “Housing for All” Must Include Those Who are Justice-Involved, THE HILL (Aug. 3, 2019), <https://thehill.com/opinion/criminal-justice/456041-housing-for-all-must-include-those-who-are-justice-involved> [<https://perma.cc/6XD8-668K>].

165. U.S. Dep’t of Hous. & Urb. Dev., *FAQs: Excluding the Use of Arrest Records in Housing Decisions 2* (Nov. 2, 2015), [https://www.hud.gov/sites/documents/FAQ\\_EXCLUDE\\_ARREST\\_RECORDS.PDF](https://www.hud.gov/sites/documents/FAQ_EXCLUDE_ARREST_RECORDS.PDF) [<https://perma.cc/R2SE-CYWD>].

166. Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, BROOKINGS INST. 5 (Mar. 14, 2018), [https://brookings.edu/wp-content/uploads/2018/03/es\\_20180314\\_looneyincarceration\\_final.pdf](https://brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf) [<https://perma.cc/CHV8-6YSU>].

167. See Norrinda Brown Hayat, *Section 8 Is the New N-Word: Policing Integration in the Age of Black Mobility*, 51 WASH. U. J.L. & POL’Y 61, 86 (2016) (discussing sheriff involvement in developing criminal fraud cases against voucher holders in Palmdale, California).

A. *Exclusion Under Federal Subsidized Housing Policy*

During the Clinton Administration, the federal government enacted a string of laws as part of the reinvigoration of the “War on Drugs” under the banner of “One Strike You’re Out” and the Supreme Court’s interpretation of those laws in *Department of Housing and Urban Development v. Rucker*. Those laws were used to deny prospective and exclude actual tenants from subsidized housing based on even minimal contacts with the criminal legal system. Despite what is now known about the ills of private prisons and the disparate impact of mass incarceration on communities of color, these Clinton-era laws continue to perpetuate a narrative of inherent criminality in subsidized housing and to bar the recently decarcerated from rejoining their families and neighborhoods.

1. *“One-Strike You’re Out”*

In 1988, federal subsidized housing policy shifted to the pursuit of “criminals” with the passage of the Anti-Drug Abuse (ADA) Act.<sup>168</sup> Congress’s stated intent in enacting the Anti-Drug Abuse Act of 1988 was to address drug dealers “increasingly imposing a reign of terror on public and other federally assisted low-income tenants.”<sup>169</sup> The Cranston-Gonzalez National Affordable Housing Act of 1990 elaborated on the ADA, by broadening the basis for eviction to “any criminal activity that threatens the health, safety, or right to peaceful enjoyment.”<sup>170</sup> Acting on Congress’s mandate in the ADA, HUD promulgated §1437d(l)(6) in 1991. In its original version, §1437(d) granted local PHAs the discretion to evict federally subsidized tenants whether or not they knew or should have known about the criminal activity of their household members or guests.<sup>171</sup> Importantly, PHAs also maintained the right to use their discretion to look to the circumstances surrounding each case to determine whether eviction was appropriate for any particular “innocent tenant” based on the impact of the conduct on others in the premises.<sup>172</sup> In 1996, the Housing Opportunity Program Extension Act (HOPEA) broadened the scope of HUD’s criminal activity lease provision to include drug-related activity “on or off such premises.”<sup>173</sup> Also, in 1996 during his State of the Union address, former President Bill Clinton announced his “One Strike You’re Out” policy. This policy called on PHAs to desist from engaging in a case-by-case analysis, which

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168. See Elayne Weiss, *Housing Access for People with Criminal Records*, 6 NAT’L LOW INCOME HOUS. COAL. 2019 ADVOCATE’S GUIDE 27, 27 (2019), [https://nlihc.org/sites/default/files/AG-2019/06-07\\_Housing-Access-Criminal-Records.pdf](https://nlihc.org/sites/default/files/AG-2019/06-07_Housing-Access-Criminal-Records.pdf) [<https://perma.cc/EZU3-NMPH>].

169. 42 U.S.C. § 11901(3).

170. 42 U.S.C. § 1437d(l)(6).

171. Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,566–67 (Oct. 11, 1991).

172. 24 C.F.R. § 966.4(l)(5)(vii)(B).

173. Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 9, 110 Stat. 834, 836–38 (1996).

created a tension between the executive branch and HUD.<sup>174</sup> “One Strike” incentivized PHAs to increase their rate of crime-related evictions by tying such practices to continued federal funding.

## 2. *Department of Housing and Urban Development v. Rucker*

The ADA had a devastating impact on the families it ensnared. Innocent tenants were being evicted through no fault of their own. To some, it seemed unlikely that Congress had truly meant to deny housing to innocent tenants with the passage of the ADA.<sup>175</sup> This question was taken up in *Department of Housing and Urban Development v. Rucker*.<sup>176</sup> The Oakland Housing Authority (OHA) had initiated separate unlawful detainer actions in municipal court against four tenants—Pearlie Rucker,<sup>177</sup> Willie Lee, Barbara Hill,<sup>178</sup> and Herman Walker<sup>179</sup>—who the agency admitted were all “innocent” themselves of any criminal wrongdoing. Nonetheless, the *Rucker* tenants were each accused of violating the lease provision obligating them to “assure that tenant, any member of the household, or another person under the tenant’s control, shall not engage in . . . [a]ny drug-related criminal activity on or near the premises.”<sup>180</sup> In response to OHA’s notice of eviction, the tenants filed an action in federal district court under the Administrative Procedure Act (APA), arguing that

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174. John F. Harris, *Clinton Links Housing Aid to Eviction of Crime Suspects*, WASH. POST (Mar. 29, 1996), <https://www.washingtonpost.com/archive/politics/1996/03/29/clinton-links-housing-aid-to-eviction-of-crime-suspects/fd81a5bb-a407-4f85-b427-5a6d2754da5f/> [<https://perma.cc/B78M-DFRL>].

175. See Lisa Weil, *Drug-Related Evictions in Public Housing: Congress’ Addiction to a Quick Fix*, 9 YALE L. & POL’Y REV. 161, 167 (1991).

