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Civil Means to Criminal Ends

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Abstract

The divide between the civil and criminal legal systems is one of the most fundamental distinctions in American law. There are laws, however, that do not fit clearly into either category and the Supreme Court's jurisprudence on how to categorize these statutes has been murky. Crime-free rental housing ordinances, which encourage or coerce private landlords into evicting tenants for a single incident of criminal activity that does not need to result in a conviction, are an example of the laws that occupy this middle ground. Local legislatures designate these laws as civil statutes and use them as a means to accomplish one of the same ends as the criminal legal system—the removal of undesirable people from the community—but without the need to comply with the more stringent constitutional rights and protections that criminal defendants are entitled to. Tenants facing eviction under crime-free rental housing ordinances must confront allegations of criminal activity without the protections of the Fourth Amendment exclusionary rule, the Sixth Amendment right to counsel, or the expectation that the criminal activity be proven beyond a reasonable doubt. This Article argues that, given the severe consequences that individuals and communities suffer as a result of eviction, including the racial justice implications, legislatures and courts should consider designating evictions under crime-free rental housing ordinances as quasi-criminal matters, thereby ensuring better protection of tenants' constitutional rights.

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INTRODUCTION

In 2019, Deborah Brumit and Andrew Simpson were renting a house in Granite City, Illinois.[1] Ms. Brumit's adult daughter, Tori, who had previously lived with them but moved

1. Verified Complaint for Declaratory & Injunctive Relief paras. 2–3, Brumit v. City of Granite City, No. 19-cv-1090, 2022 WL 4250264 (S.D. Ill. Sept. 15, 2022), *vacated*, 72 F.4th 735 (7th Cir. 2023) [hereinafter Granite City Complaint]. Granite City is a city of approximately 27,000 residents located about ten miles outside of St. Louis. *Quick Facts: Granite City City, Illinois*, U.S. CENSUS BUREAU, https://perma.cc/C73M-K84P (last visited July 7, 2023).

out in 2017, had struggled with a substance abuse problem for a number of years.[2] Ms. Brumit and Mr. Simpson briefly let Tori stay with them again during the first half of 2019, but asked her to leave when they realized that she was still "engaging in self-destructive behavior and failing to care for her children."[3] Tori left the home, but called her mother a few weeks later telling her that she was ready to get clean and asking for help to get herself and her boyfriend into a treatment facility in Granite City.[4] Ms. Brumit picked up Tori and her boyfriend, took them to the treatment facility, waited until they were registered, and then returned to her own home.[5] However, unbeknownst to Ms. Brumit and Mr. Simpson, Tori and her boyfriend left the treatment facility that night and were accused of attempting to steal a vehicle the next day.[6] Months later, neither Tori nor the boyfriend had been convicted of a crime related to the attempt to steal the vehicle.[7] Within days, Granite City ordered Ms. Brumit's and Mr. Simpson's landlord to evict them, stating that they were in violation of Granite City Ordinance 8343.[8] Ms. Brumit and Mr. Simpson had no knowledge of Tori's alleged criminal activity and could not have prevented it, but, according to their local government, they nonetheless were responsible and had to suffer the consequences.[9]

The law in Granite City that forced Ms. Brumit and Mr. Simpson's landlord to evict them is an example of a crime-free rental housing ordinance. Crime-free rental housing ordinances are local laws that require or encourage private-market landlords to evict tenants for criminal activity, even if that

2. Granite City Complaint, *supra* note 1, paras. 52–54.

3. *Id.* para. 56.

4. *Id.* para. 60.

5. *Id.* paras. 61–62.

6. *Id.* paras. 63–66.

7. *Id.* para. 67.

8. Granite City, Ill., Ordinance 8343 (Apr. 2, 2013); *see* Granite City Complaint, *supra* note 1, paras. 68–74. Granite City's ordinance required that landlords evict all tenants from rental properties when any member of a tenant's "household" has "engage[d] in criminal activity, . . . engage[d] in any act intended to facilitate criminal activity, . . . [or committed a] forcible felony." Granite City, Ill., Ordinance 8343.

9. Granite City Complaint, *supra* note 1, paras. 75–93.

activity is unproven in a criminal court.[10] As was the situation with Ms. Brumit's daughter, the alleged criminal activity does not necessarily need to be on or near the rental premises, and it does not have to be committed by the tenant or someone who lives in the house.[11] In many jurisdictions, crime-free rental housing ordinances are enforced by the local police officers, who give landlords little or no choice but to evict the tenants that the police tell them to; landlords who refuse can be subject to fines and/or the loss of their business license.[12] In many cases, tenants are evicted even though they have had good tenancy records and there is no indication that the alleged criminal activity will continue or recur.[13] Many times, local governments do not specify what level of proof is required for the alleged criminal activity to be a violation of the crime-free ordinance.[14] As a result, conduct that never results in a criminal charge or conviction can cause a family to be displaced from their housing.[15] If this happens, it can be extremely difficult, if not impossible, for a family to find new housing within the same community because of the stigma of eviction history or because of mandatory background checks that require landlords to deny housing to applicants with evictions or criminal history.[16]

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10. *See* Kathryn V. Ramsey, *One-Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law*, 65 UCLA L. REV. 1146, 1179 (2018) (discussing how crime-free rental housing ordinances "insert the local police department directly into the private landlord-tenant relationship").

11. *See* Granite City Complaint, *supra* note 1, para. 22; Granite City, Ill., Ordinance 8343.

12. *See* Jenna Prochaska, *Breaking Free From "Crime-Free": State-Level Responses to Harmful Housing Ordinances*, 27 LEWIS & CLARK L. REV. 259, 270 (2023).

13. For example, in 2002, the Supreme Court upheld the Oakland, California Housing Authority's decision to evict four elderly public housing tenants whose family members or guests had allegedly engaged in drug-related criminal activity. Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 127–28 (2002).

14. *See* Ramsey, *supra* note 10, at 1182 (describing the standard, or lack thereof, required to prove the alleged criminal activity); *infra* Part II.B.3.

15. *See* Deborah N. Archer, *Exile from Main Street*, 55 HARV. C.R.-C.L. L. REV. 788, 806–07 (2020) [hereinafter Archer, *Exile from Main Street*] (discussing how a member of the household need not be convicted to be evicted under the ordinance).

