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STATE-SPONSORED SURVEILLANCE AND PUNISHMENT: HOW MUNICIPAL CRIME-FREE ORDINANCES EXACERBATE THE CARCERAL CONTINUUM

KIMBERLY J. CULLEN*

INTRODUCTION	48
I. INCARCERATION IN THE HOME	51
A. <i>One Response to Mass Incarceration During the Pandemic: Send Vulnerable People Home</i>	52
B. <i>Housing Insecurity is a Barrier to Successful Reentry</i>	56
C. <i>The Carceral Continuum Enters the Home</i>	60
D. <i>Crime-Free Housing Ordinances Contribute to the Problem of Excessive State-Surveillance</i>	65
II. THERE IS A PROBLEMATIC INTERSECTION OF HOME CONFINEMENT AND CFOs	70
A. <i>CFOs Block the Federal Government's Successful Transfer of Individuals to Home Confinement during the COVID-19 Pandemic</i>	71
B. <i>CFOs Impact Communities of Color and Lead to "Exclusionary Localism" that Should be a Violation of the Fair Housing Act of 1968</i>	72
C. <i>CFOs are Increasingly Challenged in the Courts</i>	74
III. FOUR PROPOSED SOLUTIONS	77
CONCLUSION	79

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INTRODUCTION

In cities across the nation, individuals are transferred from federal prison to their homes on home confinement due to the COVID-19 pandemic. Though home confinement is considered a rehabilitative alternative to prison, it still flips the concept of “home” on its head.¹ Home becomes synonymous with continued state surveillance, control, and punishment, rather than the sanctuary that our Framers and the United States Supreme Court have fought to protect.² This is particularly true in cities that have enacted Crime-Free Housing Ordinances (CFOs). CFOs further restrict where people who have contact with the criminal legal system can call home.³ And when CFOs combine with the state’s imposition of home as a continued prison, successful reentry into society for many decarcerated individuals is completely blocked. These ordinances effectively inflict punishments outside of prison into the privacy of the home and contribute to the carceral continuum.

CFOs are also contrary to the purpose of the Fair Housing Act (FHA) of 1968.⁴ Congress enacted the FHA to solve the problem of racial housing discrimination.⁵ Section 3604 of the FHA prohibits discrimination in the sale or rental of housing.⁶ Specifically, the FHA states that it is unlawful to “make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”⁷ Further, it is unlawful to make a rental

¹ Maya Schenwar, *The Quiet Horrors of House Arrest, Electronic Monitoring, and Other Alternative Forms of Incarceration*, MOTHER JONES (Jan. 22, 2015), <https://www.motherjones.com/politics/2015/01/house-arrest-surveillance-state-prisons/> (“At first glance, these alternatives may seem like a ‘win-win.’ Instead of taking place in a hellish institution, prison happens ‘in the comfort of your own home’ (the ultimate American ad for anything). However, this change threatens to transform the very definition of ‘home’ into one in which privacy, and possibly ‘comfort’ as well, are subtracted from the equation.”).

² See WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–1791, at lxiii–lxiv (2009); see also *Boyd v. United States*, 116 U.S. 616, 630 (1886), *overruled on other grounds by* *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967) (noting that the Framers took special care to ensure that the American government would not have the power to violate “the sanctity of a man’s home and the privacies of life”).

³ See discussion *infra* Section I.A.

⁴ See Fair Housing Act of 1968, 42 U.S.C. § 3601 *passim*.

⁵ Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 216 (2019) [hereinafter *The New Housing Segregation*]; see also Richard D. Kahlenberg, *An Economic Fair Housing Act*, CENTURY FOUND., Aug. 3, 2017, <https://tcf.org/content/report/economic-fair-housing-act/?agreed=1> (“[T]he Fair Housing Act of 1968 outlawed explicit racial discrimination in the sale and rental of housing units But class discrimination in the form of exclusionary zoning laws is not explicitly based on race, and so it remains perfectly lawful in virtually all states—even if it results in outlandish racial and economic segregation.”).

⁶ Fair Housing Act, 42 U.S.C. § 3604(a).

⁷ *Id.*

unavailable to a person “because of a handicap.”⁸ People with a criminal background are excluded from the statutory list of individuals for which discriminatory housing practices are illegal.⁹ However, CFOs have a distinct disparate impact on communities of color—a class protected by the FHA—as these communities are often targeted by over-policing and thus more likely to have contact with the criminal legal system.¹⁰ In addition, Black families are more likely to rent a home than to own one, in part due to “centuries of discriminatory practices” by the real estate industry, lending institutions, and the federal government.¹¹ In effect, CFOs perpetuate the very racial segregation that the FHA sought to eliminate.¹²

In 2015, the United States Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*¹³ “recognized a right to a claim of racial discrimination based on a theory of disparate impact under the [FHA].”¹⁴ However, FHA plaintiffs must “allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection” between a defendant’s policies and the disparity they face.¹⁵ Otherwise, plaintiffs simply “cannot make out a prima facie case of disparate impact.”¹⁶ This “robust causality requirement” protects defendants and courts from “race [being] used and considered in a pervasive way.”¹⁷ It is intended to prevent unconstitutional racial quotas, encourage race-neutral efforts to target racial isolation, and protect the free-market system in the construction or renovation of housing units.¹⁸ Consequently, like many disparate impact claims that challenge facially neutral laws, the true impact of CFOs can be difficult to prove

⁸ *Id.* § 3604(f)(1)–(2).

⁹ *Id.*

¹⁰ See Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 118 (2012).

¹¹ See Michele Lerner, *One Home, a Lifetime of Impact*, WASH. POST (July 23, 2020), <https://www.washingtonpost.com/business/2020/07/23/black-homeownership-gap/>.

¹² Deborah N. Archer, *Exile from Main Street*, 55 HARV. C.R.-C.L. L. REV. 789, 807 (2020) [hereinafter *Exile from Main Street*] (“[C]rime-free housing ordinances will disproportionately exclude people of color” and “reinforc[e] racial segregation in the adopting and surrounding communities.”).

¹³ 576 U.S. 519 (2015).

¹⁴ Kathryn V. Ramsey, *One-Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law*, 65 UCLA L. REV. 1146, 1157 (2018); see also *Inclusive Cmty. Project, Inc.*, 576 U.S. at 545–46 (“The Court holds that disparate-impact claims are cognizable under the Fair Housing Act.”).

¹⁵ *Inclusive Cmty. Project, Inc.*, 576 U.S. at 543.

¹⁶ *Id.*

¹⁷ *Id.* at 542.

¹⁸ *Id.* at 542–45.

under the FHA.¹⁹ This is in part because statistical data for disparate impact claims is often hard to obtain, even with a Freedom of Information Act Request (FOIA).²⁰ Most municipalities do not keep eviction data.²¹ Researchers may have to layer city council minutes over a demographic shift to see the patterns around the time the ordinance was passed.²² But once the proof is gathered, federal courts like the court in *Victor Valley Family Resource Center v. Hesperia*, do find CFOs contrary to the purpose of the FHA.²³

In Part I, this Article provides background information on how CFOs create a disparate impact on people being released from prison on home confinement. Section I.A introduces information on COVID-19 in federal prisons. It also details the Federal Bureau of Prisons' (BOP) response to the pandemic under the Coronavirus Aid, Relief, & Economic Security Act of 2020 (CARES Act).²⁴ Specifically, this Article focuses on the BOP's use of home confinement as a tool of decarceration to stymie the spread of the virus. Then, Section I.B. describes how housing insecurity is a barrier to successful reentry for many

¹⁹ Archer, *Exile from Main Street*, *supra* note 12, at 821 ("The difficulty of calculating the number of people impacted by policing-based housing policies is compounded by the difficulty of assessing racial disparities in who may be discouraged, excluded, or evicted as a result of these policies."); *see also* DOJ, *Proving Discrimination – Disparate Impact*, TITLE VI LEGAL MANUAL, <https://www.justice.gov/crt/fcs/T6Manual7> (last updated Feb. 3, 2021) ("Of course, the ideal evidence, i.e., statistical proof that covers the relevant population, is not always available . . . [D]etermining the population to which the challenged policy is applied or area the policy actually affected can present a challenging, fact-intensive element of proof.").

²⁰ *See, e.g.*, MATTHEW DESMOND ET AL., EVICTION LAB, METHODOLOGY REPORT: VERSION 1.1.0., at 5 (2018), <https://evictionlab.org/docs/Eviction%20Lab%20Methodology%20Report.pdf> ("The Freedom of Information Act (FOIA) extends the right to access eviction records; however, local policy barriers and resource limitations pose significant challenges to data acquisition.").

²¹ "Several states that seal their eviction records, have incomplete records, or don't release their records publicly . . . [M]any states have missing or incomplete data for both eviction filings, when a landlord files a notice against the tenant, and eviction judgments, when a judge decides whether the tenant must leave." Emily Peiffer, *Robust Eviction Data Can Keep Cities from "Designing Policy in the Dark,"* HOUS. MATTERS: URB. INST. (Aug. 15, 2018), <https://housingmatters.urban.org/feature/robust-eviction-data-can-keep-cities-designing-policy-dark>.

²² *See, e.g.*, Complaint and Demand for Jury Trial at 6–7, *United States v. City of Hesperia*, No. 5:19-cv-02298 (C.D. Cal. Dec. 2, 2019) ("City Councilmember Russ Blewett stated the purpose of the ordinance was 'to correct a demographical problem.' He stated he 'could care less' that landlords and organizations including 'the Apartment House Association, and the Building Industry, and the Board of Realtors' disagreed with him . . . Blewett also stated that 'those kind of people' the ordinance would target were 'no addition and of no value to this community, period.'").

²³ No. EDCV1600903ABSPX, 2016 WL 3647340, at *4–5 (C.D. Cal. July 1, 2016).

²⁴ *See* Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act), Pub. L. No. 116-136, 134 Stat. 281.

individuals. Section I.C. also analyzes how the carceral continuum enters the homes of individuals who are released on home confinement. The Section then pinpoints the ironies of state surveillance while a person is transferred to home confinement given the Fourth Amendment to the United States Constitution, the Bill of Rights, and the United States Supreme Court's protection of the home as derived from the penumbral right of privacy. Finally, Section I.D. provides background information on the proliferation of CFOs in the United States, and how they block successful reentry for many prisoners returning to their communities.

Part II identifies two main problems that arise from the intersection of home confinement and CFOs: (1) blocking successful reentry that undermines the federal government in its determination that an individual should be released from prison; and (2) the disparate impact that CFOs have on people of color, in particular, in violation of the FHA.

Finally, Part III suggests several avenues for change including utilizing the FHA to its full potential to ban CFOs in the United States, supporting grassroots and legal efforts to repeal CFO ordinances and change the public perception of people involved in the criminal legal system, and providing people on home confinement with constitutional protections to abolish the all too pervasive presence of state surveillance and control inside the home.