176. Dep’t of Hous. v. *Rucker (Rucker IV)*, 535 U.S. 125, 127–28 (2002).

177. *Rucker v. Davis (Rucker I)*, 203 F.3d 627, 627 (9th Cir. 2000). Pearlie Rucker was a sixty-three-year-old woman who lived with her mentally disabled daughter, her two grandchildren, and one great-granddaughter. *Id.* OHA sought to evict Rucker because her daughter was found in possession of cocaine three blocks from the apartment and her adult son was found in possession eight blocks from the apartment. *Id.* Rucker asserted that she regularly searched her daughter’s room for evidence of alcohol and drug use and had never found any evidence or observed any sign of drug use by her daughter. *Id.*

178. Willie Lee was a seventy-one-year-old man who had been a public housing resident for over twenty-five years. *Id.* Barbara Hill, sixty-three, had been a public housing resident for over thirty years. *Id.* Lee and Hill lived with their grandsons. OHA sought to evict Lee and Hill because their grandsons were caught smoking marijuana together in the apartment complex parking lot. *Id.* Lee and Hill contended they had no prior knowledge of any illegal drug activity by their grandsons. *Id.*

179. Herman Walker was a disabled seventy-five-year-old man who had lived in public housing for approximately eight years. *Id.* He was not capable of living independently and required an in-home caregiver. *Id.* On three instances within two months, Walker’s caregiver and two others were found with cocaine in Walker’s apartment. *Id.* OHA terminated the lease and initiated an unlawful detainer action. *Id.*

180. *Id.* at 683 (quoting OHA lease paragraph 9(m), stating “that a tenant must assure that tenant, any member of the household, or another person under the tenant’s control, shall not engage in (i.) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other public housing residents or threatens the health and safety of the housing authority employees . . . , or (ii) Any drug-related criminal activity on or near the premises (e.g., manufacture, sale distribution, use, or possession of illegal drugs or drug paraphernalia, etc.)”).

§1437d(l)(6) did not authorize the eviction of innocent tenants.<sup>181</sup> They also argued that if the statute did in fact authorize such evictions then the statute was unconstitutional.

The district court sided with the tenants, concluding that Congress had not dealt with eviction of an innocent tenant.<sup>182</sup> The Housing Authority appealed the district court's decision. The Ninth Circuit examined §1437d(l)(5) and found that the statutory language plainly allowed eviction of tenants even if they are innocent.<sup>183</sup> After the panel decision, the Ninth Circuit heard the case *en banc* and reversed the panel's decision, holding that Congress did not intend § 1437d(l)(6) to authorize the eviction of innocent tenants.<sup>184</sup> The United States Supreme Court reversed the *en banc* decision of the Ninth Circuit and held that a public housing authority could evict tenants who were unaware of drug-related criminal activity.<sup>185</sup>

Justice Rehnquist, writing for the Court, opened the *Rucker* opinion with the principle that served as the basis for its hardline approach with regard to innocent tenants: "drug dealers [are] increasingly imposing a reign of terror on public and other federally-assisted low-income housing tenants."<sup>186</sup> First, the Court found that the statutory language, particularly the word "any," was broad enough to negate the need for Congress to have articulated a knowledge requirement.<sup>187</sup> The Court also analyzed the phrase "under the tenant's control" to determine both who the tenant was required to control and the meaning of control.<sup>188</sup> The Court found that the tenant only need to have allowed the other person to enter their premises to lose their housing.<sup>189</sup> The Court dismissed the legislative history altogether as unnecessary given the "clarity" of the statutory language.<sup>190</sup> The Court also challenged the *en banc* court's characterization of any result which called for the eviction of innocent tenants as unreasonable because of the permissive nature of the statute and the discretion provided to local housing authorities.<sup>191</sup> Post-*Rucker*, any alleged criminal conduct, whether

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181. *Id.* at 634.

182. *Id.*

183. *Id.* at 637.

184. *Id.* at 641.

185. *Dep't of Hous. v. Rucker (Rucker IV)*, 535 U.S. 125, 127–28 (2002).

186. *Id.* at 127.

187. *Id.* at 131 (citing *United States v. Gonzales*, 520 U.S. 1, 5 (1997) for the proposition that "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'" and "[t]hus any drug-related activity engaged in by the specified persons is grounds for termination, not just drug-related activity that the tenant knew, or should have known, about").

188. *Id.*

189. *Id.*

190. *Id.* at 131–33.

191. *Id.* at 134 ("And, of course, there is an obvious reason why Congress would have permitted local public housing authorities to conduct no-fault evictions: Regardless of knowledge, a tenant who 'cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.'").

on the premises or off, known or unknown, could form the basis of a subsidized tenant's eviction from federally subsidized housing.<sup>192</sup>

### B. PHAs: Arbiters of Exclusion

Local PHAs' discretion to evict tenants under the "one strike" laws and reaffirmed in *Rucker* impacts eligibility, enforcement, and set asides for subsidized housing, posing a significant barrier to decarcerated people accessing subsidized housing and securing the economic and social capital they might need to avoid recidivating.

#### 1. Eligibility

Federal guidelines only outright disqualify two categories of formerly incarcerated persons from subsidized housing for life: lifetime sex offenders and those who have been convicted of manufacturing methamphetamine in federally assisted housing.<sup>193</sup> All other exclusions and the timelines pertaining to the eligibility of recently decarcerated people are discretionary and determined by the PHAs themselves.<sup>194</sup> More specifically, under 24 C.F.R. § 982.552(c)(2), HUD confers responsibility for determining eligibility to the discretion of PHAs.<sup>195</sup> Section one of the regulation states that "[a] PHA may deny assistance for an applicant or terminate assistance for a participant under the programs because of the family's action or failure to act as described in this section or § 982.553."<sup>196</sup> Section 982.553 also gives discretion to PHAs to deny admission

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192. Similar to the lawsuits interpreting the Anti-Drug Abuse Act of 1988, the scholarship surrounding the application of one-strike policies in subsidized housing has been preoccupied with innocence. See Michael A. Cavanagh & M. Jason Williams, *Low-Income Grandparents as the Newest Draftees in the Government's War on Drugs: A Legal and Rhetorical Analysis of Department of Housing and Urban Development v. Rucker*, 10 GEO. J. ON POVERTY L. & POL'Y 157, 164–65 (2003) ("[P]oor elderly grandmothers and disabled persons are, single-handedly, to rid the PHAs of drug dealers" despite the fact that "[t]he full force of the United States government, consisting of the courts, the military, and the police, ha[d] been unable to stop drug crime for more than thirty years."). Not all observers disagreed with the Court's decision in *Rucker*.