16. *See* Ramsey, *supra* note 10, at 1161 (describing the strongly encouraged background check process that Elgin, Illinois ordinances prescribe); Sarah Swan, *Exclusion Diffusion*, 70 EMORY L.J. 847, 884–85 (2021)

Although the underlying allegation that triggers the enforcement of a crime-free rental housing ordinance is criminal in nature, the laws themselves are designated as civil statutes.[17] This is a pivotal distinction for people against whom the laws are enforced because the end result of the enforcement of a crime-free rental housing ordinance is often similar to the end result of the enforcement of a criminal statute: a tenant can be evicted from their housing under a crime-free rental housing ordinance and may be effectively prohibited from finding alternative housing within the same community,[18] and a criminal defendant may be removed from the community through incarceration.[19] While the outcomes of a civil crime-free rental housing ordinance enforcement and a criminal conviction may both result in the removal of an allegedly undesirable member from the community, for the government that is enforcing both sets of laws, the civil eviction process is a much easier and more effective means to accomplishing the same ends.[20] For the defendant, civil eviction actions under crime-free rental housing ordinance trigger fewer constitutional rights and protections, yet the consequences of the eviction for criminal activity can be devastating and, this Article argues, as impactful and disruptive as the consequences of a criminal conviction.[21]

[hereinafter Swan, *Exclusion*] (explaining the barriers to entry that arrests can lead to within the context of tenancy).

17. *See* Ramsey, *supra* note 10, at 1193; *see also* Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 833 (2015) [hereinafter Swan, *Home Rules*] (discussing how "civil remedies are now often used in service of crime control" and that many such laws involve land).

18. *See* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 5 (2016) (describing, generally, the state and fallout of eviction in America).

19. Sociologist Matthew Desmond has compared the crisis of eviction among Black women to the crisis of mass incarceration for Black men. "If incarceration had come to define the lives of men from impoverished black neighborhoods, eviction was shaping the lives of women. Poor black men were locked up. Poor black women were locked out." Matthew Desmond, *Forced Out*, NEW YORKER (Jan. 31, 2016), https://perma.cc/5E45-KSJC.

20. *See infra* Parts II–III; *see also* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325 (1991) ("[T]here is a rapidly accelerating tendency for the government to punish antisocial behavior with civil remedies such as injunctions, forfeitures, restitution, and civil fines.").

21. *See infra* Part II.

Using the civil legal system to hold people accountable for criminal activity is not a new phenomenon in American law. Well known examples include wrongful death lawsuits, monetary fines and restitution imposed on people convicted of crimes in addition to the criminal sanctions, and civil forfeiture.[22] The civil law is an effective and efficient tool for law enforcement agencies as an alternative or supplement to criminal prosecution.[23] However, "the application of civil-law tools like 'nuisance abatement, forfeiture, and eviction' to problems originally approached through the criminal law has been dramatically increasing."[24] Crime-free rental housing ordinances are a recent and insidious example of this blurring of the line between the civil and criminal law. They allow local police departments to use the civil legal system to circumvent the more stringent requirements of the criminal legal system in order to accomplish the same goal—removal from the community of a person who engages in antisocial behavior, as well as anyone tangentially connected to them.[25] As was the case with Ms. Brumit and Mr. Simpson in Granite City, people who are subject to eviction under crime-free rental housing ordinances are often not the actual wrongdoers, but rather their family members or associates.[26] This represents a disturbing level of accountability that tenants are expected to assume for the actions of other people.[27]

This Article argues that crime-free rental housing ordinances present serious constitutional and public policy

22. *See* Cheh, *supra* note 20, at 1325–27 (explaining how civil law can and has been used to hold people accountable for criminal activity).

23. *See id.* at 1334–44 (describing various civil remedies and how they can be used in conjunction with criminal penalties).

24. Swan, *Home Rules*, *supra* note 17, at 834 (quoting Scott Duffield Levy, Note, *Seeking Order Through Disorder: New York's Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 549 (2008)).

25. *See* Swan, *Exclusion*, *supra* note 16, at 847 (discussing the rise of municipal governments using "banning and exclusion laws as a means of crime prevention").

26. *See* Swan, *Home Rules*, *supra* note 17, at 844.

27. *See id.* at 827 (elucidating the vicarious liability that these laws necessitate); *see also* Ramsey, *supra* note 10, at 1179–84 (discussing how crime-free rental housing ordinances represent a disruption of the traditional landlord-tenant relationship by removing the discretion of when, and whether, to evict a tenant from the landlord and placing it with the local police department).

dilemmas because they use civil eviction mechanisms to remove supposedly bad actors from the community by sidestepping the criminal legal system. The legal characterization of crime-free ordinances and the resulting evictions as civil actions, despite their factual grounding in criminal violations, means that important constitutional protections that are available to criminal defendants are lost. The result of this is that thousands of tenants are displaced by the enforcement of crime-free ordinances, yet they are not afforded the same rights as if they were subject to criminal prosecutions. Part I of this Article discusses crime-free ordinances and the eviction process, emphasizing the injustices that already exist in the civil legal system. Part II delves into the divide between civil and criminal law in the American legal system, and highlights areas in which that distinction is unclear, often to the detriment of defendants. It also discusses the specific constitutional protections that are available to criminal defendants but not tenants facing eviction under crime-free rental housing ordinances, and the ways in which the lack of those protections is harmful in the civil context.[28] Part III compares crime-free rental housing ordinances to civil forfeitures, and proposes that courts and policymakers should treat crime-free ordinances as what they truly are—quasi-criminal statutes that merit greater constitutional scrutiny than typical civil proceedings.

I. CRIME-FREE RENTAL HOUSING ORDINANCES AND THE CIVIL EVICTION PROCESS

In order to understand the ways in which crime-free rental housing ordinances implicate important constitutional rights and protections, it is essential to understand how the ordinances themselves and the accompanying eviction process operate. This Part will overview crime-free rental housing ordinances and explain how the civil eviction process works.

28. *See infra* Part II.B.

A. *Crime-Free Rental Housing Ordinances*

Crime-free rental housing ordinances are a relatively new phenomenon in municipal law.[29] The ordinances are modeled after a federal law known as the one-strike policy, which applies to federal public housing tenants.[30] Under the one-strike policy, public housing authorities are allowed to evict tenants for a single incident of criminal activity, on or off the public housing premises, committed by the tenant, a household member, or a guest.[31] The alleged criminal activity that forms the basis for the eviction need not result in a criminal conviction or even a charge; the public housing authority must simply prove, by a preponderance of the evidence in an administrative or court hearing, that the activity occurred.[32] The one-strike policy was first instituted in 1988 and strengthened in 1996, and it imposes strict liability on the public housing lease holder for the conduct of any of their family members or guests.[33] This policy, which is still in place today, has resulted in the eviction of many so-called innocent tenants—that is, tenants who undisputedly had no knowledge of or control over the criminal activity of another person.[34] Tenant advocates, and some courts, have criticized the one-strike policy for its unfairness in holding tenants responsible for alleged criminal activity which they could not

29. *See* Ramsey, *supra* note 10, at 1152–54 (describing how crime-free rental housing ordinances have gained in popularity since the 1990s).

30. *See id.* at 1152–53.

31. *See* 42 U.S.C. § 1437d(*l*)(6) ("Each public housing agency shall utilize leases which . . . provide that any criminal activity . . . engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.").