I. INCARCERATION IN THE HOME

The Federal Bureau of Prisons (BOP) reported over 43,000 positive COVID-19 cases among inmates as of September 2021.²⁵ The infection rate in U.S. prisons is three times higher than in the outside population because “[t]he cramped, often unsanitary settings of correctional institutions have been ideal for incubating and transmitting [COVID-19].”²⁶ The BOP cannot contain the spread of the virus or its variants. The virus thus continues to spread through prisons like wildfire, killing nearly 2,800 prisoners and staff as of July 2021.²⁷ Scientific research shows that any hopes of vaccination being the answer must include decarceration to stop the spread of COVID-19.²⁸

²⁵ *COVID-19 Inmate Test Information*, FED. BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/index.jsp> (last visited Nov. 5, 2021).

²⁶ Eddie Burkhalter et al., *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. TIMES (Apr. 10, 2021), <https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html?searchResultPosition=1>.

²⁷ Roni Caryn Rabin, *Vulnerable Inmates Left in Prison as Covid Rages*, N.Y. TIMES (Feb. 27, 2021), <https://www.nytimes.com/2021/02/27/health/coronavirus-prisons-danbury.html>.

²⁸ See Benjamin A. Barsky et al., *Vaccination Plus Decarceration—Stopping COVID-19 in Jails and Prisons*, 384 N. ENG. J. MED. 1583, 1584 (2021).

A. *One Response to Mass Incarceration During the Pandemic: Send Vulnerable People Home*

One of the earliest responses to the spread of the virus in federal prisons occurred on March 27, 2020, when Congress enacted the CARES Act.²⁹ Congress, in enacting the CARES Act, “[r]ecogniz[ed] that the COVID-19 pandemic was having a substantial effect on federal correctional institutions” and thus in Section 12003(b)(2) it “expanded BOP’s preexisting discretion to employ home confinement.”³⁰ As the CARES Act indicates, the law was intended to expand the Attorney General’s existing power to release people on home confinement.³¹

However, home confinement itself is not a new concept.³² Congress in 18 U.S.C. § 3624(c) intended home confinement (also known as home detention) to be used as a tool for the early release of qualifying individuals nearing the end of their prison term with either six months or ten percent (whichever is less) of their sentence remaining.³³ Early release of lower risk individuals into the community occurs under the supervision of the U.S. Probation Office.³⁴ This allows released individuals an opportunity to prepare for successful reentry, but mandates strict compliance with government regulations set by U.S. Probation Officers and the BOP.³⁵

Prior to the CARES Act, to qualify for home confinement—in addition to being an older, medically vulnerable adult—individuals had to be a low risk of

²⁹ Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act), Pub. L. No. 116-136, 134 Stat. 281.

³⁰ Fed. Bureau of Prisons, Opinion Letter on Home Confinement of Federal Prisoners (Jan. 15, 2021) [hereinafter Home Confinement of Federal Prisoners]. It is worth noting that home confinement (home detention) is different from compassionate release. Compassionate release is a reduction in sentence. 18 U.S.C. § 3582(c)(1)(A); BUREAU OF PRISONS, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR THE IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(g) (2019). However, because home confinement is underutilized by the BOP, many individuals are forced to seek emergency compassionate release so as not to risk dying in prison from the virus.

³¹ See Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 § 12003(b)(2).

³² See FED. JUD. CTR., HOME CONFINEMENT: AN EVOLVING SANCTION IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 7 (1987) (describing how mass incarceration led to overburdened prison system and home confinement was cheaper alternative to prison intended to save money).

³³ See 18 U.S.C. § 3624(c)(2) (governing release of prisoner in federal custody); see also Crime Control Act of 1990, Pub. L. No. 101-647, § 2902(a), 104 Stat. 4913 (“Section 3624(c) of title 18, United States Code, is amended by inserting after the first sentence the following: ‘The authority provided by this subsection may be used to place a prisoner in home confinement.’”).

³⁴ See, e.g., 18 U.S.C. § 3624(e).

³⁵ *Id.*

danger to the community.³⁶ The BOP followed strict standards for who qualified for home confinement in its Home Confinement Operations Memorandum.³⁷ The BOP only released people who were “elderly,” terminally ill, and whose “reentry needs can be addressed without [Residential Reentry Center] placement.”³⁸

Even before the COVID-19 pandemic, in 2018, there were approximately 3,540,000 people in communities around the United States on court-ordered supervision in lieu of incarceration.³⁹ An additional 878,000 persons were on parole, or conditional release back into the community after a prison term.⁴⁰ While the correctional population is slowly declining, one in forty adults in the United States are still under some form of correctional supervision.⁴¹ Today, especially during the pandemic, many people in the community are serving their court-ordered supervision at home.⁴²

Home confinement, however, can be used as a tool for decarceration. Home confinement stymies the spread of the virus in federal prisons.⁴³ Former Attorney General William Barr agreed that utilizing home confinement during the pandemic protects “the health and safety of BOP personnel and the people in our custody.”⁴⁴ So, in tandem with the CARES Act, Attorney General Barr instructed the BOP to “utilize home confinement” for those in federal prison at

³⁶ Memorandum from Bill Barr, Att’y Gen., to the Dir. of the Fed. Bureau of Prisons (Apr. 3, 2020) [hereinafter Barr April Memorandum], https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf.

³⁷ Memorandum from the Fed. Bureau of Prisons on Home Confinement Under the First Step Act (Apr. 3, 2020) (as amended May 1, 2021) [hereinafter BOP Operations Memorandum 001-2020].

³⁸ *Id.* A federally contracted Residential Reentry Center (RRC) is commonly known as a “halfway house.” Roxanne Daniel & Wendy Sawyer, *What You Should Know About Halfway Houses*, PRISON POL’Y INITIATIVE (Sept. 3, 2020), <https://www.prisonpolicy.org/blog/2020/09/03/halfway>. “These facilities work with corrections departments to house individuals leaving incarceration, often as a condition of parole or other post-release supervision or housing plan.” *Id.* But don’t be fooled: “[c]ontrary to the belief that halfway houses are supportive service providers, the majority of halfway houses are an extension of the carceral experience” with strict requirements, controlling surveillance, and a lack of oversight that leads to violence, abuse, neglect, and more often than not reincarceration. *Id.*

³⁹ BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2017–2018, at 2 (2020).

⁴⁰ *Id.*

⁴¹ *Id.* at 1.

⁴² *The most significant criminal justice policy changes from the COVID-19 pandemic*, PRISON POL’Y INITIATIVE (Oct. 12, 2021), <https://www.prisonpolicy.org/virus/virusresponse.html>.

⁴³ Barr April Memorandum, *supra* note 36.

⁴⁴ *Id.*

risk of severe COVID-19 complications, with a low risk of recidivism, and who could serve the remainder of their prison sentence at home.⁴⁵

In April 2021, the BOP recognized the continuing threat of the virus—and presumably its more lethal variants—and expanded the factors to be considered in granting home confinement under the CARES Act.⁴⁶ These sub-regulatory factors include: (1) an “inmate’s institutional discipline history for the last twelve months,” (2) a “verifiable release plan,” (3) a non-violent current or prior offense nor a sex or terrorism-related offense; (4) no detainers or state warrants out for a person’s arrest; (5) a low or minimum security risk; (6) a low or minimum PATTERN recidivism risk score; (7) no engagement “in violent or gang-related activity while incarcerated;” (8) vulnerability to COVID-19; and (9) and having served “50% of more” of sentence, or having “18 months or less remaining.”⁴⁷

How much of a risk a person is to the community depends on several additional factors, including the nature and seriousness of the underlying offense.⁴⁸ But the BOP considers a person’s recidivism risk—or how likely they are to commit a future crime—a strong indicator of whether they will be a danger.⁴⁹ To evaluate whether an individual is at a high, medium, or low risk of recidivism, the BOP uses a tool created under the First Step Act of 2018 called the Prisoner Assessment Tool Targeting Estimated Risk and Need (PATTERN score).⁵⁰ The PATTERN score includes many non-dispositive factors, including

⁴⁵ *Id.*; see also Memorandum from Andre Matevousian, et al., U.S. Dep’t of Just. to Chief Exec. Officers of the Fed. Bureau of Prisons (Apr. 13, 2021) [hereinafter Matevousian Memorandum] (expanding home confinement factors further under CARES Act to encourage decarceration during pandemic).

⁴⁶ Matevousian Memorandum, *supra* note 45.

⁴⁷ *Id.*

⁴⁸ People convicted of a crime of violence, a sex offense, or act of terrorism are not eligible for home confinement, and other serious offenses weigh heavily against eligibility. Memorandum from Bill Barr, Att’y Gen. to the Dir. of the Fed. Bureau of Prisons (Mar. 26, 2020) [hereinafter Barr March Memorandum], https://www.fd.org/sites/default/files/covid19/bop_jail_policies_and_information/barr_memo.pdf; see also BOP Operations Memorandum 001-2020, *supra* note 37. A crime of violence includes “the use, attempted use, or threatened use of physical force against the person or property of another . . .” 18 U.S.C. § 16(a); see also 34 U.S.C. § 20911(5) (defining a sex offense); 18 U.S.C. § 2332b(g)(5)(B) (defining “acts of terrorism transcending national boundaries”).

⁴⁹ BOP Operations Memorandum 001-2020, *supra* note 37 (“The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted . . .”).

⁵⁰ U.S. DEP’T OF JUST., OFF. OF ATT’Y GEN., THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM 43 (2019) [hereinafter RISK AND NEEDS ASSESSMENT SYSTEM], https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf; see also U.S. DEP’T OF JUST., OFF. OF THE ATT’Y GEN., THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM – UPDATE 1 (Jan. 2020)

criminal history, history of violence, disciplinary infractions, age, sex, and pursuit of prison work and rehabilitative programming.⁵¹ During the pandemic, the BOP is instructed to prioritize the release of individuals with a *low* PATTERN score.⁵² The PATTERN score factors are so strictly evaluated that only 4% percent of the total federal prison population has been released on home confinement under the CARES Act since the start of the pandemic.⁵³

If a person is not a risk to the community, the BOP, with the assistance of the U.S. Probation Office, next determines whether a particular residence is suitable for home confinement.⁵⁴ A Community Corrections Manager (CCM) at the BOP verifies a person's release plan on home confinement and then notifies the local U.S. Probation Officer assigned to the case.⁵⁵ The CCM approves a home confinement placement by assuring that the residence has "telephone service," and that adult household members are aware of, and do not oppose, the inmate's plan to transfer to home confinement.⁵⁶ The CCM and U.S. Probation Officer are not required to approve a transfer to home confinement by first contacting local law enforcement, or the landlord, if a person is returning to a multi-family residential unit.⁵⁷

Under the CARES Act, on April 3, 2020, Attorney General Barr instructed the BOP to only release "inmates with a suitable [home] confinement plan."⁵⁸ Attorney General Barr stated this was due to the BOP and U.S. Probation Office having limited resources "to monitor large numbers of inmates in the

[hereinafter RISK AND NEEDS ASSESSMENT SYSTEM – UPDATE], <https://nij.ojp.gov/sites/g/files/xyckuh17l/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system-updated.pdf>.

⁵¹ RISK AND NEEDS ASSESSMENT SYSTEM, *supra* note 50, at 45.