193. 42 U.S.C. § 13661(b); 24 C.F.R. §§ 982.553(a), 960.204(a).

194. It is hard to determine the number of people being excluded by PHAs with any level of certainty. In connection with a 2004 report by Human Rights Watch, HUD provided Human Rights Watch with the number of PHA exclusions by each PHA. See HUM. RTS. WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING (Nov. 18, 2004), <https://www.hrw.org/sites/default/files/reports/usa1104.pdf> [https://perma.cc/QM9W-6J29]. Human Rights Watch also requested data from PHAs reflecting "the number of denials of admission or findings of ineligibility based on someone's criminal history by the housing authority for the year 2002." *Id.* at 32 n.103. The Housing Authority of the City of Pittsburgh, for example, told Human Rights Watch that it denied 446 applications for conventional public housing in 2002 due to the applicants' criminal history. *Id.*; Human Rights Watch e-mail correspondence with Anthony Williams, Director, Housing Authority of Pittsburgh (January 27, 2004). However, only 184 denials were reflected in the data HUD provided to Human Rights Watch. *No Second Chance*, *supra*, at 32 n.103.

195. 24 C.F.R. § 982.552(c)(2).

196. *Id.* § 982.552(a)(1).

and terminate assistance for criminals and alcohol abusers.<sup>197</sup> Finally, in 24 C.F.R § 982.552(e) regarding “Applicant Screening,” the PHA “*may* at any time deny program assistance for an applicant in accordance with the PHAs’ own policies as stated in their Administrative Plan on screening applicants for family behavior or suitability for tenancy.”<sup>198</sup> These rules vary greatly by locale. For example, Chapter 3 of Berkeley Housing Authority’s (BHA) Administrative Plan excludes any persons who have been evicted from federally assisted housing for drug-related criminal activity within the past three years unless they have completed a drug treatment program approved by the BHA.<sup>199</sup> On the other hand, just fourteen minutes to the south of Berkeley, the Oakland Housing Authority’s prohibition on persons with drug-related criminal activity from housing “looks back” five years.<sup>200</sup> Some housing authorities do not define their “lookback period” at all.

A 2015 review by the Shriver Center of criminal record barriers in federally subsidized housing found twenty-four PHAs “used open-ended language” in their written admissions policies.<sup>201</sup> Other PHAs, including the Boston, San Antonio and Sacramento Housing Authorities, refused to include their lookback periods in their policies at all.<sup>202</sup> The absence of explicit, reasonable time limits on “lookback periods” as a chilling effect on applicants with contacts to the criminal legal system.<sup>203</sup> Still worse, some PHAs admit to engaging in permanent bans.<sup>204</sup> In an anonymous survey conducted by the Texas Housing Association, one authority admitted to never renting to person who had an assault or bodily injury charge.<sup>205</sup> The Indianapolis Housing Authority has no time limit for banning persons with “violent criminal activity.” And the City of Ville Platte has no time limit on its ban for persons engaged in drug-related criminal activity. HUD considers these bans in violation of its policies, but does not penalize the PHAs for perpetuating them.<sup>206</sup> Express, yet unreasonably lengthy, bans are no less harmful. HUD suggests five years as a reasonable lookback period for

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197. *Id.* § 982.553.

198. *Id.* § 982.552(e) (emphasis added).

199. U.S. DEP’T OF HOUS. & URB. DEV., OFF. OF PUB. & INDIAN HOUS., CITY OF BERKELEY, OMB NO. 2577-0226, 5-YEAR PHA PLANS (FOR ALL PHAS) attach. 2 (2020), [https://www.cityofberkeley.info/uploadedFiles/BHA/Level\\_3\\_-\\_General/BHA%205%20Year%20and%20Annual%20Plan%202020%20-%202025.pdf](https://www.cityofberkeley.info/uploadedFiles/BHA/Level_3_-_General/BHA%205%20Year%20and%20Annual%20Plan%202020%20-%202025.pdf) [<https://perma.cc/62QA-7925>].

200. Oakland Hous. Auth., Admissions and Continued Occupancy Policy § 3-III-B, 3-20 (2019), <http://www.oakha.org/AboutUs/ReportsPolicies/Documents/ACOP%20FT%20final.pdf> [<https://perma.cc/S2PR-7XWQ>].

201. MARIE CLAIRE TRAN-LEUNG, SHRIVER CTR., WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS: BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 11 (Feb. 2015), <https://www.povertylaw.org/wp-content/uploads/2019/09/WDMD-final.pdf> [<https://perma.cc/225C-6G83>].

202. *See id.* at 41 n.65.

203. *Id.* at v.

204. *See id.*

205. *Id.* at 12.

206. *Id.*

serious crimes. Many PHAs look further back—a dozen look back ten years, and some as far as twenty years.<sup>207</sup> These periods can include relatively minor offenses, including for public intoxication in Alexandria, Virginia, and for negotiating “worthless instruments” in Maine.<sup>208</sup>

Without exception, PHAs use their discretion regarding admission to exclude recently decarcerated people outright in the immediate months after release where it is arguably the most crucial. These numbers—three years versus five years versus no time limit—are arbitrary, and there is no legal hurdle to preventing the PHAs from revising their policies to take these terms out completely.

In June 2011, Shaun Donovan (then Secretary of Housing and Urban Development) wrote a letter to the directors of all PHAs urging them to take steps to increase access to public and federally subsidized housing by those with contacts to the criminal justice system, including recently decarcerated people.<sup>209</sup> The Donovan letter stated, “people who have paid their debt to society deserve the opportunity to become productive citizens and caring parents, to set the past aside and embrace the future[, and] [p]art of that support means helping ex-offenders gain access to one of the most fundamental building blocks of a stable life – a place to live.”<sup>210</sup> HUD released a second set of guidelines regarding eligibility in 2015 urging PHAs to eliminate the consideration of prior arrests when making admissions decisions.<sup>211</sup> HUD’s Obama-era policies never became final rules or regulations. Work on this issue stalled under the Trump administration and, thus, many PHAs have not changed their *Rucker*-era policies leaving eligibility wildly inequitable nationwide, but also making it impossible for the very recently decarcerated to access subsidized housing anywhere in the country even when they are at risk of homelessness.