32. *See* Paul Stinson, *Restoring Justice: How Congress Can Amend the One-Strike Laws in Federally-Subsidized Public Housing to Ensure Due Process, Avoid Inequity, and Combat Crime*, 11 GEO. J. ON POVERTY L. & POL'Y 435, 450–51 (2004) (explaining the burden of proof). The burden of proof in public housing administrative termination of tenancy proceedings is the same as in other civil cases. *Id.* at 450. See *infra* Part II.B.3 for a detailed discussion of the constitutional implications of the lower burden of proof in civil cases than in criminal cases.

33. *See* Ramsey, *supra* note 10, at 1169–70.

34. *See* Swan, *Home Rules*, *supra* note 17, at 827 ("Crime-free lease addendums and chronic-nuisance-abatement ordinances use the same form of vicarious liability as the one-strike policy, and local law has now brought that vicarious liability to bear on a much larger portion of the population.").

have known about or prevented.[35] Despite this, the Supreme Court upheld the one-strike policy as constitutional in 2002 in the case of *Department of Housing & Urban Development v. Rucker*.[36] The one-strike policy remains in effect for all federal public housing tenants.[37]

1. Common Features of Crime-Free Rental Housing Ordinances

Beginning in the late 1990s, after the implementation of the one-strike policy for federal public housing tenants, local governments began adopting similar laws that applied to the private rental housing market.[38] These laws proliferated quickly, and there are now estimated to be several thousand cities with some version of a crime-free rental housing ordinance.[39] Crime-free rental housing ordinances at the local

35. *See* Stinson, *supra* note 32, at 435–36.

36. 535 U.S. 125 (2002). Some municipalities have tried to argue that the Supreme Court's decision in *Rucker* authorized the use of crime-free rental housing ordinances in the private market context. *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 8–9, Brumit v. City of Granite City, No. 19-cv-1090, 2022 WL 4250264 (S.D. Ill. Sept. 15, 2022), *vacated*, 72 F.4th 735 (7th Cir. 2023). However, this is an erroneous interpretation of the *Rucker* holding, which was limited to public housing in which the government is the owner and landlord of the property. *See* Brief for Professor Kathryn Ramsey Mason as Amicus Curiae in Support of Plaintiffs-Appellants at 7–9, Brumit v. City of Granite City, 72 F.4th 735 (7th Cir. 2023) (No. 22-2828); Ramsey, *supra* note 10, at 1151.

37. *See* Ramsey, *supra* note 10, at 1176.

38. *See id.* at 1151.

39. *Crime Free Programs: Keep Illegal Activity Off Rental Property*, INT'L CRIME FREE ASS'N [hereinafter *Crime Free Programs*], https://perma.cc/7XNR-ZCYV (last visited June 12, 2023). It is difficult to know the exact number of crime-free ordinances that exist because there is not a single repository of this data. Some nonprofits and journalists have attempted to categorize crime-free rental housing ordinances in different states, but new ordinances are passed every year, so it is difficult to get an accurate count. For example, a 2013 report from the Sargent Shriver National Center on Poverty Law in Chicago listed 106 Illinois municipalities with some version of a crime-free rental housing ordinance. EMILY WERTH, SARGENT SHRIVER NAT'L ON POVERTY L., THE COST OF BEING CRIME-FREE: LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 26–28 app. (2013), https://perma.cc/22F9-3K7A (PDF). In 2020, a *Los Angeles Times* investigation found that of the 539 municipalities in California "at least 147 cities and counties . . . have enacted a crime-free housing law or advertise crime-free housing training for landlords." Liam Dillon et al., *Black and Latino Renters*

level can take various forms, but they tend to have certain common characteristics. First, many ordinances require that landlords provide, and tenants sign, a crime-free lease addendum.[40] Often, the required language for the lease addendum is included in the text of the ordinance itself or is provided by the local police department.[41] The crime-free lease addendum operates similarly to the federal one-strike policy in that it imposes strict liability on the tenant for the conduct of any household member or guest.[42] Instead of allowing the landlord to determine if any alleged criminal activity should result in eviction, the crime-free lease addendum makes any such alleged activity an automatic lease violation that will result in the termination of the tenancy.[43] In many cities, if a landlord fails to enforce a crime-free lease addendum, they will be subject to monetary fines and/or the loss of their business license.[44]

A second common feature of crime-free rental housing ordinances is a nuisance property ordinance. Nuisance property ordinances create specific grounds under which a property can

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Face Eviction, Exclusion Amid Police Crackdowns in California, L.A. TIMES (Nov. 19, 2020), https://perma.cc/JZ22-K7BL.

40. *See* Prochaska, *supra* note 12, at 270–71 (describing the crime-free lease addendums many crime-free housing programs require landlords to include as part of rental lease agreements).

41. *See id.* at 271 (discussing how the International Crime-Free Association ("ICFA") provides a model lease addendum). The ICFA has testimonials on its website from numerous police departments in the United States and Canada attesting to the success of crime-free programs. *See Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, INT'L CRIME FREE ASS'N, https://perma.cc/7Z5F-YP4A (last visited July 19, 2023).

42. *See* Granite City Complaint, *supra* note 1, para. 130 ("Debi and Andy are not being punished for anything they did. They are instead being punished purely because Debi's adult daughter spent some amount of time at their home at some point in time. Holding individuals strictly liable for crimes committed by people they associate with infringes their fundamental rights.").

43. *See* Ramsey, *supra* note 10, at 1163. This is a significant departure from the traditional structure of the landlord-tenant relationship, where the landlord has the discretion to decide whether conduct by the tenant should result in eviction or whether the tenancy should continue. *See id.* at 1179–84. Under crime-free rental housing ordinances and, specifically, crime-free lease addenda, the decision about whether a tenant should be evicted for alleged criminal activity is taken away from the landlord and placed with the local government, which often means the police department. *See id.*

44. *See* Prochaska, *supra* note 12, at 270.

be considered a public nuisance; under crime-free housing schemes, these grounds often include an excessive number of 911 calls from a certain property.[45] If a property is found to be a nuisance under the local ordinance, property owners are usually required to submit an abatement plan to the city, which must be approved in order for them to continue to rent out the property.[46] Often, the approved abatement plan includes eviction of the current tenants.[47]

Third, municipal crime-free housing schemes often require a property owner to obtain a business license from the local government in order to operate as a landlord.[48] While landlord licensing requirements can have benefits for tenants, including facilitating enforcement of local housing and building codes,[49] they are often used as weapons against landlords who do not

45. *See* Gretchen Arnold & Megan Slusser, *Silencing Women's Voices: Nuisance Property Laws and Battered Women*, 40 L. & SOC. INQUIRY 908, 910 (2015) (describing the nuisance property ordinance in St. Louis, which "[i]n practice . . . is usually triggered when there have been two or more calls to 911 reporting nuisance behavior at a specific address"). This is particularly problematic for domestic violence victims and can have a chilling effect on the reporting of domestic abuse. *See* Theresa Langley, *Living Without Protection: Nuisance Property Laws Unduly Burden Innocent Tenants and Entrench Divisions Between Impoverished Communities and Law Enforcement*, 52 HOUS. L. REV. 1255, 1256–57 (2015) (describing the case of Lakisha Briggs, a tenant in Norristown, Pennsylvania, who begged her neighbor not to call the police to report her partner abusing her because of her fear of being evicted for too many 911 service calls). Several states, including Wisconsin and Illinois, have passed laws requiring cities to carve out exceptions to their nuisance property ordinances for domestic violence and other crime victims. *See* Prochaska, *supra* note 12, at 302 n.313.