⁵² Matevousian Memorandum, *supra* note 45.

⁵³ See *Oversight of the Federal Bureau of Prisons: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 2 (2021) (statement of Michael D. Carvajal, Director, Federal Bureau of Prisons) ("Since March of last year, we have transferred . . . almost 7,000 [inmates to home confinement] directly under the CARES Act."). There were approximately 152,260 federal inmates. *Population Statistics*, FED. BUREAU OF PRISONS, https://www.bop.gov/mobile/about/population_statistics.jsp (last visited Nov. 5, 2021). In other words, there would have been about 160,000 but 7,000 (4%) were released on home confinement under the CARES Act.

⁵⁴ Barr April Memorandum, *supra* note 36, at 2.

⁵⁵ U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, CHANGE NOTICE TO HOME CONFINEMENT 5 (2016), https://www.bop.gov/policy/progstat/7320_001_CN-1.pdf.

⁵⁶ *Id.*

⁵⁷ The BOP is, however, required to notify local law enforcement when transferring a person convicted of a drug trafficking crime or a crime of violence to home confinement. 18 U.S.C. § 4042(b). However, the BOP does not currently prioritize the transfer of people convicted of these types of crimes to home confinement. See Barr April Memorandum, *supra* note 36, at 1.

⁵⁸ Barr April Memorandum, *supra* note 36, at 2.

community.”⁵⁹ But because the BOP prioritizes releasing people who are medically vulnerable and not a danger to the community or likely to recidivate,⁶⁰ anyone released on home confinement has already effectively been identified as safe and thus unlikely to require heavy monitoring. In other words, people released on home confinement have been identified by the BOP as not being a serious burden or danger to the community.⁶¹ The BOP’s April 2021 guidance further states that before being released, individuals must have a “viable release residence.”⁶² The largest barrier to release on home confinement for most inmates, then, is finding the “suitable” or “viable” home to return to.

B. *Housing Insecurity is a Barrier to Successful Reentry*

Finding and maintaining stable and affordable housing that is “suitable” or “viable” can prove difficult for inmates that are otherwise eligible for home confinement. Generally speaking, “formerly incarcerated individuals face a high risk of housing insecurity and homelessness.”⁶³ Maintaining stable and affordable housing is often a barrier to successful reentry. This is because an inability to find stable and affordable housing increases a person’s risk of recidivism.⁶⁴ Whereas, “[h]aving a place to call home establishes a secure foundation from which to pursue employment opportunities, seek out health

⁵⁹ *Id.*

⁶⁰ BOP Operations Memorandum 001-2020, *supra* note 37.

⁶¹ *See id.* It is beyond the scope of this Article to challenge the extreme and unduly burdensome regulations that make housing nearly impossible for individuals on the Sex Offender Registry. Because individuals on the sex offender registry are considered by the BOP as posing a threat to the community, this Article does not address people with a sex offense in the abolition of excessive community monitoring and control upon release from prison.

⁶² Matevousian Memorandum, *supra* note 45.

⁶³ U.S. COMM’N ON C.R., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 60–61 (2019) [hereinafter CROSSROADS OF PUNISHMENT]; *see also* Kimberly Burrowes, *Can Housing Interventions Reduce Incarceration and Recidivism?*, URB. INST. (Feb. 27, 2019), <https://housingmatters.urban.org/articles/can-housing-interventions-reduce-incarceration-and-recidivism> (“Formerly incarcerated people are 10 times more likely than the general public to become homeless. This revolving door of incarceration is perpetuated when people are not connected to the housing services they need after release. In addition, when people cannot find stable housing, they are more likely to recidivate.”).

⁶⁴ *See* Burrowes, *supra* note 63. Conversely, having stable housing decreases “survival crimes (offenses like theft, robbery, trespassing, loitering, and prostitution),” or the crimes that put many non-violent offenders in prison in the first place. *Id.*; *see* ROOSEVELT UNIV. POL’Y RSCH. COLLABORATIVE, NO PLACE TO CALL HOME: NAVIGATING REENTRY HOUSING IN CHICAGO 5 (2018).

care, and reintegrate into the social fabric of the community.”⁶⁵ Deborah Archer asserts that “the most critical marker of civil inclusion [is] having a stable and affordable place to live”⁶⁶ and others have recognized housing as a necessity.⁶⁷ Housing is therefore “a critical component of any release plan, even if that initial housing is temporary.”⁶⁸

But the COVID-19 pandemic has “revealed just how difficult it can be” to find stable housing for people who have contact with the criminal legal system.⁶⁹ During the pandemic, “[m]ore than 10 percent of formerly incarcerated people have reported experiencing homelessness within months of reentry, and 18 out of 22 formerly incarcerated people have reported that their housing situation declined after reentry.”⁷⁰ Only 9% are stably housed.⁷¹ COVID-19 also highlights the fragility of many American homes on the brink of eviction.⁷² These are the homes that many incarcerated individuals are hoping to return to.⁷³ One reason many individuals on home confinement plan on returning to live

⁶⁵ COLUMBIA UNIV. JUST. LAB, THE ENORMOUS COST OF PAROLE VIOLATIONS IN NEW YORK 13 (2013), https://justicelab.columbia.edu/sites/default/files/content/Cost_Parole_Violations_in_New_York.pdf?nocache=1.

⁶⁶ Archer, *Exile from Main Street*, *supra* note 12, at 791.

⁶⁷ See *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (recognizing housing as necessity); Archer, *Exile from Main Street*, *supra* note 12, at 819 (“The United States Supreme Court has held that housing is a life necessity. Yet, the current system of policing-based housing policies in public and private housing creates an all-encompassing web that threatens to bar people from their homes and their communities.”).

⁶⁸ URB. INST.: JUST. POL’Y CTR., RELEASE PLANNING FOR SUCCESSFUL REENTRY: A GUIDE FOR CORRECTIONS, SERVICE PROVIDERS, AND COMMUNITY GROUPS 13 (2008) [hereinafter RELEASE PLANNING FOR SUCCESSFUL REENTRY] (citation omitted); see Deborah N. Archer, *You Can’t Go Home Again: Racial Exclusion Through Crime Free Housing Ordinances*, AM. CONST. SOC’Y, Nov. 2019, at 14 [hereinafter *Racial Exclusion Through Crime Free Ordinances*] (footnote omitted); U.S. DEP’T OF HOUS. AND DEV., OFF. OF THE GEN. COUNS., GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE TRANSACTIONS 1 (2016) (“When individuals are released from prisons and jails, their ability to access safe, secure and affordable housing is critical to their successful reentry to society.”) (footnote omitted).

⁶⁹ Cassie M. Chew, *How COVID-19 Worsens the Housing Crunch for Returning Citizens*, CRIME REP. (Jan. 25, 2021), <https://thecrimereport.org/2021/01/25/how-covid-19-worsens-the-housing-crunch-for-returning-citizens/>.

⁷⁰ Jaboa Lake, *Preventing and Removing Barriers to Housing Security for People with Criminal Convictions*, CTR. FOR AM. PROGRESS (Apr. 14, 2021, 9:01 AM), <https://www.americanprogress.org/issues/poverty/news/2021/04/14/498053/preventing-removing-barriers-housing-security-people-criminal-convictions>.

⁷¹ *Id.*

⁷² See Matthew Desmond, *The Rent Eats First, Even During a Pandemic*, N.Y. TIMES (Aug. 29, 2020), <https://www.nytimes.com/2020/08/29/opinion/sunday/coronavirus-evictions-superspreader.html>.

⁷³ RELEASE PLANNING FOR SUCCESSFUL REENTRY, *supra* note 68, at 13 (“Most inmates will reside with family, friends or in their own home on the first night of release.”).

with family and friends is because “obtaining housing typically requires photo identification, a security deposit, and evidence of ongoing employment.”⁷⁴ And people transferred or released from prison are not likely to have a valid photo ID, immediate employment, or the funds for a security deposit.⁷⁵

Finding friends or family to live with is also exceedingly difficult for those who have been incarcerated. Studies show that “longer stays in prison are associated with a decline in the frequency of contact with family members.”⁷⁶ Additionally, some family members may be “legally prohibited from having an inmate reside with them if they live in subsidized housing”⁷⁷ as a result of changes to public housing laws under the Regan and Clinton Administrations.⁷⁸ In his 1996 State of the Union Address, President Bill Clinton melded crime with housing to promote his Crime Bill of 1994, stating:

I challenge local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule for residents who commit crime and peddle drugs should be *one strike and you're out*. I challenge every state to match federal policy to assure that serious violent criminals serve at least 85 percent of their sentence. More police and punishment are important, but they're not enough.⁷⁹

⁷⁴ *Id.* at 7.

⁷⁵ *Id.*

⁷⁶ Patricia McKernan, *Homelessness and Prisoner Re-Entry: Examining Barriers to Housing*, VOLUNTEERS OF AM., <https://www.voa.org/homelessness-and-prisoner-reentry> (last visited Nov. 5, 2021) (citing study done by Lynch & Sabol).

⁷⁷ RELEASE PLANNING FOR SUCCESSFUL REENTRY, *supra* note 68, at 14 (citation omitted).

⁷⁸ President Ronald Regan's controversial Anti-Drug Abuse Act was followed by the Violent Crime Control Act & Law Enforcement Act of 1994 (“Crime Bill”), 42 U.S.C. § 130701. The Anti-Drug Abuse Act “gave [public housing authorities] the authority to exclude applicants with criminal records and to evict tenants who engaged in undefined “criminal activity.” Archer, *Exile from Main Street*, *supra* note 12, at 797 (footnote omitted). The Crime Bill itself accelerated mass incarceration. Ed Chung et al., *The 1994 Crime Bill Continues to Undercut Justice Reform—Here's How to Stop It*, CTR. FOR AM. PROGRESS (Mar. 26, 2019, 8:00 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop>. The Crime Bill contributed to “systematiz[ing] so-called tough-on-crime policies in the United States.” *Id.* Following the Crime Bill, the Clinton Administration, by way of the Housing Opportunity Program Extension Act of 1996, § 9(a)(1)(A), Pub. L. No. 104-120, 110 Stat. 834, furthered “the Anti-Drug Abuse Act and expand[ed] the reach of the policy to cover any drug-related criminal activity, whether or not it occurred on public housing premises.” Archer, *Exile from Main Street*, *supra* note 12, at 797–78. The result is that many family members receiving subsidized or public housing are still legally prohibited from housing inmates and those involved with the criminal legal system.

⁷⁹ President William J. Clinton, State of the Union Address (Jan. 23, 1996), <https://clintonwhitehouse4.archives.gov/WH/New/other/sotu.html> (emphasis added).

The one-strike policy and other “increasingly punitive and exclusionary federal public housing policies” have led to an increase in homelessness and housing discrimination.⁸⁰ So, “[t]hose fortunate enough to have some financial resources will look for housing on the private rental market, where they are likely to encounter a new range of restrictions and exclusions in municipalities that have also adopted policing-based rental housing policies.”⁸¹ A detailed analysis of one of those exclusive policies—Crime-Free Housing Ordinances—is provided in Section II.D. of this Article.