## 2. Enforcement

PHAs further the culture of exclusion by using their discretion to target subsidized housing tenants with no contacts with the criminal legal system for termination based on violations of program rules. This includes associating with persons having contacts with the criminal legal system or permitting an unauthorized person to live in the home, especially if they are recently

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207. *Id.*

208. *Id.* at 13.

209. Letter from Shaun Donovan, Secretary, United States Department of Housing and Urban Development, to Public Housing Authority Executive Directors (June 17, 2011), [http://usich.gov/resources/uploads/asset\\_library/Rentry\\_letter\\_from\\_Donovan\\_to\\_PHAs\\_6-17-11.pdf](http://usich.gov/resources/uploads/asset_library/Rentry_letter_from_Donovan_to_PHAs_6-17-11.pdf) [<https://perma.cc/K678-FNQA>].

210. *Id.*

211. U.S. Dep’t of Hous. & Urb. Dev., Off. of Pub. & Indian Hous., Notice PIH 2015-19: Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions 3 (Nov. 2, 2015), <https://www.hud.gov/sites/documents/PIH2015-19.PDF> [<https://perma.cc/5YC6-2XQX>].

decarcerated.<sup>212</sup> Since the mid-1990s there has been an intentional blurring of the lines between administrative and criminal law policy in subsidized housing.<sup>213</sup> In practice, the merger of public benefits and criminal law<sup>214</sup> has resulted in housing authorities teaming up with or modeling themselves after law enforcement to root out violations of program rules, including various levels of association with persons who have criminal contacts.<sup>215</sup> For example, in Palmdale, California, in the mid-2000s, criminal fraud cases were routinely brought against subsidized tenants for violations of the voucher program's rules,

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212. See *Williams v. City of Antioch*, No. C 08-02301 SBA, 2010 U.S. Dist. LEXIS 97829 (N.D. Cal. 2010).

213. LOÏC WACQUANT, PUNISHING THE POOR 41 (2009) (asserting that America is engaged in the “gradual replacement of a (semi-) welfare state by a police and penal state for which the criminalization of marginality and the punitive containment of the dispossessed categories serve as social policy”).

214. There is a particular brand of localism that inspires governments to resist heterogeneity, especially in the form of poor racial minorities. See Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 180 (2019); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 357 (1990) (discussing how local government law has affected the development of cities); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1988 (2000) (arguing that localism has helped create segregated communities); Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1432–33 (2014) (discussing the definition of political decentralization—localism—and its prominence).

Localism, generally, is the delegation of political power to decentralized and autonomous local government units. The theoretical benefits of localism are substantial, including opportunities for governmental innovation and the potential for increased efficiencies for residents that rises out of local competition. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 5 (1990). The idea here is that small units of government facilitate robust political participation and civic engagement. Archer, *supra*, at 181. These characteristics are foundational to little-d democracy. *Id.*; see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1068–70 (1980) (asserting that individual participation is of critically important political value and that such individual involvement can only occur in small political units). Modern political science literature offers empirical evidence supporting Madison's contention in local governments today that concerns racial minorities. Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 554–57 (1999). At the state level, voters behave more self-interestedly as decision-making authority is brought closer to them, which creates a risk of “majoritarian tyranny,” including and especially for the minority poor. *Id.* at 591.

Post-civil rights movement, “legal localism” calcified what had previously been more informal processes. Legal localism has been defined as a body of state law cases, which “codified decades of state law decisions that combined with private industry actors and federal policies to build a fortified suburbia . . . whose rules were designed to exclude,” and was protected from constitutional attack by a series of Supreme Court decisions during the 1970's. David D. Troutt, *Katrina's Window: Localism, Resegregation and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1111 (2008). Professor David Troutt argues that what segregation started localism codified through “a more durable form of race-neutral rules of local autonomy.” *Id.* at 1115. Put another way, modern localism, as codified in “race-neutral” terms and “color-blind” ideology, has established a structural mechanism for the retrenchment of middle-class wealth at the exclusion of poverty. This is partially because homogeneity is perpetuated over time, which reinforces the notion that it represents the natural order of things.

215. Archer, *supra* note 214, at 175.

such as housing unauthorized tenants, many with criminal records.<sup>216</sup> In connection with these investigations, subsidized tenants were often interviewed in the presence of police without knowing it or unwittingly requested to admit to violations of program rules.<sup>217</sup> These rules included allowing unauthorized tenants with criminal contacts to live in the home, which were then used as a basis for criminal charges against the original tenants themselves.<sup>218</sup> This is all done by the housing authorities acting within their discretion. PHAs do not have to pursue these cases.<sup>219</sup> More importantly, PHA policies could be amended to cease categorizing recently decarcerated persons found to be in or near a subsidized tenant's home *per se* unauthorized tenants.

### 3. Prioritization

PHAs have discretion to prioritize persons with “special purpose voucher types.” There are currently seven special purpose voucher types: Family Reunification Program, Foster Youth to Independence (FYI) Initiative, Mainstream Vouchers (non-elderly disabled), Non-Elderly Disabled (NED), Tenant Protection Vouchers, Veterans Affairs Supportive Housing Vouchers (VASH), and Emergency Vouchers. Special programs are designed to substantially decrease the wait times for especially vulnerable populations, which have historically included non-elderly disabled people, elderly people, veterans.<sup>220</sup> As a result, and despite commonly held misperceptions about the voucher program, “[n]ine-tenths of entitlement spending goes to the elderly,

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216. See U.S. v. Cnty. of Los Angeles, No. 2:15-cv-03174 (C.D. Cal. Apr. 25, 2015), <https://www.justice.gov/file/676676/download> [<https://perma.cc/ZM2P-4HXA>].