46. *See* Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOCIO. REV. 117, 122–24 (2012) (detailing how the Milwaukee Police Department issued and resolved nuisance property citations with landlords, often through eviction of the tenants).

47. *See id.* at 131 ("Property owners' favored means of addressing nuisance citations was eviction.").

48. *See, e.g.*, ELGIN, ILL., MUN. CODE §§ 6.37.040–.050 (2023) (requiring licensure of persons who offer residential properties for rent within the City of Elgin).

49. *See* Katherine Burgess, *How a Registry Could Help Renters in Shelby County—and What the Odds Are of Getting One*, COM. APPEAL (Jan. 9, 2023), https://perma.cc/K53N-NJKD (describing how a rental registry in Memphis, Tennessee, which would require landlords to pay a fee of $10 per year to obtain a business license, would "allow[] for the reduction of code violations and blight").

want to evict tenants under crime-free rental housing ordinances.[50] If a landlord is faced with the choice of evicting a tenant or losing its ability to operate its business, it is almost certainly going to choose eviction.[51]

2. Racial Justice Concerns with Crime-Free Rental Housing Ordinances

Crime-free ordinances raise a number of concerns about racial justice and policing practices in communities of color.[52] Scholars have argued that crime-free ordinances are a form of third-party policing in which "the state requires private parties—who neither participate in nor benefit from the misconduct they are compelled to address—to enforce laws and prevent misconduct by enacting some method of control over a primary wrongdoer."[53] The Supreme Court endorsed the federal government's use of third-party policing in the form of the one-strike policy in *Rucker*.[54] In its decision, the Court quoted from the 1991 Housing and Urban Development ("HUD") regulation promulgating the one-strike policy, stating that "a tenant who 'cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the

50. *See* Granite City Complaint, *supra* note 1, para. 20 ("Landlords are subject to governmental sanctions if they violate the compulsory-eviction law. These governmental sanctions include monetary fines and suspension or revocation of their business license."); *see also id.* para. 91 (describing how the plaintiffs' landlord did not wish to evict the tenants under Granite City's crime-free rental housing ordinance).

51. *See* Desmond & Valdez, *supra* note 46, at 131 ("Most landlords . . . expressed feeling as if they had no other choice but to evict what some called 'nuisance tenants.'").

52. *See generally* Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173 (2019) [hereinafter Archer, *The New Housing Segregation*] (arguing that crime-free programs restrict access to affordable housing and further racial segregation in housing).

53. Swan, *Home Rules*, *supra* note 17, at 825.

54. *See* Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 134 (2002) (explaining that Congress's reasoning for the one-strike, third-party evictions by local public housing authorities is to "provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs").

project.'"[55] This type of third-party policing policy is most likely to apply to tenants of color, as most public housing tenants are not White.[56]

Crime-free rental housing ordinances are just as likely to apply disproportionately to people of color as is the federal one-strike policy. Black and Latinx families are more likely to rent their homes than White families,[57] which means that they are more likely to be subject to crime-free rental housing ordinances. While, as Professor Deborah Archer has written, it is difficult to quantify the overall number of people who have been affected by eviction and exclusionary housing policies, it is well documented that Black and other communities of color are overpoliced, "experience mass criminalization more acutely[,] and are more vulnerable to exclusions."[58] In Tampa Bay, 90 percent of the tenants who were identified by the police as having potentially violated the city's crime-free rental housing ordinance were Black.[59] In Faribault, Minnesota, a federal judge found that the city's crime-free rental housing ordinance was "likely motivated by 'undisputedly race-based complaints and concerns' from city residents that discriminated against Black and Latino renters."[60] The end result of the continuation of these policies is that cities that have crime-free rental housing

55. *Id.* (quoting Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51560, 51567 (Oct. 11, 1991) (codified at 24 C.F.R. pt. 966)).

56. *See* Nat'l Low Income Hous. Coal., *Who Lives in Federally Assisted Housing?*, HOUS. SPOTLIGHT, Nov. 2012, at 1, 3, https://perma.cc/N65N-43DN (PDF) ("Across all public housing, about 45% of residents are black while another third (32%) are white and a little over 20% are Hispanic.").

57. *See* Drew Desilver, *As National Eviction Ban Expires, a Look at Who Rents and Who Owns in the U.S.*, PEW RSCH. CTR. (Aug. 2, 2021), https://perma.cc/9VTG-7JH2 ("Nationwide, about 58% of households headed by Black or African American adults rent their homes, as do nearly 52% of Hispanic- or Latino-led households . . . . By contrast, roughly a quarter of households led by non-Hispanic White adults (27.9%) are rentals, as are just under 40% of Asian-led households.").

58. Archer, *Exile from Main Street*, *supra* note 15, at 821.

59. Christopher O'Donnell, *Department of Justice Investigates Tampa Police's Crime-Free Housing Program*, TAMPA BAY TIMES (May 2, 2022), https://perma.cc/2ZCH-WZ3B.

60. Ricardo Lopez, *Judge Rules Faribault's "Crime-Free" Rental Ordinance Was Likely Racially Motivated, Clearing Way for Trial to Proceed*, MINN. REFORMER (Mar. 3, 2021), https://perma.cc/UXG6-X8PF.

ordinances will experience increased housing segregation.[61] While there has been advocacy involving fair housing claims against cities with crime-free ordinances, it is difficult to find the time and resources to build these cases.[62] However, the Fair Housing Act[63] remains a potentially powerful tool to address the racial disparities that crime-free housing ordinances present.[64]

B. *The Eviction Process in Civil Courts*

In addition to understanding how crime-free rental housing ordinances operate, it is also necessary to understand the interplay between the ordinances and the state court eviction process. While crime-free rental housing ordinances provide the basis for an eviction action against a tenant, in order to actually regain possession of the property legally, a landlord must still follow the eviction process laid out by state statute.[65] Each

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61. *See* Archer, *The New Housing Segregation*, *supra* note 52, at 208

> By relying on criteria destined to exclude people of color at disproportionate rates, the ordinances will perpetuate and increase segregation in the communities that adopt them. . . . Accordingly, the ordinances will predictably reinforce and perpetuate segregation in surrounding communities by exiling people of color, forcing them to seek housing in already segregated communities, and recreating conditions in those communities that are among the drivers of systemic segregation.