Meanwhile, if evicted, or if family or friends can no longer provide housing, “[t]he mere act of not having a place to go can be a technical violation” of the terms of release.⁸² And “[a] technical violation can land somebody back into incarceration.”⁸³ One condition of home confinement, in particular, is that a person can *only* reside at the BOP-approved address listed on the conditions of the home confinement agreement.⁸⁴ A loss of housing or an unexpected change of address violates the conditions of home confinement and may result in the individual returning to the facility where they were formerly incarcerated.⁸⁵ This causes an understandable “‘level of desperation’ among people leaving prisons . . . because ‘housing is such a great need and one of the biggest fears of individuals coming home.’”⁸⁶

The collateral consequences of incarceration, like not having stable, affordable housing “exacerbate punishment beyond the criminal conviction.”⁸⁷

⁸⁰ Archer, *Exile from Main Street*, *supra* note 12, at 803 (footnote omitted).

⁸¹ *Id.*; see also ROOSEVELT UNIV. POL’Y RSCH. COLLABORATIVE, *supra* note 64, at 5 (“Despite recent guidance from the U.S. Department of Housing and Urban Development (HUD) noting that blanket bans on renters with criminal records may violate the Fair Housing Act, it is still legal for a landlord to screen and reject applicants based on criminal record.”).

⁸² Chew, *supra* note 69; see also BOP Operations Memorandum 001-2020, *supra* note 37 (“A violation . . . of the terms of home detention . . . shall result in the removal of that offender from home detention and the return of that offender to the designated Bureau institution in which that offender was imprisoned immediately before placement on home detention.”); U.S. DEP’T OF JUST., FED. BUREAU OF PRISONS, CONDITIONS OF HOME DETENTION, BP-A0460 [hereinafter CONDITIONS OF HOME DETENTION], https://www.bop.gov/policy/forms/BP_A0460.pdf.

⁸³ Chew, *supra* note 69.

⁸⁴ CONDITIONS OF HOME DETENTION, *supra* note 82.

⁸⁵ BOP Operations Memorandum 001-2020, *supra* note 37; CONDITIONS OF HOME DETENTION, *supra* note 82.

⁸⁶ Marisa Endicott, *A Radical Approach to Helping Former Prisoners Start Over: Let Them into Your Home*, MOTHER JONES (Nov./Dec. 2019), <https://www.motherjones.com/crime-justice/2019/10/homecoming-project-oakland>.

⁸⁷ Letter from Catherine E. Lhamon, Chair of U.S. Comm’n on C.R., to Donald Trump, President (June 13, 2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> (describing various collateral consequences, including: sanctions, restrictions, or disqualifications that stem from person’s criminal history).

This impacts entire communities and families.⁸⁸ Not being able to find or afford stable housing also undermines the deterrent and rehabilitative effect of enacting punishments like home confinement in the first place.⁸⁹

C. *The Carceral Continuum Enters the Home*

For individuals who are able to find suitable housing to return to, the punitive nature of these forms of government supervision are like that of incarceration.⁹⁰ Legal scholars, like Michelle Alexander, and journalists Maya Schenwar and Victoria Law, consider these forms of release into the community examples of the carceral continuum.⁹¹ The carceral continuum, or “carceral circle,” is a phrase coined by French philosopher Michel Foucault in his 1975 book *Discipline and Punish: The Birth of the Prison*.⁹² Following the development of mass incarceration, these “carceral circles [] expand far outside the prison There are no neat divisions between inside and outside.”⁹³ People are effectively kept “trapped within social spaces characterized by exclusion and close surveillance.”⁹⁴ Similarly, legal scholar Michelle Alexander writes:

[We] still manage to increase the size of the carceral state [T]hese people who are “free” from their cages may be sentenced to their homes, placed under house arrest for years or even decades, confined to their neighborhoods through electronic monitoring (EM) devices that will summon the police if they dare to leave their invisible cage even for a minute. In short, we could successfully cut the number of people “locked in,” while another caste-like system is quietly born.⁹⁵

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR PRISON REFORMS 27–28 (2020).

⁹¹ See Michelle Alexander, *Foreword* to MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR PRISON REFORMS ix–xiv (2020) (“The term ‘mass incarceration’ makes it easy to forget the majority of people who are under some form of carceral control aren’t even in prisons or jails. More than twice as many people are currently on probation or parole as are held behind bars.”).

⁹² MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 298 (Alan Sheridan, trans., Vintage Books 2d ed. 1995) (1977).

⁹³ Liam Martin, *Reentry Within the Carceral: Foucault, Race and Prisoner Reentry*, 21 CRIT. CRIM. 493, 496 (2013) (discussing Foucault’s use of “carceral circles” in DISCIPLINE & PUNISH).

⁹⁴ *Id.* at 494.

⁹⁵ Alexander, *supra* note 91, at xi–xiii.

In effect, people under community surveillance are “[c]arceral citizens.”⁹⁶ They are treated as less than second-class citizens, and they simply “don’t have the same rights as other people.”⁹⁷

Additionally, the requirements of community surveillance, through home confinement or any form of community supervision, are severe. Requirements generally include paying a daily fee for the electronic ankle monitor,⁹⁸ mandatory treatment or educational classes, “regular reporting to a probation officer, avoiding particular places or people associated with the offense one was convicted of committing, abiding by curfews, submitting to drug testing, abstaining from alcohol, and paying fees or restitution, as well as a range of other restrictions and conditions that vary by jurisdiction.”⁹⁹ When a person cannot comply with the strict U.S. Probation Office requirements of their release, they risk being sent back to prison.¹⁰⁰ These requirements are so severe, that many people would rather stay in prison than be on community supervision.¹⁰¹ For example, this year, Joe Ligon—the nation’s oldest juvenile lifer—was released after serving nearly seven decades in prison.¹⁰² He could have gotten out three years earlier, but he “rejected the very idea of parole.”¹⁰³ Mr. Ligon said, “I like to be free . . . [W]ith parole, you got to see the parole people every so often. You can’t leave the city without permission from parole. That’s part of freedom for me.”¹⁰⁴

These severe supervisory requirements extend to family and other members of the household.¹⁰⁵ Being confined at home subjects a person’s *entire* family or household to “[t]he tentacles of surveillance . . . effectively sentencing them as well.”¹⁰⁶ For example, under BOP and U.S. Probation Office guidelines, people on home confinement cannot be around household members with

⁹⁶ SCHENWAR & LAW, *supra* note 90, at 92 (citing studies conducted by legal scholars Amanda Alexander and Reuben Miller).

⁹⁷ *Id.* at 91 (citing studies conducted by legal scholars Amanda Alexander and Reuben Miller).

⁹⁸ *Id.* at 38, 41. “These payments pose a serious hardship for many people on probation, who are disproportionately low-income: 66 percent of people on probation earn less than \$20,000 annually.” *Id.* at 90.

⁹⁹ *Id.* at 88, 90.

¹⁰⁰ CONDITIONS OF HOME DETENTION, *supra* note 82.

¹⁰¹ SCHENWAR & LAW, *supra* note 90, at 28 (citation omitted).

¹⁰² Samantha Melamed, *The Nation’s Oldest Juvenile Lifer, Joe Ligon, Left a Pa. Prison after 68 Years*, PHILA. INQUIRER (Feb. 11, 2021), <https://www.inquirer.com/news/joe-ligon-juvenile-lifer-philadelphia-incarceration-release-lifetime-parole-20210211.html>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See SCHENWAR & LAW, *supra* note 90, at 38.

¹⁰⁶ *Id.*

firearms, a criminal record, or who have alcohol in the home.¹⁰⁷ Household members must also agree to allow the home to be searched at any time with very little notice.¹⁰⁸ In addition, “family members of those on house arrest must also take on even more responsibilities to compensate for their loved one’s lack of mobility, twisting their schedules to assist with basic tasks like running errands.”¹⁰⁹ The nature of home confinement and other forms of state surveillance mandate that people, and their families, assume the risk of intrusions into the home by surveillance, electronic monitoring, and probation officers.¹¹⁰ This is because one of the many conditions of home confinement is consenting to home visits by probation officers to ensure compliance with the terms of release.¹¹¹ This surveillance, control, and intrusion transforms the home, “the most essential bastion of privacy recognized by the law,”¹¹² into a prison.¹¹³

It seems ironic then, that the Fourth Amendment to the U.S. Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”¹¹⁴ The Constitution therefore protects all citizens, regardless of contact with the criminal legal system, from harm to their privacy interests in the home. It also places obstacles in the way of an all too permeating state surveillance. Similarly, longstanding Fourth Amendment jurisprudence has held that the home is a constitutionally protected space.¹¹⁵ The Fourth Amendment draws a firm and bright line “at the

¹⁰⁷ See, e.g., CONDITIONS OF HOME DETENTION, *supra* note 82 (“I will not own or possess any deadly weapon or knowingly be in the company of a person possessing the same . . . I will not knowingly associate with persons having a criminal record.”).

¹⁰⁸ *Id.*

¹⁰⁹ SCHENWAR & LAW, *supra* note 90, at 39.

¹¹⁰ Vincent Schiraldi, *Explainer: How ‘Technical Violations’ Drive Incarceration*, APPEAL (Mar. 23, 2021), <https://theappeal.org/the-lab/explainers/explainer-how-technical-violations-drive-incarceration> (“The two prevailing Supreme Court decisions concerning the diminished legal protections people on probation and parole enjoy—or, rather, don’t enjoy—are *Morrissey v. Brewer*, decided in 1972, and *Gagnon v. Scarpelli*, decided in 1973.”); see also CONDITIONS OF HOME DETENTION, *supra* note 82.

¹¹¹ CONDITIONS OF HOME DETENTION, *supra* note 82.

¹¹² *Minnesota v. Carter*, 525 U.S. 83, 107 (1998) (Ginsburg, J., dissenting).

¹¹³ See Derecka Purnell, *The System is Built for Power, Not Justice*, LEVEL (Oct. 19, 2020), <https://level.medium.com/the-system-is-built-for-power-not-justice-c83e6dc4dd66> (“Diversion and other [prison] reforms—changes that increase the power, scope, and legitimacy of the criminal legal system—sound great. We want to believe that these reforms are gentle or perhaps that a more diverse system will alleviate the suffering of the people who bear the brunt of the badge and the cage. Yet as Maya Schenwar and Victoria Law detail in their book, *Prison by Any Other Name*, reforms encourage judges and cops and prisons to enter into our most sacred spaces, our homes, therapy sessions, jobs, schools, hospitals, even places of worship.”).

¹¹⁴ U.S. CONST. amend. IV.