217. See Brown Hayat, *supra* note 167, at 61, 86.

218. See *id.* at 86.

219. *Id.* Section 8 enforcement schemes often have a disparate impact on racial minorities. For example, according to the expert in *Williams*, the disparity in termination rates in Antioch suggested that African American households were being referred to the housing authority for less significant or less well-documented conduct than were non-African Americans. Decl. of Barry Krisberg, Ph.D, *Williams v. City of Antioch*, No. C-08- 2301, 1–2 (N.D. Cal. Sept. 4, 2009). And the large number of African American Section 8 referrals in conjunction with the insufficiency of the evidence presented in those referrals supported an allegation that African Americans were being intentionally targeted for termination by the Community Action Team (CAT) of the Antioch Police Department. *Id.* More specifically, in 2006, “Section 8 households comprised 5% of all households, but 58% of all CAT locations” in Antioch. *Id.* at 9. From mid-2006 to the start of 2009, Section 8 households represented 5.9 percent (1,920 of 32,067) of all Antioch households and 23.7 percent (1,920 of 8,041) of Antioch rental households, but 48.0 percent (170 of 354) of all CAT locations and 64.9 percent (170 of 262) of renter CAT households. *Id.* at 10. These highly statistically significant disparities indicated a strong focus on Section 8. The expert in *Williams* asserted that “[f]or the period 2006 to 2009, African Americans represented 55.8% of all Antioch Section 8 households (1,061 to 1,902), but 68.2% of investigated Section 8 locations (116 of 170).” *Id.* at 12–14. Since African Americans made up a disproportionate portion of Antioch’s Section 8 households, the expert concluded “[i]t is likely that CAT activities disproportionately targeted African Americans.” *Id.* at 20.

220. *Stuck on a Section 8 Waiting List? Here’s How to Get Priority*, BENEFITS (NOV. 5, 2020), <https://www.benefits.com/section-8/waiting-list> [<https://perma.cc/6YY7-GNXX>].

disabled, and working poor.”<sup>221</sup> Elderly people, disabled people, and non-Latinx Whites together receive approximately 69 percent of entitlement benefits through set asides.<sup>222</sup>

HUD’s Veteran’s Affairs Supportive Housing (VASH) Program is an example of a special purpose program.<sup>223</sup> In each year between 2008 and 2010 and 2012 and 2015, HUD issued ten thousand VASH vouchers.<sup>224</sup> Since 2008, HUD has awarded over 106,989 HUD-VASH vouchers to public housing agencies.<sup>225</sup> In addition, another \$40 million was appropriated for new HUD-VASH vouchers for FY 2019.<sup>226</sup> The allocation process for HUD-VASH vouchers entails a collaborative approach that relies on three sets of data: HUD’s point-in-time data, data on the number of contacts with homeless veterans, and performance data from PHAs and VAMCs.<sup>227</sup> After determining which areas of the country have the highest number of homeless veterans, HUD selects PHAs near to the identified Veterans’ Affairs facilities.<sup>228</sup> There is at least one site in each of the fifty states, the District of Columbia, Puerto Rico, and Guam.<sup>229</sup> Practically speaking, VASH makes it possible for veterans, with additional funding from Congress, to line jump in many cities where the wait for others takes years. The rules governing subsidized housing, which can be applied in a draconian manner against some families as seen in *Williams*, are also differently applied against others through programs like VASH. Why there are programs like VASH for veterans but not for other vulnerable groups is really a matter of societal valuation—a valuation that could be expanded to achieve additional public policy goals.<sup>230</sup>

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221. ARLOC SHERMAN, ROBERT GREENSTEIN & KATHY RUFFING, CTR. ON BUDGET & POL’Y PRIORITIES, CONTRARY TO “ENTITLEMENT SOCIETY” RHETORIC, OVER NINE-TENTHS OF ENTITLEMENT BENEFITS GO TO ELDERLY, DISABLED, OR WORKING HOUSEHOLDS 1, 2 (Feb. 10, 2012), <https://www.cbpp.org/sites/default/files/atoms/files/2-10-12pov.pdf> [<https://perma.cc/738N-88AP>] (discussing the fact that “able-bodied, working-age” adults receive only 9 percent of the benefits).

222. *Id.*

223. *U.S. Department of Housing and Urban Development-VA Supportive Housing (HUD-VASH) Program*, U.S. DEP’T OF VETERAN AFFS., <https://www.va.gov/homeless/hud-vash.asp> [<https://perma.cc/CKB6-4G8Q>].

224. “Congress appropriated \$50 million in 2011 to serve approximately 7,000 voucher families, \$60 million in 2016 to serve approximately 8,000 families, and \$40 million in both 2017 and 2018 to serve approximately 10,000 total families.” SYLVIA BLACK, BUY A HOME WITH YOUR SECTION 8 HOMEOWNERSHIP VOUCHER REGION II 96 (2020).

225. *HUD-VASH Vouchers, 2008 – 2021*, HOUS. & URB. DEV.-VETERANS AFFS. SUPPORTIVE HOUS. (2022), [https://www.hud.gov/sites/dfiles/PIH/documents/VASH\\_Awards\\_2008-2021.pdf](https://www.hud.gov/sites/dfiles/PIH/documents/VASH_Awards_2008-2021.pdf) [<https://perma.cc/ZXG9-AE6Z>].

226. *HUD-VASH Vouchers: Overview*, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/programs/hcv/vash](https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/vash) [<https://perma.cc/H7PU-V8H8>].

227. *Id.*

228. *Id.*

229. *Id.*

230. Under the 2008 Consolidated Appropriations Act, HUD can waive or specify alternative requirements for any provision of any statute or regulation affecting the HCV program in order to effectively deliver and administer HUD-VASH voucher assistance. *See* 24 C.F.R. § 982; Consolidated

In 2020, a new “special purpose voucher” for the homeless—the emergency housing voucher (EHV)—was created under the American Rescue Plan.<sup>231</sup> Through EHV, HUD allocated 70,000 vouchers to local housing authorities in order to “assist individuals and families who are homeless, at-risk of homelessness, fleeing, or attempting to flee, domestic violence, dating violence, sexual assault, stalking, or human trafficking, or were recently homeless or have a high risk of housing instability.”<sup>232</sup> The EHV program is a move in the right direction towards housing the homeless, though without movement on the “lookback period” and enforcement areas it will still leave recently decarcerated unhoused persons unsupported.