62. *See* Prochaska, *supra* note 12, at 291–92 (explaining how crime-free housing and nuisance property ordinances are difficult to challenge because of the significant time and resources needed to evidence a concrete and demonstrable injury).

63. 42 U.S.C. §§ 3601–3631.

64. *See* Archer, *The New Housing Segregation*, *supra* note 52, at 223 (discussing how, once plaintiff makes a prima facie case, the Fair Housing Act's segregative effects cause of action shifts the burden to the defendant to "prove that its challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests").

65. *See, e.g.*, 735 ILL. COMP. STAT. 5/9-101 (2023) (providing that when entry is allowed by law, peaceable entry is permitted and forcible entry is prohibited); *id.* at 5/9-209 (providing an eviction action may be commenced only upon the tenant's failure to pay the demanded rent by the fifth day of receipt of the notice of eviction). Unfortunately, eviction often does not happen through the formal judicial process. *See* Sabiha Zainulbhai & Nora Daly, *Informal Evictions: Measuring Displacement Outside the Courtroom*, NEW AM., https://perma.cc/N7QT-FHDR (last updated Jan. 20, 2022) (stating that landlords circumvent the formal eviction process in the courts by using informal eviction). Informal eviction is a "forced residential move that occurs outside the formal court system, often initiated by a landlord's request,

state's eviction laws somewhat differ, but every state uses a summary process for eviction cases.[66] Additionally, state laws nearly always distinguish between eviction proceedings that are based on nonpayment of rent and those that are based on a lease violation other than nonpayment.[67] Evictions under crime-free rental housing ordinances would fall under the latter category.

As noted above, while crime-free rental housing ordinances provide the basis for an eviction action, they do not allow a landlord to regain possession of the leased premises without an order from a court.[68] In order to obtain such an order, a landlord must provide the tenant with any pre-filing notices that are required by state statute and file a complaint in the civil court that oversees eviction cases.[69] After that, the tenant may have the opportunity to file an answer,[70] and the case will be set for

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negotiation or coercion." *Id.* Some estimates indicate that nearly three-quarters (72.3%) of forced moves are a result of informal eviction. Ashley Gromis & Matthew Desmond, *Estimating the Prevalence of Eviction in the United States: New Data from the 2017 American Housing Survey*, 23 CITYSCAPE 279, 281 (2021). Informal eviction is very common in cities with crime-free rental housing ordinances, with one study in Milwaukee showing that, "[o]f the 243 property owners included in [the] sample, 118 (or 49 percent) initiated or executed a formal eviction and 190 (or 78 percent) relied on a method involving a landlord-initiated forced move: formal and informal evictions as well as threats to evict if the nuisance continues." Desmond & Valdez, *supra* note 46, at 131.

66. *See* Kathryn Ramsey Mason, *Housing Injustice and the Summary Eviction Process: Beyond* Lindsey v. Normet, 74 OKLA. L. REV. 391, 393 (2022) (stating that the summary eviction process was "[d]esigned to provide a quick and efficient judicial alternative to landlord self-help, [where the] process prioritizes the landlord's claim to possession above all other considerations," and has been adopted by every state in the United States).

67. *See, e.g.*, ANDREW SCHERER & FERN FISHER, RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK § 8:1 (2022–2023 ed. 2023) (providing that New York separates eviction proceedings into nonpayment cases and holdover cases, which are cases based on something other than nonpayment of rent).

68. *See* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 512 (1982) (explaining that the movement towards judicial oversight of eviction proceedings happened in the nineteenth and twentieth centuries in order to reduce landlords use of self-help and to encourage oversight and supervision of the eviction process).

69. *See* Kathryn A. Sabbeth, *Eviction Courts*, 18 U. ST. THOMAS L.J. 359, 378 (2022) ("After service of a summons and complaint, civil litigation typically allows the defendant twenty to thirty days to file an answer.").

70. Some states, like New York, require tenants to file answers to all eviction complaints. *See* N.Y. REAL PROP. ACTS. LAW §§ 732, 743 (McKinney

trial.[71] Since eviction cases are summary proceedings, there are major differences between eviction matters and other civil trials.[72] These procedural differences are nearly always to the advantage of the landlord.[73] The reason that eviction cases are summary proceedings is because courts and policy makers wanted to incentivize landlords to use the courts, rather than resorting to self-help, and therefore sought ways to make evictions quick and efficient for landlords to regain possession of their property.[74] There are several of these procedural concessions that are particularly important for tenants at risk of eviction under crime-free rental housing ordinances.

First, motion practice and discovery are significantly limited in eviction cases.[75] Unlike other civil proceedings, pre-trial motions and discovery are not matters of right, but rather usually require permission from the judge.[76] This limits

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2024) (requiring an answer from the tenant in non-payment proceedings and in lease violation proceedings other than non-payment). In other states, like Tennessee, it is not only not required for the tenant to formally answer the complaint, but it is extremely rare for a tenant to do so. *See LSC Eviction Laws Database*, LEGAL SERVS. CORP., https://perma.cc/263D-A5DF (last visited Jan. 13, 2024) (providing that Tennessee has no legal requirement for a tenant to formally answer a complaint before a court hearing).

71. *See, e.g.*, TENN. CODE ANN. § 29-18-115(a)(1) (2023) (providing that an ejectment or detainer action commences upon service of process on any adult in possession of the premises).

72. *See* Sabbeth, *supra* note 69, at 378 (explaining that summary proceedings are speedy processes, requiring tenants to answer and prepare fully for trial in as little as fourteen days).

73. *See* Ramsey Mason, *supra* note 66, at 399 (stating that "[a]s the summary process developed, it 'primarily . . . benefited landlords by giving them an alternative to the time-consuming and expensive action of ejectment'" and "most states did not provide mechanisms for tenants to assert defenses like the habitability of the premises" (quoting Glendon, *supra* note 68, at 512)).

74. *See id.* at 398 (providing that, before the summary eviction process, ejectment actions were plagued with complexities and delays, driving impatient landlords towards self-help eviction).

75. "The purposes of the discovery rules include promoting accurate outcomes and fairness, as well as efficient evaluation of settlement alternatives." *See* Sabbeth, *supra* note 69, at 379.