¹¹⁵ See discussion *infra* notes 122–24.

entrance to the house.”¹¹⁶ United States Supreme Court Justice Antonin Scalia held in *Kyllo v. United States* the home is a place where even a subjective expectation of privacy is legitimate and deserves the highest protection.¹¹⁷ In most cases, physically invading any part of the home “by even a fraction of an inch [is] too much” without a warrant.¹¹⁸

The Supreme Court has recognized that more than a mere subjective expectation of privacy exists in the home—privacy is a right. Justice Douglas, in *Griswold v. Connecticut*, stated that the Bill of Rights includes a penumbral right of privacy for all citizens.¹¹⁹ This right is “older than the Bill of Rights—older than our political parties” and well ingrained in our legal system.¹²⁰ The penumbral right of privacy derives from the rights guaranteed by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.¹²¹ The right of privacy protects all individuals from government intrusion, regardless of an individual’s personal history and characteristics.¹²² Justice Kennedy, writing for the Court in *Lawrence v. Texas*, affirmed this penumbral right to privacy exists, especially in the home.¹²³ The Court held that “[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.”¹²⁴

However, these constitutional protections do not extend to individuals on home confinement, or other forms of supervised release, in the same way that they cover non-carceral citizens. This is in part because home confinement

¹¹⁶ *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (citing *Payton v. New York*, 445 U.S. 573, 590 (1980)).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 37 (2001) (citing *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

¹¹⁹ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

¹²⁰ *Id.* at 486.

¹²¹ *Id.* at 484. “Various guarantees create zones of privacy.” *Id.* “The right of association contained in the penumbra of the First Amendment is one, as we have seen.” *Id.* “The Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy.” *Id.* “The Fourth Amendment explicitly affirms the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’” *Id.* “The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.” *Id.* “The Ninth Amendment provides: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’” *Id.* “The Fourth and Fifth Amendments were described . . . as protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life.’” *Id.*

¹²² *Id.* at 483.

¹²³ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

¹²⁴ *Id.*

functions as a substitute for prison.¹²⁵ Prior to the CARES Act, a transfer to home confinement permitted a person to be “on home detention until the expiration of the prison term to which the offender was sentenced.”¹²⁶ Then, in January 2021, under the Trump Administration, the BOP took the substitution for prison a step further by asserting that a transfer to home confinement under the CARES Act is only temporary.¹²⁷ The BOP has thus threatened to return people back to prison from their home after the pandemic ceases to be a “national emergency.”¹²⁸ This proves that the BOP treats the home as a temporary substitute for prison during the pandemic, rather than for the reentry purposes for which Congress originally intended.¹²⁹

In addition, people on home confinement consent to home searches by signing the terms and conditions of their transfer.¹³⁰ After this consent, a person on home confinement has no reasonable expectation of privacy against Government intrusion into the home.¹³¹ Similarly, the United States Supreme Court in *Samson v. California* held “parole is more akin to imprisonment.”¹³² Having the status of “parolee” means that a person does “not have an expectation of privacy that society would recognize as legitimate.”¹³³ While *Samson* pertains to the warrantless search of a *parolee*’s person, the societal status of being on home confinement is no different than the status of being on parole. Like parole, the individual on home confinement is “release[d] from prison, before the completion of their sentence, on the condition that [the prisoner] abide[s] by certain rules.”¹³⁴ The Court’s holding in *Samson* thus arguably extends to home confinement. A person on home confinement agrees to allow home searches by the Government as a condition of their transfer,¹³⁵ and therefore does not have

¹²⁵ See PAUL J. HOFER & BARBARA S. MEIERHOEFER, FED. JUD. CTR., HOME CONFINEMENT: AN EVOLVING SANCTION IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (1987) (“Incarceration at home is the most severe form of home confinement; the home substitutes for prison.”).

¹²⁶ See BOP Operations Memorandum 001-2020, *supra* note 37.

¹²⁷ Home Confinement of Federal Prisoners, *supra* note 30.

¹²⁸ *Id.* It is unclear if this will be enforced under the Biden Administration, or whether Congress or President Biden will step in.

¹²⁹ See *supra* note 33 and accompanying text.

¹³⁰ See CONDITIONS OF HOME DETENTION, *supra* note 82. Similarly, the Fourth Amendment permits warrantless searches of a probationer’s home by probation officers if done as a result of agreed upon probation conditions. *United States v. Knights*, 534 U.S. 112, 118–19 (2001).

¹³¹ See *Samson v. California*, 547 U.S. 843, 852 (2006).

¹³² *Id.* at 850.

¹³³ *Id.* at 852.

¹³⁴ *Id.* at 850 (citing *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)).

¹³⁵ State law holds differently. See *State v. Short*, 851 N.W.2d 474, 502, 504–05 (Iowa 2014) (refusing to follow *Samson* approach and holding that sanctity of home cannot be diluted in home searches of probationers and should be respected by requiring at least reasonable suspicion, as it prevents “arbitrary searches and seizures by law enforcement”).

an expectation of privacy that society recognizes as legitimate. The sanctity of the home for a person on home confinement is simply not protected.

D. *Crime-Free Housing Ordinances Contribute to the Problem of Excessive State-Surveillance*

Over 2,000 municipalities across 48 states have enacted Crime-Free Housing Ordinances (CFOs).¹³⁶ These ordinances “are local laws that either encourage or require private landlords to evict or exclude tenants who have had varying levels of contact with the criminal legal system.”¹³⁷ In many ways, CFOs are similar to other nuisance property laws, but the difference is they often include mandatory actions enforced by the City and law enforcement officers, followed by penalties against the landlord for non-compliance.¹³⁸ CFOs focus on “stemming crime in rental housing,” protecting rental properties from the risks that a person with a criminal history allegedly presents, and protecting the safety of tenants.¹³⁹ Some CFOs, like the one in Granite City, Illinois, are also concerned with tax payer dollars and increasing or maintaining property values that would otherwise be negatively impacted by crime.¹⁴⁰

The genesis of CFOs is the Crime-Free Multi-Housing Program (CFMHP).¹⁴¹ The CFMHP started in Mesa, Arizona in 1992.¹⁴² Timothy L. Zehring—a Phoenix police officer—developed the CFMHP and created the International Crime-Free Association (ICFA) to promote it.¹⁴³ ICFA “assist[s] any person or organization involved with rental property management by expanding their knowledge of the Crime Free Programs through training, information sharing, and assistance.”¹⁴⁴ The “stated goal of the ICFA is to use ‘law enforcement

¹³⁶ *Exile from Main Street*, *supra* note 12, at 792.

¹³⁷ *Racial Exclusion Through Crime Free Ordinances*, *supra* note 68, at 2; *The New Housing Segregation*, *supra* note 5, at 173, 175.

¹³⁸ EMILY WERTH, SHRIVER CTR., THE COST OF BEING “CRIME FREE”: LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 4 (2013), <https://www.povertylaw.org/wp-content/uploads/2019/09/cost-of-being-crime-free.pdf>.

¹³⁹ *Exile from Main Street*, *supra* note 12, at 804–05.

¹⁴⁰ *Landlord Training – New Rental Ordinance 8910*, GRANITE CITY POLICE DEP’T, <http://www.granitecity.illinois.gov/docs/CFMH/Training/RENTAL%20LICENSE%20TRAINING%208910.pdf> (last visited Nov. 5, 2021).

¹⁴¹ Samantha Michaels, *Hundreds of Cities Have Adopted a New Strategy for Reducing Crime in Housing. Is it Making Neighborhoods Safer—or Whiter?*, MOTHER JONES (Nov./Dec. 2019), <https://www.motherjones.com/crime-justice/2019/10/crime-free-housing-making-neighborhoods-safer-or-whiter>.

¹⁴² *Id.*

¹⁴³ *Id.*; *About Crime Free (Media Information)*, INT’L CRIME FREE ASS’N, www.crime-free-association.org/about_crime_free.htm (last visited Nov. 5, 2021).

¹⁴⁴ *Crime Free Programs*, INT’L CRIME FREE ASS’N, <http://www.crime-free-association.org> (last visited Nov. 5, 2021).

based crime prevention’ to keep illegal activity, and the tenants believed to bring it, off of rental property.”¹⁴⁵

There are often four components of CFMHPs: “(1) licensing programs and mandatory landlord training programs; (2) a crime-free database or background screenings; (3) a crime-free lease addendum; and (4) an enforcement scheme that encourages eviction and exclusion.”¹⁴⁶ Many CFOs require local landlords to attend CFMHP training programs.¹⁴⁷ However, the “heart and soul”¹⁴⁸ of these programs are the “lease addendums that allow or require landlords to evict tenants who they believe have engaged in or facilitated criminal behavior” immediately.¹⁴⁹ ICFA also provides a “model [lease] addendum”¹⁵⁰ that any city wanting to start a CFMHP can distribute. Municipalities around the country adopt many, if not all, of these CFMHP components and goals in their CFOs.¹⁵¹ CFMHPs, like the one in Ankeny, Iowa, are purportedly designed to “keep[] rental properties safe” by “reduc[ing] crime, drugs and gangs on apartment properties.”¹⁵²

CFOs “are historically police-sponsored programs.”¹⁵³ Therefore, they heavily involve local law enforcement. CFOs encourage or mandate either tenant screening or criminal background checks on potential and current renters.¹⁵⁴ Tenant screening usually occurs at the prospective-tenant stage.¹⁵⁵ In other words, when a person applies for rental housing “some landlords will [] *automatically* deny a lease to people with a criminal record.”¹⁵⁶ CFOs also broaden the scope of criminal tenant screening to look for “*contacts* with the criminal legal system” rather than limiting screening to detect criminal

¹⁴⁵ *The New Housing Segregation*, *supra* note 5, at 188.

¹⁴⁶ *Exile from Main Street*, *supra* note 12, at 805. For example, the CFO in Granite City, Illinois incentivizes landlords by having four tiers based on performance with a difference in fees paid and terms of license renewal. *Landlord Training – New Rental Ordinance 8910*, *supra* note 140.

¹⁴⁷ WERTH, *supra* note 138, at 3.

¹⁴⁸ *The New Housing Segregation*, *supra* note 5, at 193 (citation omitted).

¹⁴⁹ Archer, *Exile from Main Street*, *supra* note 12, at 805–06.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 805. These goals are often “adopted wholesale by municipalities around the country” by way of enacting local CFOs. *Id.*

¹⁵² *Crime Free Multi-Housing Program*, CITY OF ANKENY, <https://www.ankenyiowa.gov/our-city/departments/police/programs/crime-free-multi-housing-program> (last visited Nov. 4, 2021). The City of Ankeny’s program boasts that “[c]ertified properties have reported up to a 70% reduction in calls for police service.” *Id.*

¹⁵³ *The New Housing Segregation*, *supra* note 5, at 187.

¹⁵⁴ *Id.* at 189; *Exile from Main Street*, *supra* note 12, at 805.

¹⁵⁵ *Exile from Main Street*, *supra* note 12, at 805.