#### IV.

##### UNDOING THE CULTURE OF EXCLUSION

The previous Sections of this Article sought to establish that (1) the post-Covid-19 acceleration of the prison abolition and right to housing movements suggests that recently incarcerated persons who are released are much less likely to recidivate and more likely to thrive if they have access to social and economic capital such as subsidized housing and (2) federal housing policy, which incentivizes PHAs to use their discretion to exclude, is a barrier to housing the recently decarcerated. Congress should repeal the ADA and *Rucker*. Congress should explicitly set out not only that innocent tenants should not be evicted for illegal activity of which they had no knowledge, but that a person’s contacts with the criminal legal system are not disqualifying from tenancy in subsidized housing. At this late stage in the prison abolition and the right to housing movements, backing away from “one strike” policies feels merely prefigurative. This Section proposes three farther reaching interventions: transcending the narrative of innocence, redirecting PHAs’ broad discretion towards admission and equalizing vulnerable communities as the pandemic-related Emergency Rental Assistance Program (ERAP) did, and enlarging civil rights protections for subsidized tenants to conceive of a pathway for the recently decarcerated to reside in federally subsidized properties immediately after release.

##### A. *Transcending Innocence*

The public<sup>233</sup> needs to disabuse itself of a preoccupation with the “innocent tenant.” The *Rucker* tenants were literally all innocent—it was undisputed that they had no role in the allegedly criminal misconduct—but were still subject to

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Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844. The alternative requirements, including waivers, are established in the HUD-VASH Operating Requirements and were published in the Federal Register on May 6, 2008, and updated March 23, 2012. 77 Fed. Reg. 17086 (Mar. 23, 2012).

231. *Emergency Housing Vouchers*, U.S. DEP’T OF HOUS. & URB. DEV. (2022), <https://www.hud.gov/ehv> [<https://perma.cc/Q53B-2ZWM>].

232. *Id.*

233. Here public is meant to include the general public but also PHAs, courts, and advocates.

a no-fault eviction.<sup>234</sup> That should never have been. Thankfully, the public's understanding of innocence has broadened since *Rucker* was decided. The work of organizations like the Innocence Project amplifies the stories of the convicted, exonerates the wrongly accused through reforms to the criminal legal system, and educates the public.<sup>235</sup> Michelle Alexander's seminal project on mass incarceration, *The New Jim Crow*, also awakened the public's consciousness regarding the ills of the carceral state and challenged common notions of "guilt."<sup>236</sup> As a result, even HUD has acknowledged "the fact that there has been an arrest for a crime is not a basis for the requisite determination that the relevant individual engaged in criminal activity warranting denial of admission, termination of assistance, or eviction."<sup>237</sup> It is now widely understood that an arrest shows no more than that someone probably suspected the person apprehended of an offense.<sup>238</sup> And in many cases, arrests do not result in criminal charges. Even where they do, such charges can be and often are dismissed or the person is not convicted of the crime alleged.<sup>239</sup> In fact, HUD's Notice on the role of criminal contacts in evaluating rent-worthiness revealed that "in the seventy-five largest counties in the country, approximately one-third of felony arrests did not result in conviction, with about one-quarter of all cases ending in dismissal."<sup>240</sup> Additionally, HUD's Notice recognized that "arrest records are often inaccurate or incomplete (e.g., by failing to indicate whether the individual was prosecuted, convicted, or acquitted), such that reliance on arrests not resulting in conviction as the basis for denying applicants or terminating the assistance or tenancy of a household or household member may result in unwarranted denials of admission to or eviction from federally subsidized housing."<sup>241</sup>

All of the research cited above educates us on innocence.<sup>242</sup> It tells us a greater number of people are truly innocent than society is led to believe. The

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234. *Id.*

235. *All Cases*, INNOCENCE PROJECT, <https://innocenceproject.org/all-cases/3> [<https://perma.cc/9XMW-AVTW>].

236. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

237. U.S. Dep't of Hous. & Urb. Dev., *supra* note 211.

238. N.Y. AM. C.L. UNION, *STOP-AND-FRISK IN THE DE BLASIO ERA 1* (2019), [https://www.nyclu.org/sites/default/files/field\\_documents/20190314\\_nyclu\\_stopfrisk\\_singles.pdf](https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf) [<https://perma.cc/4TQB-KQLC>] ("The New York City Police Department's aggressive stop-and-frisk program exploded into a national controversy during the mayoral administration of Michael Bloomberg, as the number of NYPD stops each year grew to hundreds of thousands. Most of the people stopped were [B]lack and Latin[x], and nearly all were innocent. Stop-and-frisk peaked in 2011, when NYPD officers made nearly 700,000 stops.").

239. *Id.*

240. U.S. Dep't of Hous. & Urb. Dev., *supra* note 211.

241. *Id.*

242. Camila Domonoske, *Denying Housing over Criminal Record May Be Discrimination*, *Feds Say*, NPR (Apr. 4, 2016), <https://www.npr.org/sections/thetwo-way/2016/04/04/472878724/denying-housing-over-criminal-record-may-be-discrimination-feds-say> [<https://perma.cc/3639-JTU3>].

abolition and right to housing movements prod us farther, beyond the narrative of innocence altogether, inquiring about housing for the guilty. Within the frame of abolition and the human right to housing, the recently decarcerated should be housed even when they may not be innocent of the crimes alleged. Innocence, after all, is a fiction created by a caste system<sup>243</sup> that allows a Black man, Fair Wayne Bryant, to serve twenty years of a life sentence for stealing hedge clippers<sup>244</sup> while four White Blackwater guards are pardoned after killing fourteen Iraqi citizens and wounding seventeen others.<sup>245</sup> This is America<sup>246</sup> where until 2010, when the Fair Sentencing Act (FSA) passed, identical drugs (crack and cocaine) were punished at a disparity of 100:1 because of the race and class of the people who tended to use one versus the other.<sup>247</sup> Even now, they are punished at a rate of 18:1, meaning that a Black person is still eighteen times more likely to be jailed than a White person who committed the same act.<sup>248</sup> And where, in 2018, over six hundred thousand people were jailed for marijuana possession though thirty-five states allowed for the medical use of marijuana and recreational marijuana was legal in fifteen.<sup>249</sup> The examples could go on, but they show the cracks in our criminal legal system are wide and deep. Withholding basic human needs like housing on the basis of determinations made as part of such a flawed system is ill-reasoned. Access to housing should not turn on whether one was unlucky enough to be trapped in this web of inequities called the criminal legal system. Housing decarcerated people requires public policy that looks beyond whether a recently decarcerated person committed a crime and that will house them in spite of whether they did or not. The pandemic response to the looming threat of evictions, \$46.55 billion in federally funded emergency rental assistance money dispersed without regard to traditional narratives regarding who is deserving or not, offers a glimpse into a future where the right to housing does not turn on innocence.