76. *See* Andrew Scherer, *The Case Against Summary Eviction Proceedings: Process as Racism and Oppression*, 53 SETON HALL L. REV. 1, 49 (2022) ("The niceties of civil litigation, such as motions, discovery, and adjournments, are often barred, or they are severely limited. . . . [A]vailable litigation tools are regularly foregone under the pressure of the mandate for speed.").

the amount of information that a tenant can obtain about the grounds for the landlord's eviction claim and impairs their ability to prepare an effective defense.[77] Second, the time from complaint to trial in an eviction case is very short—often less than a week.[78] This means that it can be difficult, if not impossible, for a tenant to obtain legal representation.[79] There are many reasons why there is a shortage of legal representation for tenants, and these reasons have been explored in depth in other scholarship.[80] One of the most common reasons is that many tenants facing eviction are low-income and cannot afford

77. *See id.* at 77 ("There is little or no time to secure counsel in advance of court appearances, limited or no opportunity for counsel to test the validity of the landlord's claims through discovery, little or no time to investigate and prepare defenses."). *See generally* Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 122 COLUM. L. REV. 1423 (2022).

78. Three states—Alaska, Arizona, and North Carolina—only require two days' notice before certain eviction cases are set for trial. *See* ALASKA R. CIV. P. 85(a)(2); ARIZ. REV. STAT. ANN. § 12-1175(C) (2024); N.C. GEN. STAT. § 42-29 (2023). Nine states only require three days' notice, three require four days' notice, and ten require five days' notice. *See, e.g.*, *LSC Eviction Laws Database*, *supra* note 70 (providing that Iowa, Minnesota, and Rhode Island are examples of states that require three, four, and five days' notice, respectively).

79. *See* Ramsey Mason, *supra* note 66, at 417–18 (recognizing the importance of legal representation on the tenant's behalf for a successful defense); *see also* Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J.L. & GENDER 55, 59 (2018) [hereinafter Sabbeth, *Housing Defense*] ("Representation by counsel decreases eviction rates for tenants, but courts across the country are teeming with unrepresented tenants, the vast majority of whom must defend against lawyers litigating on behalf of the landlords."). One of the most oft-cited statistics on rates of legal representation is that 90 percent of landlords are represented by attorneys, whereas 90 percent of tenants are not. *Id.* at 59–60. A 2021 study in Memphis, Tennessee found that nearly 91 percent of landlords had legal counsel, but fewer than 5 percent of tenants were represented. *See Eviction Courtwatch Data Release*, INNOVATE MEMPHIS (Apr. 2023), https://perma.cc/ZRY6-J7EA (providing that landlords had professional legal representation 90.8% of the time but tenants only had legal representation 4.6% of the time).

80. *See, e.g.*, Sabbeth, *Housing Defense*, *supra* note 79, at 61 (arguing that poor defendants need a right to counsel similar to New York City's appointment model, which is similar to the criminal model of appointment); Maria Roumiantseva, *Patching the Patchwork: Moving the Civil Right to Counsel Forward with Key Data*, 36 J. C.R. & ECON. DEV. 199, 210 (2022) (stating limited finances and overworked legal aid centers as reasons for tenants to go unrepresented in eviction proceedings).

to pay attorneys to represent them.[81] Because evictions are civil cases, there is no right to counsel, with the exception of the few cities that have implemented it as a policy priority.[82] Another consequence of the short time between complaint and trial in eviction cases is that many tenants simply do not appear for their hearings.[83] One study conducted by this author in 2021 in eviction court in Memphis, Tennessee found that nearly 80 percent of tenants who were sued for eviction failed to attend their court dates.[84] An additional procedural barrier for tenants facing eviction under crime-free rental housing ordinances is the lower evidentiary standard. Eviction cases are heard in civil courts, which means that the burden of proof that is required for the plaintiff-landlord to prove their case is lower than it would be in a criminal prosecution—preponderance of the evidence in civil cases versus beyond a reasonable doubt in criminal cases.[85] For eviction cases that are based on violations of crime-free rental housing ordinances, this means that evidence of criminal activity that may not be sufficient to sustain a criminal conviction could be sufficient to warrant an eviction judgment.[86]

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81. *See* Roumiantseva, *supra* note 80, at 210 (explaining how legal aid centers are unable to serve all eligible, low-income individuals due to an insufficient number of attorneys).

82. *See, e.g.*, Sabbeth, *Housing Defense*, *supra* note 79, at 57 (exemplifying New York City's appointment model and stating that it was the first city in the country to institute a right to counsel program for eviction cases in 2017). See *infra* Part III for a more detailed discussion of the right to counsel in eviction cases based on crime-free rental housing ordinances.

83. There are many possible explanations for why tenants default at such a high rate, including inability to miss work, lack of childcare, lack of transportation, and hopelessness about the outcome of the case. *See* Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 555–57 (1992) (explaining that tenants miss rental payments because they live paycheck to paycheck and have default judgments rendered against them even when only a few minutes late to a hearing).

84. *See Eviction Courtwatch Data Release*, *supra* note 79 (observing, using a weighted frequency, that tenant-defendants did not appear at hearings 79.73% of the time).

85. *See* John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA. L. REV. 1569, 1570 (2015) (providing that the preponderance of the evidence standard is a "contrasting twin" with the reasonable doubt rule).

86. *See, e.g.*, *Crime Free Lease Addendum: Arizona Version*, INT'L CRIME FREE ASSOC. [hereinafter *Crime Free Lease Addendum*], https://perma.cc/32KM-B22P (last visited July 28, 2023) ("Unless otherwise

The social consequences of eviction are also severe. Eviction results in displacement from housing and makes it significantly more difficult for a tenant to find new housing.[87] Frequently, tenants who are evicted are unable to relocate within the same neighborhood and end up moving to areas that are less desirable and less safe.[88] Depending on the town, an evicted tenant may or may not be able to find alternative housing within the same municipality.[89] If this happens, a local government has effectively banished that tenant from the city, accomplishing the same goal as if the tenant had been criminally convicted and incarcerated.[90] Moreover, many landlords conduct criminal background checks and credit checks on prospective tenants; if an evicted tenant has, for example, been criminally charged but never convicted, that charge may result in the denial of housing.[91] Similarly, if a tenant has had an eviction case filed against them but there was never a judgment, the simple filing of the case can be enough to disqualify a new tenancy application.[92] While eviction is ostensibly a civil matter, the

provided by law, proof of violation shall not require a criminal conviction, but shall be by a preponderance of the evidence.").

87. *See* Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 298–99 (2015) (providing some of the detrimental impacts of an eviction include time wasted, stress, and the blemish of eviction, which makes finding jobs and future housing more difficult).

88. *See* Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88, 118 (2012) [hereinafter Desmond, *Eviction and the Reproduction of Urban Poverty*] ("Because many landlords reject applicants with recent evictions, evicted tenants are pushed to the very bottom of the rental market and often are forced to move into run-down properties in dangerous neighborhoods.").

89. *See id*. at 118–19 (describing a real case where a woman with her two young boys was forced to find an alternative shelter an hour's drive from her original residence in Milwaukee).

90. *See* Swan, *Exclusion Diffusion*, *supra* note 16, at 885, 889 (discussing the expansion of banishment and exclusionary policies from public spaces to private spaces, like the home).