¹⁵⁶ TERRY-ANN CRAIGIE ET AL., BRENNAN CTR. FOR JUST., CONVICTION, IMPRISONMENT, AND LOST EARNINGS 22 (2020) (emphasis added).

convictions.¹⁵⁷ “Contact” could be as simple as calling the police to report domestic violence.¹⁵⁸ Contact could also include “a mere arrest—or even a stop.”¹⁵⁹ And in some municipalities, landlords can regularly work with law enforcement to “request information on arrests involving . . . current adult tenant[s].”¹⁶⁰

The goals of CFMHPs and CFOs “are modeled after a federal statute known as the ‘one-strike policy’ that has been in place for federally subsidized public housing tenants since the late 1980s.”¹⁶¹ In many CFOs, it only takes one violation to create “good cause for immediate termination of the lease.”¹⁶² It is thus easy to evict someone for the actions of their family members and friends since it typically only requires proof of criminal conduct by a preponderance of the evidence.¹⁶³ In *Department of Housing and Urban Development v. Rucker*, the United States Supreme Court held that public housing tenants do not need to know about the criminal activities of non-tenant relatives or guests to be evicted.¹⁶⁴ Similarly, CFOs frequently permit or mandate eviction of “entire household[s] based on the *alleged* criminal activity of a single household member, guest, or other person” regardless of “whether the other occupants had any involvement in or even knowledge of this activity.”¹⁶⁵ In many ways, CFOs are “outgrowths” of the one-strike public housing policies.¹⁶⁶ One-strike policies in CFOs, like those found in many public housing projects, “separate families and make it impossible for people to return home.”¹⁶⁷ However, unlike the one-strike policy in public housing, private landlords who fail to evict people for contact with the criminal legal system can be fined by municipalities under a CFO.¹⁶⁸ Landlords who do not comply can also face “increased licensing fees

¹⁵⁷ *The New Housing Segregation*, *supra* note 5, at 191 (emphasis added); *Exile from Main Street*, *supra* note 12, at 805.

¹⁵⁸ See Ramsey, *supra* note 14, at 1186 (footnotes omitted) (describing how several cases have “challenged nuisance property ordinances on procedural due process grounds on behalf of domestic violence victims who were put at risk of eviction for calling 911 to report abuse”); *Exile from Main Street*, *supra* note 12, at 806.

¹⁵⁹ *Exile from Main Street*, *supra* note 12, at 806.

¹⁶⁰ *The New Housing Segregation*, *supra* note 5, at 192 (describing Hesperia, California’s “Crime Free Screening Program”).

¹⁶¹ Ramsey, *supra* note 14, at 1149.

¹⁶² *Exile from Main Street*, *supra* note 12, at 806.

¹⁶³ See *id.*

¹⁶⁴ *Dep’t of Hous. & Urb. Dev. v. Rucker*, 535 U.S. 125, 127–28 (2002). The Court reasoned that *Chevron* deference applies to HUD’s decision “to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity.” *Id.* at 136.

¹⁶⁵ WERTH, *supra* note 138, at 12.

¹⁶⁶ Ramsey, *supra* note 14, at 1153.

¹⁶⁷ See CRAIGIE ET AL., *supra* note 156, at 22.

¹⁶⁸ See Ramsey, *supra* note 14, at 1149; see, e.g., FARIBAULT, MINN., STAT. § 7-41(c)(3) (2019).

or lose their authorization to rent property altogether if they fail to act on police determinations that certain tenants are a nuisance.”¹⁶⁹

Being transferred to serve the remainder of a prison sentence on home confinement can violate the provisions of a CFO or crime-free lease addendum. For example, consider these provisions from the controversial CFO in the city of Faribault, Minnesota:

(e) Crime free/drug free housing lease addendum requirements.

All tenant leases for rental units governed by this article shall contain the crime free/drug free housing lease addendum. The crime free/drug free housing lease addendum provisions are in addition to all other terms of the lease and do not limit or replace any other provisions. These lease provisions shall be incorporated into every new and renewed lease for a tenancy. The lease addendum shall contain the following “Crime Free/Drug Free” language or language that is contractual and legal equivalent as follows:

(1) Resident, any members of the resident’s household or a guest or other person under the resident’s control shall not engage in illegal activity, including drug-related illegal activity, on or near the said premises. “Drug-related illegal activity” means the illegal manufacture, sale, distribution, purchase, use or possession with intent to manufacture, sell, distribute, or use of a controlled substance (as defined in Section 102 of the Controlled Substance Act, 21 U.S.C. 802) or possession of drug paraphernalia.

(f) Crime free housing violations.

(1) Upon determination by the Faribault Police Department by a preponderance of the evidence that a licensed premises or dwelling unit within a licensed premises was used in violation of the crime free/drug free lease provisions of this subchapter, the Police Department shall cause notice to be made to the owner, agent, or property manager of the violation. If the violation of the crime free/drug free lease addendum committed on the licensed premises would rise to the level of a felony charge under state or federal law, the Police Department shall cause notice to be made to the owner, agent, or property manager to proceed with termination of the tenancy of all tenants occupying the unit. If the violation of the crime free/drug free lease addendum committed on the licensed premises would rise to the level of a misdemeanor or gross misdemeanor charge under applicable law, the Police Department may cause notice to be made to the owner, agent, or property manager to proceed with termination of the tenancy of all tenants occupying the unit

¹⁶⁹ Deborah N. Archer, ‘Crime-Free’ Housing Ordinances, Explained, *APPEAL* (Feb. 17, 2021), [https://theappeal.org/the-lab/explainers/crime-free-housing-ordinances-explained;](https://theappeal.org/the-lab/explainers/crime-free-housing-ordinances-explained; Exile from Main Street, supra note 12, at 804 (footnote omitted).) *Exile from Main Street*, *supra* note 12, at 804 (footnote omitted).

if the violation threatens the peaceful enjoyment or safety of any other resident or neighbor to the premises.¹⁷⁰

As stated above, tenants are penalized for criminal activity engaged in at locations other than the rental property, or “on or near the said premises.”¹⁷¹ Further, “members of the resident’s household or a guest or other person under the resident’s control shall not engage in illegal activity.”¹⁷² But the term “illegal activity” is overbroad. This could include an indictment, current conviction, former conviction, police report, or any activity—regardless of what stage of the carceral continuum an individual is in—that the landlord deems unlawful. The broad scope of this provision reaches families housing family members returning home on home confinement to serve the remainder of their prison sentence at home. It also covers landlords who choose to rent to individuals being released from prison on home confinement. The CFO therefore implies that currently serving out a term of a prison sentence at home violates the provisions of the CFO. The broad scope of illegal activity under the CFO is similar to that of public housing, where studies show any “involvement with the criminal justice system,” including probation or parole, can be grounds for banning access to public housing assistance.¹⁷³

Other terms in the Fairbault CFO provision regarding “illegal activity” conflict with the federal government’s goal of utilizing home confinement. The Police Department is empowered to determine that a unit was “used in violation” of the ordinance.¹⁷⁴ This gives police unbridled discretion to determine what constitutes a CFO violation. A simple tenant screen, or check by law enforcement, may not necessarily pick up the fact that a person is on home confinement, but it could indicate a former conviction and sentence, triggering law enforcement and landlords to investigate. This is on top of the fact that neighbors who feel threatened by a person on home confinement may call the police, triggering CFO nuisance provisions.¹⁷⁵ It seems, then, that home confinement could easily trigger the CFO, especially in a society where police evict people without “any criminal convictions” due to “calls to the police by . . . [] white neighbors,” who feel threatened by a non-white neighbor’s unfounded “ongoing [illegal] criminal activity.”¹⁷⁶

Another example of how home confinement can violate a CFO is in Fremont, California. In Fremont, the CFO’s “Crime Free Lease Addendum” broadly

¹⁷⁰ FARIBAULT, MINN., STAT. § 7-42 (2019), <https://www.ci.fairbault.mn.us/DocumentCenter/View/233/City-Rental-Ordinance-PDF>.

¹⁷¹ FARIBAULT, MINN., STAT. § 7-42(e)(1).

¹⁷² *Id.*

¹⁷³ Marah A. Curtis et al., *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 CITYSCAPE 37, 44 (2013), <https://www.huduser.gov/periodicals/cityscape/vol15num3/ch2.pdf>.

¹⁷⁴ FARIBAULT, MINN., STAT. § 7-42(f)(1).

¹⁷⁵ See Archer, *supra* note 169.

¹⁷⁶ *Id.* (recounting Black woman’s eviction due to Faribault, Minnesota CFO).

states that “illegal activity” includes “any breach of the lease agreement that otherwise jeopardizes the health, safety and welfare of the landlord, his agent or other tenant.”¹⁷⁷ Home confinement could arguably be said to jeopardize the safety of tenants because of the risk that a person violates the terms of their release and commits another crime. However, it is important to note that people released on home confinement have already been vetted by the federal government as not posing a risk to society.¹⁷⁸

Similarly, the ACLU in 2018 challenged the crime-free housing program in Savannah, Georgia, in part for its criminal history screening process.¹⁷⁹ The ACLU found that the “Criminal History Disqualification Standards” required landlords to reject applicants for housing in part based on a history of probation or parole for a non-violent felony within the past ten years, as well as active parole or probation status.¹⁸⁰ The ACLU aptly noted that “[i]ndividuals on probation or parole are subject to heightened scrutiny by law enforcement. As a result, they may be *less* likely to commit crime than similar individuals not under supervision.”¹⁸¹ The same screening of tenants would likely apply to individuals on home confinement, a status similar to probation or parole. Because home confinement is increasingly used as a result of the COVID-19 pandemic,¹⁸² there is a rising risk of CFO exclusion and eviction for individuals with such status.

II. THERE IS A PROBLEMATIC INTERSECTION OF HOME CONFINEMENT AND CFOS

This Article addresses two main problems with CFOs in the context of home confinement. First, CFOs add a harmful layer of local surveillance and control that further blocks the success of individuals on home confinement. This surveillance also makes the concept of home—and the right to privacy that comes with it—elusive for many individuals in the community trying to reintegrate after serving time in prison facilities. The second problem with

¹⁷⁷ *Crime Free Lease Addendum*, FREMONT POLICE DEP’T, <https://www.fremontpolice.gov/home/showpublisheddocument?id=176> (last visited Nov. 5, 2021).

¹⁷⁸ See discussion *supra* Section I.A.

¹⁷⁹ See Letter from Sean Young, ACLU of Georgia et al. to Chief Joseph H. Lumpkin, Sr., Savannah-Chatham Metro. Police Dep’t (Jan. 18, 2018), <https://www.aclu.org/letter/aclus-racial-justice-project-letter-savannah-crime-free-housing-policy?redirect=SavannahCrimeFree>. In response to this letter, the City of Savannah suspended its crime-free housing program. Rachel Goodman, *Savannah Police Suspend Its Discriminatory ‘Crime Free Housing Program’*, ACLU (Feb. 1, 2018, 2:30 PM), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/savannah-police-suspend-its-discriminatory-crime-free> (“In response to our letter, the city of Savannah has announced a suspension of the Crime-Free Housing Program while it reviews the policy.”).

¹⁸⁰ *Id.* at 4.

¹⁸¹ *Id.* at 5.

¹⁸² See *supra* Section I.A.