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243. ISABEL WILKERSON, *CASTE* 191–92 (2020) (likening “dominant” groups and scapegoats to castes because of their hierarchical nature and privileges associated with each group. A prime example is marijuana: there is similar marijuana use but disparate conviction rates between rich dominant-group businessmen and African-Americans.).

244. Matthew S. Schwartz, *Black Man Serving Life Sentence for Stealing Hedge Clippers Granted Parole*, NPR (Oct. 18, 2020), <https://www.npr.org/2020/10/18/925198663/black-man-serving-life-sentence-for-stealing-hedge-clippers-granted-parole> [<https://perma.cc/QQV8-K6MC>].

245. Laurel Wamsley, *Shock and Dismay After Trump Pardons Blackwater Guards Who Killed 14 Iraqi Civilians*, NPR (Dec. 23, 2020), <https://www.npr.org/2020/12/23/949679837/shock-and-dismay-after-trump-pardons-blackwater-guards-who-killed-14-iraqi-civil> [<https://perma.cc/K4L3-RQ6A>].

246. CHILDISH GAMBINO, *THIS IS AMERICA* (RCA 2018).

247. See U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010, at 3 (Aug. 2015), [https://www.usc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507\\_RtC\\_Fair-Sentencing-Act.pdf](https://www.usc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf) [<https://perma.cc/9BJR-38MJ>] (finding that a 100-to-1 crack-to-powder ratio resulted in higher sentences prior to the FSA’s retroactive reduction of sentences).

248. *Id.*

249. *Drug War Statistics*, DRUG POL’Y ALL. (2021), <https://drugpolicy.org/issues/drug-war-statistics> [<https://perma.cc/T6JY-8A7H>].

*B. Utilizing PHA Discretion to Admit, Not Deny*

Public housing authorities have broad discretion to liberate their policies from this narrative of innocence and immediately house the recently decarcerated, as was done in the New York, Washington, and Maryland pilot programs. As aforementioned, HUD regulations afford PHAs broad discretion to manage and operate federally subsidized housing programs, including with respect to the criteria for admissions, denials, and exclusions.<sup>250</sup> Historically, PHAs have used their discretion to perpetuate the culture of exclusion, including expelling subsidized tenants who have had even minimal contacts with the law or who are associated with others who have.<sup>251</sup> Allegations of unauthorized tenants, including those with any criminal contacts, in subsidized homes are often investigated in concert with law enforcement. If substantiated, these allegations may result in actual criminal prosecutions for the subsidized tenant. The risk to the subsidized tenant makes state-sponsored housing a site of mass incarceration. This practice also reduces access to economic and social capital for the recently decarcerated because they cannot access kin networks, the lack of which increases their likelihood of recidivism and harms abolitionist efforts more broadly.<sup>252</sup> These enforcement schemes have a disparate impact on Black and Brown communities.<sup>253</sup> Moreover, set asides like VASH perpetuate advantage for some vulnerable groups and compound disadvantage for others. None of this need stand. PHAs have authority not to expel families with contacts to the criminal legal system under the many circumstances that PHAs do now.

*C. Protecting Housing for All*

Civil rights protections for subsidized families with connections to the criminal legal system will need to be strengthened to bring the recently decarcerated fully within the social safety net. In the epilogue to his book *Evicted: Poverty and Profit in the American City*, Matthew Desmond makes a pitch for “universal vouchers” as a way out of America’s eviction crisis.<sup>254</sup> Yet, *Evicted* glosses over what is perhaps the largest hurdle—after appropriations—to the implementation of the universal voucher program: bias against voucher holders.<sup>255</sup> Access to a voucher will do a recently decarcerated person little good if the person cannot utilize it. In 2016, thirty-five homeless people died on the street in Washington D.C. and seventeen of them had housing vouchers at the time.<sup>256</sup> Their unfortunate stories underscore how difficult it is even for tenants

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250. *See supra* Part III.

251. *Id.*

252. Brown Hayat, *supra* note 167, at 86–87.

253. *Id.*

254. DESMOND, *supra* note 77, at 308.

255. *Id.* at 310 (“They simply don’t want to house ‘those people.’”).

256. The causes of the inability to match voucher holders with housing are multiple. Some attribute the challenges to rising rents. An influx of affluent young professionals has led landlords to turn away tenants who show up with the problems commonly associated with life on the street—criminal

in possession of vouchers to utilize them.<sup>257</sup> It is already especially difficult for racial minorities, families with children, and people with disabilities to utilize vouchers.<sup>258</sup> Adding source of income discrimination to the list of protected classes under the Fair Housing Act is a crucial step.<sup>259</sup> Beyond adding source of income as a protected class, however, policy makers will need to acknowledge that adding a criminal record to this mix will make finding housing doubly difficult. As noted in Part III, the tail end of the Obama administration began this work of offsetting the impact of a criminal record on the ability to identify housing in the private market. The administration urged housing providers to limit the use of arrest records in housing decisions through the issuance of the Office of General Counsel's Guidance on the Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions.<sup>260</sup>

The Obama-era policies provided guidance to PHAs and owners of federally assisted housing that they cannot use arrest records as the basis of denying admission, terminating assistance, or evicting tenants. They further emphasized that "HUD does not require the adoption of 'one strike' policies."<sup>261</sup> The guidance also "reminds PHAs and owners of their obligation to ensure that any admissions and occupancy requirements they impose comply with

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records, poor credit histories, or addiction to drugs and alcohol. See Peter Jamison, *At an Overnight Vigil, the Homeless Who Died on D.C. Streets Are Remembered*, WASH. POST (Dec. 21, 2016), [https://www.washingtonpost.com/local/dc-politics/at-an-overnight-vigil-on-pennsylvania-avenue-the-homeless-who-died-on-the-street-are-remembered/2016/12/21/9d46cc36-c6ce-11e6-bf4b-2c064d32a4bf\\_story.html](https://www.washingtonpost.com/local/dc-politics/at-an-overnight-vigil-on-pennsylvania-avenue-the-homeless-who-died-on-the-street-are-remembered/2016/12/21/9d46cc36-c6ce-11e6-bf4b-2c064d32a4bf_story.html) [<https://perma.cc/6HAN-72YB>].