91. *See* ELGIN, ILL. POLICE, LANDLORD TRAINING PROGRAM 2, https://perma.cc/N3AN-J4M3 (PDF) (last visited Feb. 19, 2024) (explaining that one of the goals of the program is to reduce crime in rental communities).

92. *See* Ramsey Mason, *supra* note 66, at 422 ("Even for tenants who manage to avoid a judgment in court, the filing itself can have a negative impact on their ability to find new housing since many prospective landlords will not distinguish between eviction filings and eviction judgments.").

consequences of eviction can be as severe and disruptive as the consequences of a criminal conviction.[93] Furthermore, as with the enforcement of crime-free rental housing ordinances, there is an undeniable racial justice component to evictions. People of color are more likely to rent their housing than their White counterparts,[94] and Black women with children are the population most likely to face eviction.[95]

II. DISTINGUISHING CIVIL AND CRIMINAL LAWS

Traditionally, American law has been divided into two categories: criminal and civil.[96] This division holds enormous consequences for our legal system and for citizens who are subject to sanctions under one set of laws or the other.[97] Jurisprudentially, there are important constitutional and procedural differences between civil and criminal cases.[98] Criminal defendants are entitled to more protections under the law than are civil defendants.[99] This is primarily because the sanctions for criminal convictions are deemed to be higher stakes than the sanctions for civil liability—a criminal conviction can result in the loss of one's liberty and other fundamental rights, whereas a civil judgment often involves

93. *See supra* notes 17–19 and accompanying text.

94. *See supra* note 57 and accompanying text.

95. *See* Desmond, *Eviction and the Reproduction of Urban Poverty*, *supra* note 88, at 102 (supplying that almost half of the respondents were Black women, outnumbering all other evicted groups).

96. *See* Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 2 (2005) ("There are few distinctions in Anglo-American jurisprudence more fundamental and consequential than that between the civil law and the criminal law.").

97. *See id.* at 2–3 ("Adverse civil and criminal judgments can deprive defendants of valued liberties and property, but a criminal conviction—or even a mere indictment—may impose a social stigma that permanently impairs the defendant's quality of life in a manner rarely equaled by a civil judgment.").

98. *See, e.g.*, *id.* at 7–8 (explaining that the Bill of Rights offers procedural protections, which are available in criminal investigations, indictments, or prosecutions, that are not available in civil actions).

99. *See id.* at 9 (stating that these protections in criminal actions include the Fourth Amendment exclusionary rule, the Sixth Amendment right to counsel, and the obligation of the prosecution under the Due Process Clauses of the Fifth and Fourteenth Amendments to prove guilt beyond a reasonable doubt); *see also infra* Part II.A.

financial penalties.[100] However, the reality of the civil-criminal duality is that it is not always a straightforward determination of whether a remedy is, or should be, civil or criminal.[101] Crime-free rental housing ordinances, which can result in exclusion from the community and social stigma, fall into this gray area.

Until relatively recently, separating criminal and civil laws was, for the most part, an uncomplicated endeavor. In fact, the Framers of the Constitution did not explicitly define what a "crime" is, even though they reserved some protections in the Bill of Rights only for criminal defendants.[102] Traditionally, crime was considered to have a moral component; at common law, "the most basic limit on the government's power [with respect to criminal law] was the prohibition of punishment without culpability."[103] However, beginning in the nineteenth century, courts began allowing legislatures to create so-called strict liability crimes, which do not require a perpetrator to have mens rea in order to be held accountable for a criminal act.[104]

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100. *See id.* at 14 (explaining that at the time of the drafting of the Constitution criminal sanctions often involved physical punishment or death, which significantly affect one's rights in life, liberty, and property); Cheh, *supra* note 20, at 1370 ("[T]he civil procedural due process protections offer a flexible safety valve in that, where the stakes are high enough, the courts in a civil proceeding may impose safeguards similar to those mandated in criminal proceedings.").

101. *See* Cheh, *supra* note 20, at 1329 ("One difficulty in ascertaining the appropriate constitutional limitations is determining whether a particular proceeding is criminal or civil. . . . Commentators have devoted considerable energy to this engaging and nettlesome issue.").

102. *See* John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 673–74 (2012)

> The Constitution provides protections for those accused of crime and it makes reference to the consequences that may flow from criminal convictions. It defines the substance of one crime (treason), gives Congress the power to punish a second crime (counterfeiting), and allows Congress to define and punish a third set of crimes (piracies and felonies committed on the high seas and offenses against the law of nations). But it does not ever tell us what a crime is. The reader's knowledge of the concept appears to be assumed.

103. *Id.* at 663.

104. *See id.* at 684 ("Strict liability offenses punish the defendant's conduct without requiring proof of any culpable state of mind relating to such conduct."); Richard E. Myers II, *Complex Times Don't Call for Complex Crimes*, 89 N.C. L. REV. 1849, 1850 (2011) (suggesting that the Supreme Court's

Over time, the boundary between civil "regulatory" laws and criminal "punitive" laws has become less and less clear. At the end of the twentieth century, particularly as the tough-on-crime era unfolded in the 1980s and 1990s, the line between criminal and civil became even more blurred as the criminal justice system sought to expand its reach through utilizing civil law measures in service of criminal law goals.[105]

One of the frequently cited, yet ultimately unclear, distinctions between criminal and civil laws is whether the law is punitive or regulatory. If the law has a punitive purpose, it should be considered to be criminal, and if it is regulatory, it is civil.[106] However, deciding what constitutes a punishment and what constitutes a regulation is a complex task. Even the Supreme Court has never actually defined what it means when it finds that a law has a "punitive purpose."[107] An equally difficult distinction is whether the law is "public" or "private." Under this theory, a law that is considered an "offense against society," and not just a specific person, would be considered criminal.[108] Alternatively, an offense that did not have broader social implications beyond the individual who was harmed would be considered "private," and therefore civil.[109] However,

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inability to meaningfully define the line separating civil and criminal matters has led legislatures to establish strict liability criminal regimes).

105. *See* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 778 (1997)

> [M]odern law permits the state to impose a wide variety of burdens upon its citizens outside the confines of formal criminal proceedings. In proceedings deemed civil by legislatures and courts, the state can respond to the antisocial behavior of its citizens with confinement . . ., deportation . . ., monetary fines . . ., or permanent deprivation of property used in criminal activity . . . .

106. *See* Austin Sarat et al., *On the Blurred Boundary Between Regulation and Punishment*, *in* LAW AS PUNISHMENT, LAW AS REGULATION 1, 2 (Austin Sarat et al. eds., 2011) (describing the distinction between regulation and punishment as ways of understanding legal classification).

107. *See* Stinneford, *supra* note 102, at 675 (highlighting the Supreme Court's attitude towards statutes with a punitive purpose in both civil and criminal cases).