CFOs is that they are an example of what Deborah Archer calls “exclusionary localism,”¹⁸³ and should be a violation of the FHA.¹⁸⁴

A. *CFOs Block the Federal Government’s Successful Transfer of
Individuals to Home Confinement during the COVID-19 Pandemic*

First, CFOs could block the federal government’s transfer of older and medically vulnerable individuals to home confinement during the pandemic. The action of the federal government is blocked by CFO-related eviction because, as previously described in Section II.B., the loss of housing is often an automatic return ticket to prison.¹⁸⁵ If the rationale behind the ordinances is policing and safety, then evicting people on home confinement is unnecessary because they are already vetted by the federal government as not posing a danger to the community.¹⁸⁶ In addition, many people transferred home from prison have underlying health conditions, or are older adults, meaning that they may have severely limited mobility and a lower risk of recidivism.¹⁸⁷ People transferred to home confinement will thus need the support of their family and community, and a loss of housing should be the last thing on their minds. There are also strict conditions already placed on them by the U.S. Probation Office. For example, housing plans are vetted by the U.S. Probation Office and BOP prior to release.¹⁸⁸ Once a housing plan is approved, individuals on home confinement cannot easily change their agreed upon housing plan if a landlord threatens eviction. People on home confinement need advance permission from the U.S. Probation Office,¹⁸⁹ which can take time, otherwise they will violate their conditions of supervision.¹⁹⁰ Because CFOs are not necessarily flagged to individuals being released, or the responsibility of the U.S. Probation Office to investigate, a suitable housing plan can fail with very little advance notice. CFOs in conjunction with home confinement thus make it virtually impossible for people to maintain suitable housing and comply with the terms of their release.

CFOs therefore undermine the public health purpose behind the eviction moratorium, the CARES Act,¹⁹¹ and the federal government’s efforts to control

¹⁸³ *Racial Exclusion Through Crime Free Ordinances*, *supra* note 68, at 3; *The New Housing Segregation*, *supra* note 5, at 179.

¹⁸⁴ See U.S. DEP’T OF HOUS. AND URB. DEV., GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 1 (2016).

¹⁸⁵ See *supra* Section II.B.

¹⁸⁶ See *supra* Section I.A.

¹⁸⁷ *Id.*

¹⁸⁸ CONDITIONS OF HOME DETENTION, *supra* note 82.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ 15 U.S.C. §§ 9001-9141.

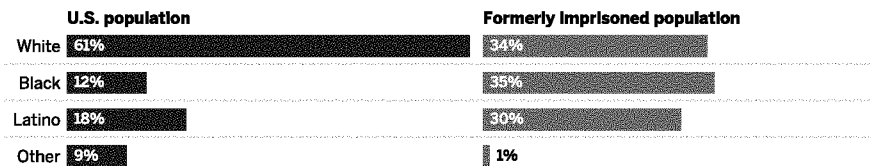
the COVID-19 public health emergency.¹⁹² If the Attorney General and BOP's response to the pandemic is releasing vulnerable people to home confinement, allowing local CFOs or CFMHPs to limit successful reentry is a problem.

B. *CFOs Impact Communities of Color and Lead to "Exclusionary Localism" that Should be a Violation of the Fair Housing Act of 1968*

Second, the impact of CFOs on communities of color leads to exclusionary localism and should be a violation of the Fair Housing Act (FHA).¹⁹³ Exclusionary localism is defined as "[e]xclusionary local laws and policies [that] are among the primary mechanisms that predominately White communities utilize to ward off racial integration."¹⁹⁴ Archer states that "[a] housing system based on whether a person has involvement with the criminal legal system effectively functions as a racialized system. This is because there are racial disparities at every stage of the criminal legal process."¹⁹⁵ In fact, "[m]ost of the people in prison are Black. Overall, Black men are seven times more likely to go to prison than White men."¹⁹⁶ Below is a graph published by the Brennan Center for Justice in 2020 showing the racial disparities between the percentage of Black and Latino people in the United States and the formerly imprisoned population:¹⁹⁷

Figure 1. Racial Disparities Persist After Release from Prison

Racial Disparities Persist After Release from Prison (2017)



Source: Brennan Center analysis.

¹⁹² Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292 (Sept. 4, 2020); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021). "The Biden administration announced on March 29 an extension of the federal eviction moratorium through June 30, 2021." *Tenants Can File Complaints Against Landlords Who Violate CDC Eviction Moratorium*, NAT'L LOW INCOME HOUS. COAL. (Apr. 5, 2021), <https://nlihc.org/resource/tenants-can-file-complaints-against-landlords-who-violate-cdc-eviction-moratorium>. But see *Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs.*, 594 U.S. ____ (2021).

¹⁹³ *Racial Exclusion Through Crime-Free Ordinances*, *supra* note 68, at 2.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 7.

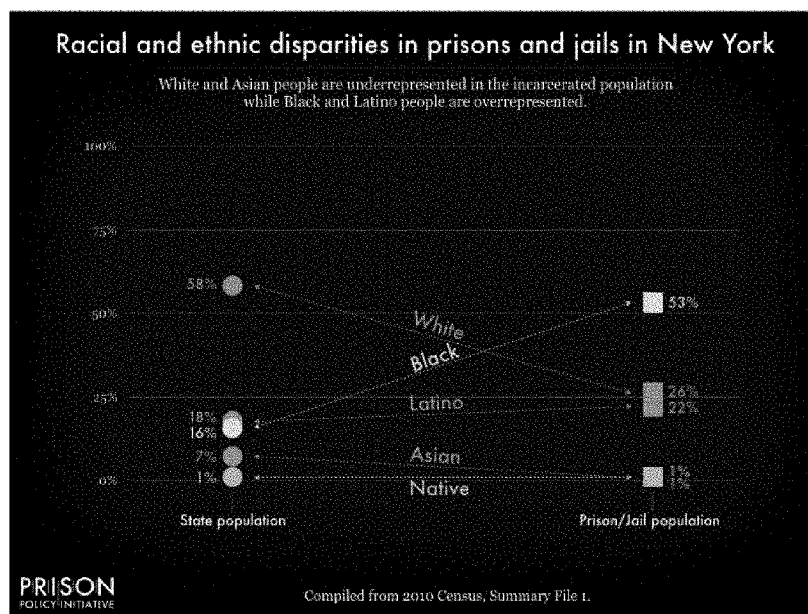
¹⁹⁶ *Id.*

¹⁹⁷ CRAIGIE ET AL., *supra* note 156, at 10

Notably, only 12% of the United States population are Black men and women, yet they make up the highest percentage (35%) of formerly incarcerated citizens.¹⁹⁸ Conversely, white men and women make up 61% of the United States population, but are only 34% of the formerly imprisoned population.¹⁹⁹

One example of this racial disparity at the state level is in the State of New York, where there are clear racial and ethnic disparities inside jails and prisons compared to state-wide population demographics.²⁰⁰ The graph below shows these disparities²⁰¹:

Figure 2. Racial and Ethnic Disparities in Prisons and Jails in New York



Further, in states like “Iowa, Minnesota, New Jersey, Vermont, and Wisconsin, incarceration rates are more than *ten times* higher for Black residents than for White residents.”²⁰²

The Department of Housing and Urban Development (HUD) agrees that people with a history of contact with the criminal legal system are statistically

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Thomas O’Neil-White, *The Problems with Parole: Sentencing Inequalities*, WBFO: NPR (Mar. 2, 2021, 5:59 AM), <https://www.wbfo.org/state/2021-03-02/the-problems-with-parole-sentencing-inequalities>.

²⁰¹ *Id.*

²⁰² *Racial Exclusion Through Crime-Free Ordinances*, *supra* note 68, at 7–8 (emphasis added).

more likely to be minorities.²⁰³ The HUD Office of General Counsel stated in 2016 that even though criminal history is not a protected category under the Fair Housing Act, “if, without justification, [the] burden falls more often on renters or other housing market participants of one race or national origin over another,” there is a violation of the FHA when criminal history is used to exclude or evict.²⁰⁴ HUD’s 2016 guidance further explains how the discriminatory effects and disparate impact of exclusion based on criminal history can violate standards existing under the FHA.²⁰⁵ CFOs are thus a modern driver of racial segregation and restriction of access to affordable housing, and should violate the standards under the FHA. However, the FHA itself does not expressly prohibit discrimination based on criminal history, and criminal history is not a protected status.²⁰⁶

C. CFOs are Increasingly Challenged in the Courts

Despite the lack of legal protections under the FHA, there have been several challenges to CFOs under 42 U.S.C. § 1983.²⁰⁷ These legal challenges have been supported by national organizations, like the Sargent Shriver National Center on Poverty Law, the American Civil Liberties Union (ACLU), the Institute for Justice, the St. Louis Realtors, and the Washington State Office of the Attorney General.²⁰⁸ These organizations have spoken out, or initiated legal action, against the most extreme examples of CFOs on behalf of both tenants and landlords.²⁰⁹

²⁰³ See U.S. DEP’T OF HOUS. & URB. DEV., *supra* note 184, at 2 (citation omitted) (“Across the United States, African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population.”).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Fair Housing Act of 1968, 42 U.S.C. § 3604(a).

²⁰⁷ See, e.g., *Javinsky-Wenzek v. City of St. Louis Park*, 829 F. Supp. 2d 787, 790 (D. Minn. 2011); *Victor Valley Fam. Res. Ctr. v. City of Hesperia*, No. ED-CV-16-00903-AB (SPx), 2016 WL 3647340, at *3 (C.D. Cal. July 1, 2016); *Woody v. City of Granite City*, No. 17-CV-534-SMY-RJD, 2019 WL 1326884, at *1 (S.D. Ill. Mar. 25, 2019); Second Amended Complaint at 20, 21, *Grape v. Town/Village of East Rochester*, No. 07 CV 6075 CJS (F) (W.D.N.Y. May 16, 2007); Amended Complaint at 4, 37, *Briggs v. Borough of Norristown*, No. 2:13-cv-02191-ER (E.D. Pa. Apr. 29, 2013); Complaint at 5, 8, *Markham v. City of Surprise* (D. Ariz. Aug. 25, 2015). Section 1983 allows individuals the right to sue state actors acting “under color of any statute, ordinance, regulation, custom, or usage” for civil rights violations. 42 U.S.C. § 1983.

²⁰⁸ Leora Smith, *When the Police Call Your Landlord: Crime-Free Housing Programs are Quietly Giving Police Widespread Influence over Landlords and Their Tenants*, ATLANTIC (Mar. 13, 2020), <https://www.theatlantic.com/politics/archive/2020/03/crime-free-housing-lets-police-influence-landlords/605728>.