257. J. Rosie Tighe, Meghan E. Hatch & Joseph Mead, *Source of Income Discrimination and Fair Housing Policy*, 32 J. PLAN. LITERATURE 3, 3–4 (2016) ("One of the most prominent reasons for this is that, in most cities and states, local law does not require landlords to accept vouchers, thus allowing landlords to discriminate against potential tenants on the grounds of their 'source of income.'").

258. *Id.* at 6 ("The current demographic breakdown of voucher holders is as follows: 38 percent adults with children, 21 percent elderly, 20 percent disabled adults, 12 percent childless adults, 8 percent disabled adults with children, and 1 percent elderly with children. Families, the elderly, and the disabled are all protected from discrimination under the Fair Housing Act. Thus, when discriminating against those with vouchers, there is often a disproportionate impact based on the tenant's familial status, disability, or age."). HUD has taken the position that defendants may be held responsible for the discriminatory effect of their actions that have a disproportionate adverse impact on a protected class, "even if the practice was not motivated by a discriminatory intent." *Id.* at 6; see 24 C.F.R. § 100.500. In 2015, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the Supreme Court confirmed that the Fair Housing Act prohibited decisions that have a disparate impact on members of protected classes. 576 U.S. 519, 545–46 (2015).

259. See *Tex. Dep't of Hous. and Cmty. Affs.*, 576 U.S. at 544 (reiterating that there is no agreement on the idea that source of income protection will provide improved outcomes for voucher holders).

260. See U.S. Dep't of Hous. & Urb. Dev., Guidance from the Office of General Counsel on the Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 4, 2016), [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) [<https://perma.cc/C9YU-CP3Z>].

261. U.S. DEP'T HOUS. & URB. DEV., FAQs: EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 1, [https://www.hud.gov/sites/documents/FAQ\\_EXCLUDE\\_ARREST\\_RECORDS.PDF](https://www.hud.gov/sites/documents/FAQ_EXCLUDE_ARREST_RECORDS.PDF) [<https://perma.cc/L7QH-8CXB>].

applicable civil rights requirements contained in the Fair Housing Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act, and Titles II and III of the Americans with Disabilities Act of 1990, and the other equal opportunity provisions listed in 24 CFR 5.105.”<sup>262</sup> The Office of the General Counsel’s Guidance “addresses how the discriminatory effects and disparate treatment methods of proof are applied in Fair Housing Act cases where a housing provider attempts to justify an adverse housing action—such as a refusal to rent or renew a lease—based on an individual’s criminal history.”<sup>263</sup> Future administrations concerned with public health, dialing down the carceral state, and expanding equitable access to housing will want to consider making these Obama-era policies enforceable and making clear that criminal contacts, and even guilt, is not a disqualifier for federally subsidized housing.

#### CONCLUSION

The prison abolition movement was accelerated at stages of the Covid-19 pandemic and under the influence of the Black Lives Matter protests of the summer of 2020. The right to housing movement also quickened after the onset of the pandemic with two national eviction moratoria and billions of dollars appropriated towards rent relief. Taken together, these changes to the carceral, housing, and public welfare systems give a glimpse of a near future where decarcerated individuals are housed. The formerly incarcerated could come out of prison, receive vouchers, and move into subsidized housing on their own or with family members already living in subsidized units.<sup>264</sup> This Article has advocated for a broadening of eligibility such that the only limitation is that participants be low income. This vastly expanded definition of eligibility would include the recently decarcerated. Pilot programs like those in New York, Washington, and Maryland offer strong evidence of how critical vouchers are to resisting poverty and recidivism for the recently decarcerated and ultimately to the project of abolition itself. To get there, federal housing law such as the Anti-Drug Abuse Act of 1988 and the Supreme Court’s opinion in *Rucker* must be undone. Even while these efforts are advanced on the federal stage, there is much work that can happen at the local level with public housing authorities in the immediate term, which may actually be more transformative.

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262. *Notice PIH 2015-19: Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions*, HOUS. & URB. DEV. EXCHANGE (Nov. 2015), <https://www.hud.gov/sites/documents/PIH2015-19.PDF> [<https://perma.cc/GY7M-FQGA>].

263. U.S. DEP’T OF HOUS. & URB. DEV., *supra* note 260, at 1.

264. During her confirmation hearings in February 2021, Secretary of HUD Marcia Fudge stated, “We need to expand resources for HUD’s programs to people who are eligible,” and further noted that “just one in five eligible households receives assistance from federal housing programs.” Kriston Capps, *Can an ‘Activist HUD’ Make Housing a Human Right?*, BLOOMBERG (Jan. 29, 2021), <https://www.bloomberg.com/news/articles/2021-01-29/marcia-fudge-wants-to-transform-u-s-housing-rights?sref=mHw3n8zP> [<https://perma.cc/FR6W-NKJV>].

Indeed, PHAs largely have discretion now to exponentially expand access and retention of subsidies by those with criminal records by removing the multi-year-long wait period for the recently decarcerated to be eligible for subsidized housing. PHAs can also cease engaging in discretionary investigations that criminalize tenants who allow members of their kin networks to live with them “unauthorized.” What we know about the systemic flaws of the criminal legal system, the linkage between poverty and recidivism, and the realities of our collective public health undermines arguments for continuing to disqualify the recently decarcerated from federally subsidized housing.

Most importantly, perhaps, the culture of exclusion is steeped in narratives of guilt and innocence that draw fictional lines, rooted in America’s racial caste system, about who is or is not deserving of housing. These narratives cannot persist if prison abolition and the human right to housing are to be realized.