²⁰⁹ *Id.*

One example of a successful challenge is *Victor Valley Family Resource Center v. City of Hesperia*.²¹⁰ In this case, the ACLU represented Victor Valley Family Resource Center (VVFRC), a group of landlords and clients, who sued the City of Hesperia under Section 1983 to obtain a preliminary injunction banning enforcement of Hesperia's CFO.²¹¹ The plaintiffs included VVFRC clients on probation who needed safe and stable housing.²¹² Despite being supervised on release by probation officers, they were targeted as a class and faced the threat of immediate eviction under Hesperia's CFO: Ordinance 2007-07 and 2015-12.²¹³ The Hesperia CFO broadly mandated "that all landlords renting or leasing a residential rental property in the City must register with the City and thereby participate in the Ordinance's 'Crime Free Rental Housing Program.'"²¹⁴ Hesperia's CFO also operated by mandating regularly shared information between the Chief of Police and landlords, with direct screening of prospective tenants by the Chief of Police.²¹⁵ Additionally, landlords were required to include a "'Crime Free Lease Addendum' in every lease agreement with a tenant."²¹⁶ Finally, if a landlord failed to comply, they risked citation or other legal action.²¹⁷

Plaintiffs challenged the CFO under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the U.S. Constitution.²¹⁸ First, the plaintiffs argued the CFO "violates the Equal Protection Clause because it 'plainly discriminate[d] against persons on probation.'"²¹⁹ Second, plaintiffs argued the CFO violated procedural due process rights because landlords were required to evict tenants without having to give sufficient notice, or an opportunity for the landlord or tenant to be heard.²²⁰

The City defended the CFO on grounds of public health and safety and alleged that it was a lawful nuisance ordinance.²²¹ However, the federal district court held that "the harm caused to Plaintiffs if the Ordinances are not enjoined outweigh the harm to Defendants."²²² "Plaintiffs attest that without housing assistance from VVFRC, they will be homeless."²²³ Additionally, the court held

²¹⁰ *Victor Valley Fam. Res. Ctr.*, 2016 WL 3647340, at *7.

²¹¹ *Id.* at *1–2.

²¹² *Id.* at *2.

²¹³ *Id.* at *1.

²¹⁴ *Id.* at *2.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at *4–5.

²¹⁹ *Id.* at *4.

²²⁰ *Id.* at *5.

²²¹ *Id.* at *4.

²²² *Id.* at *6.

²²³ *Id.* at *6. The court considered hardship to the Plaintiffs in comparison with the City as part of its analysis in determining whether a preliminary injunction was warranted. *Id.* at *3.

that the City could not meet the rational basis standard of review because there were “serious questions whether there exists a legitimate public purpose for enacting the [CFOs].”²²⁴ The court therefore granted the plaintiffs a preliminary injunction, and the City was enjoined from enforcing the CFOs against the plaintiffs.²²⁵

Then, in 2019, the Central District of California U.S. Attorney’s Office (USAO), and the Department of Justice (DOJ), sued the City of Hesperia on grounds that the CFO violates the FHA.²²⁶ According to former U.S. Assistant Attorney General Eric Drieband, “[t]he Fair Housing Act prohibits local governments from enacting ordinances intended to push out African American and Latino renters because of their race and national origin, or from enforcing their ordinances in a discriminatory manner.”²²⁷ In fact, the DOJ found that “in Hesperia, California, African American renters were close to four times as likely as white renters to be evicted under its crime-free-housing law, and Latino renters were 29 percent more likely to be evicted than white renters.”²²⁸ The lawsuit thus seeks to enjoin the City of Hesperia from:

Denying housing, or otherwise making housing unavailable because of race, in violation of 42 U.S.C. § 3604(a) . . . [d]iscriminating in the terms, conditions, or privileges of rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race in violation 42 U.S.C. § 3604(b); or . . . [c]oercing, intimidating, threatening, or interfering with a person in the exercise or enjoyment of, or on account of her having exercised or enjoyed, or on account of her having aided or encouraged any other person in the exercise or enjoyment of, a right granted or protected by Section 804 of the Fair Housing Act, in violation of 42 U.S.C. § 3617 . . . [in addition to] failing or refusing to take such affirmative steps as may be necessary to prevent the recurrence of any discriminatory or otherwise unlawful conduct in the future and to eliminate, to the extent practicable, the effects of Defendants’ discriminatory or otherwise unlawful conduct.²²⁹

²²⁴ *Id.* at *4.

²²⁵ *Id.* at *7.

²²⁶ *United States v. City of Hesperia, County of San Bernardino, & San Bernardino Cnty. Sheriff’s Dep’t*, No. 5:19-cv-02298, 2019 WL 6499518 (C.D. Cal. Dec. 2, 2019); Press Release, U.S. Dep’t of Just., Justice Department Sues City of Hesperia and San Bernardino County Sheriff’s Department for Discriminating Against African American and Latino Renters through Enactment and Enforcement of Rental Ordinance (Dec. 2, 2019), <https://www.justice.gov/usao-cdca/pr/justice-department-sues-city-hesperia-and-san-bernardino-county-sheriff-s-department>.

²²⁷ Press Release, U.S. Dep’t of Just., *supra* note 226.

²²⁸ Smith, *supra* note 208.

²²⁹ First Amended Complaint, *United States v. City of Hesperia, County of San Bernardino, & San Bernardino Cnty. Sheriff’s Dep’t*, No. 5:19-cv-02298, 2020 WL 7021797 (Sept. 10, 2021).

The case is ongoing,²³⁰ but the DOJ has made it clear that it intends to crack down on the Hesperia ordinance and take all necessary legal remedies available. Given the disparate impact these ordinances have on communities of color more solutions are needed to prevent CFOs from undermining the purposes of the FHA.

III. FOUR PROPOSED SOLUTIONS

This Article proposes four solutions to the problem of home confinement and CFOs: (1) prevent municipalities and landlords from intervening in reentry planning if the BOP, U.S. Probation Office, or court determines that a person has served enough time in prison to no longer be a danger or risk to the community; (2) amend the FHA to provide an explicit remedy for disparate impact claims in housing; (3) advocate for wide-reaching remedies that repeal these ordinances and start grassroots campaigns in communities to change the public's perception of people involved in the criminal legal system; and (4) provide people on home confinement with constitutional protections in order to abolish the all too pervasive presence of state surveillance and control inside the home.

First, the DOJ or Congress should step in to prevent municipalities and landlords from intervening in reentry planning if the BOP determines that a person has served enough time in prison to no longer be a danger or risk to the community. This is especially important during the pandemic.²³¹ Similar to the Attorney General's memoranda expanding home confinement authority under the CARES Act,²³² the Attorney General, on behalf of the BOP, could instruct municipalities to stop enforcing local ordinances that violate the federal government's initiatives during the national emergency. The power to do this could derive in part from the Supremacy Clause of Article IV of the United States Constitution.

Second, Congress must amend the FHA to provide an explicit remedy for disparate impact claims, and cover protections for people on home confinement and those with a history of contact with the criminal legal system. The FHA is not currently being used as intended to prevent residential racial discrimination.²³³ The Biden Administration has identified this flaw.²³⁴ However, President Biden's memorandum is not governing law and more public pressure is needed for congressional intervention. Amending the FHA to provide a private right of action for disparate impact claims would revive its use

²³⁰ *Id.*

²³¹ See discussion *supra* Section I.A.

²³² See Barr April Memorandum, *supra* note 36.

²³³ See discussion *supra* Section II.B.

²³⁴ See Memorandum from President Joseph R. Biden, Jr. to Sec'y of Hous. and Urb. Dev. (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies>.

in cases where individuals are banned from housing based on their criminal history. Currently, courts and litigants rely on *Griggs v. Duke Power Company* and Title VII employment discrimination analysis because the Supreme Court and the FHA do not directly authorize a private right of action for plaintiffs with disparate impact claims.²³⁵ Amending the FHA to provide a direct route to challenge discriminatory practices on disparate impact grounds—especially if coupled with lowering the strict causation standard that currently derives from Title VII discrimination analysis—would encourage plaintiffs to file disparate impact claims under the FHA. Additionally, Congress could add language to the FHA “prohibit[ing] landlords from discriminating due to criminal conviction, and strengthening renter protections would help combat the homelessness-to-prison cycle as well as racial inequality in housing security.”²³⁶

Third, civil rights and national leaders along with grassroots organizations should continue to advocate for repeal of all CFOs. Some cities, like Granite City, Illinois, have used state Human Rights Act provisions to halt evictions based on criminal records.²³⁷ Other cities, like St. Louis Park, Illinois, have repealed ordinances after community-wide investigations into the harm the CFO caused.²³⁸ St. Louis Park worked with community organizers, city council members, and attorneys to repeal the CFO.²³⁹ In addition, grassroots organizers can work to heal communities impacted by crime. Authors Maya Schenwar and Victoria Law assert that community healing is best accomplished by “the process of growing connections between individuals—creating community and building support systems from the ground up.”²⁴⁰

Fourth, people on home confinement should be afforded the same federal constitutional protections as other citizens. This could start with requiring warrants for officers to search a home as well as a requirement for reasonable suspicion that a person is not complying with the conditions of release. If people on home confinement cannot be afforded the same constitutional protections as other citizens, then perhaps the solution is more aligned with the goals of the prison abolitionist movement—abolishing incarceration in the home altogether.

²³⁵ John M. Lerner, *Private Rights Under the Housing Act: Preserving Rental Assistance for Section 8 Tenants*, 34 B.C. J.L. & SOC. JUST. 41, 43 (2014) (footnote omitted); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

²³⁶ Lake, *supra* note 70.

²³⁷ *Landlord Training – New Rental Ordinance 8910*, *supra* note 140; see Ill. Human Rights Act, 775 ILL. COMP. STAT. 5/1-103 (2020).

²³⁸ See Erin Adler, *St. Louis Park Repeals ‘Crime-Free’ Piece of Housing Ordinance*, STAR TRIB. (Aug. 30, 2020, 5:57 PM), <https://www.startribune.com/st-louis-park-repeals-crime-free-piece-of-housing-ordinance/572269052/> (“The St. Louis Park City Council has repealed the ‘crime-free, drug-free’ part of its housing ordinance after a city work group deemed it too broad, lacking due process for tenants and having a disparate impact on low-income renters and people of color.”).

²³⁹ *Id.*

²⁴⁰ SCHENWAR & LAW, *supra* note 90, at 208.

Like the prison abolitionist movement, abolishing the ability of the state to invade a person's home is the first step at true reform. Prison abolitionist Ruth Wilson Gilmore recognizes the counterarguments to carceral abolition. Wilson says:

the thirst to punish someone who hurt you is a real feeling. But the society that we want to bring into being won't come into being through a better system of punishment. Rather, it's punishment that leads people to the conclusion in the first instance that the way you deal with a problem is by killing it.²⁴¹

Excessive surveillance of a person on home confinement, and the risk that CFOs pose to them in finding and maintaining stable housing, is punishment.

Instead of spending money on controlling and monitoring people who *do not* pose a threat to the community, money could be divested into social workers, schools, and community organizations that promote growth and healing.

CONCLUSION

In conclusion, when home confinement combines with Crime-Free Housing Ordinances, the result is disastrous for the individual, their family, and their community. People released on home confinement are often older, terminally ill adults with a low risk of recidivism, who do not pose a threat or safety risk to the community. Crime-Free Housing Ordinances only exacerbate the extreme control and surveillance already imposed on these vulnerable individuals, often leading to their reincarceration. Considering the value that the United States Supreme Court places on privacy in the home, and the original purpose of the Fair Housing Act, these ordinances along with invasive state control must come to an end.

²⁴¹ Intercepted, *Ruth Wilson Gilmore Makes the Case for Abolition*, INTERCEPT (June 10, 2020, 6:02 AM), <https://theintercept.com/2020/06/10/ruth-wilson-gilmore-makes-the-case-for-abolition>.