108. *See* Cheh, *supra* note 20, at 1348 ("An offense may have had a specific victim, but what made it a crime was the fact that it violated peace, order, and societal norms.").

109. *See* Steiker, *supra* note 105, at 793 ("[C]ivil justice was considered the sole province for the resolution of private conflicts.").

actions that have one effect or the other are as difficult to discern as the punitive-regulatory conundrum. Moreover, some commentators have argued that the basis for distinguishing civil and criminal laws is the type of sanctions that they contemplate for a violation: if the sanction is something that would be imposed for a crime, the law is criminal; if it is something that would imposed for a civil violation, the law is civil.[110] However, a major problem with this theory is that there are civil sanctions that are obviously at least as severe as some criminal punishments.[111]

A. *The Supreme Court's Jurisprudence on the Civil-Criminal Divide*

In modern times, the basis that the Supreme Court has adopted for determining if a law is criminal or civil is to look at what the legislature intended when the law was created—a practice that commentators have referred to as "instrumentalism."[112] In cases involving statutory interpretation, courts traditionally defer to the motives of the legislature in creating the law.[113] In fact, the Supreme Court has almost entirely deferred to legislative intent when deciding whether a law that is nominally civil rises to the level of requiring procedural protections that criminal laws trigger.[114] Several decisions by the Court have set forth the factors that the

110. *See* Cheh, *supra* note 20, at 1350 ("[W]e might simply view the criminal law as primarily aimed at inflicting punishment and the civil law as primarily aimed at facilitating regulation and compensation, and divide proceedings according to which of these aims they primarily serve.").

111. *See id.* ("It is clear that certain proceedings, even though statutorily or judicially labeled 'civil,' in reality exact punishments at least as severe as those authorized by the criminal law.").

112. *See* Stinneford, *supra* note 102, at 660–61 ("[T]he instrumentalist revolution . . . rejected the common law emphasis on moral realism.").

113. *See id.* at 658 ("In several areas, the Court still maintains an almost impenetrable wall of deference to the legislature that prevents the development of any doctrine that might provide meaningful protection to criminal defendants.").

114. *See* Fellmeth, *supra* note 96, at 5 ("[T]he Court demands deference to the legislative intent unless an overwhelming preponderance of judicially-crafted factors favors an interpretation of the law as criminal rather than civil.").

Court uses to distinguish between civil and criminal laws, yet the jurisprudence remains muddled and complex.[115]

In the first decision, *Kennedy v. Mendoza-Martinez*,[116] the Court reviewed the case of two men who refused to be drafted into the U.S. military and, as a consequence, were stripped of their American citizenship in civil proceedings.[117] The defendants claimed that these actions were "essentially penal in character, and consequently have deprived the appellees of their citizenship without due process of law and without according them the rights guaranteed by the Fifth and Sixth Amendments, including notice, confrontation, compulsory process for obtaining witnesses, trial by jury, and assistance of counsel."[118] The Court agreed that the defendants should have been granted these constitutional protections because the law that allowed their citizenship to be revoked "plainly" imposed punishment.[119] The Court also laid out a seven-part test to determine whether Congress's intent in drafting a law was primarily punitive in ways that would trigger procedural protections that criminal defendants are entitled to.[120] The seven factors are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be

115. *See id.* at 10 ("[N]ot only has the Court alternated over time between different approaches to the distinction, its definition of criminal sanctions has varied depending on which provision of the Constitution is under examination."); Steiker, *supra* note 105, at 783 ("In the latter part of this century, however, this sharp distinction has become more difficult for courts to maintain with any clarity.").

116. 372 U.S. 144 (1963).

117. *See id.* at 148 ("[B]y remaining outside the United States to avoid military service after September 27, 1944, when [§] 401(j) took effect, he had lost his American citizenship.").

118. *Id.* at 164.

119. *Id.* at 167.

120. *See id.* at 168–69.

> connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[121]

This remains a convoluted and difficult test to apply.[122]

In a second case, *United States v. Ward*,[123] the Court considered whether civil reporting requirements for an offshore oil drilling executive, who was required to report an oil spill, violated his Fifth Amendment right against self-incrimination when the information was used in a subsequent criminal proceeding.[124] The Court, referencing the factors it laid out in *Mendoza-Martinez*, laid out a rebuttable presumption when Congress has "indicated either expressly or impliedly a preference" for a law to be civil or criminal.[125] In order for a court to override this legislative intent, the party challenging the law has a high burden because "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."[126]

More recently, while not disavowing the *Mendoza-Martinez* test, the Court has acknowledged that it is often virtually impossible to distinguish civil and criminal statutes on the basis of whether they are punitive or regulatory. In two cases, *United States v. Halper*[127] and *Austin v. United States*,[128] which both involved civil forfeitures, the Court issued decisions in which it acknowledged the existence of what some commentators have referred to as a "quasi-criminal" category of laws.[129] Both *Halper* and *Austin* dealt with constitutional provisions that usually apply exclusively to criminal defendants: the Fifth

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121. *Id.*

122. *See* Gregory Y. Porter, *Uncivil Punishment: The Supreme Court's Ongoing Struggle with Constitutional Limits on Punitive Civil Sanctions*, 70 S. CAL. L. REV. 517, 550–52 (1997) (examining the difficulty in applying tests for criminal punishment).

123. 448 U.S. 242 (1980).

124. *See id.* at 245–48.

125. *Id.* at 248.

126. *Id.* at 249 (quoting Fleming v. Nestor, 363 U.S. 603, 617 (1960)).

127. 490 U.S. 435 (1989).

128. 509 U.S. 602 (1993).

129. *See* Porter, *supra* note 122, at 517–18 ("Recently, the law of punitive civil sanctions has emerged as a quasi-criminal 'middle ground' between the civil and the criminal law.").

Amendment's Double Jeopardy Clause in *Halper*[130] and the Eighth Amendment's prohibition against excessive fines in *Austin*.[131] In both cases, the Court found that the statutes were unconstitutionally punitive.[132] In *Halper*, the Court stated, "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[133] In *Austin*, the Court found that civil forfeiture fines under the federal civil forfeiture statute can be considered excessive punishment under the Eighth Amendment.[134] Laying out that the "purpose of the Eighth Amendment . . . was to limit the government's power to punish,"[135] the Court reaffirmed its holding from *Halper* and stated, "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law."[136]

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130. *See Halper*, 490 U.S. at 438 ("The District Court . . . concluded that in light of Halper's previous criminal punishment, an additional penalty this large would violate the Double Jeopardy Clause.").

131. *See Austin*, 509 U.S. at 604 ("In this case, we are asked to decide whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under [the statute].").

132. *See Halper*, 490 U.S. at 450 (explaining that a statute which imposes a penalty in violation of double jeopardy is unconstitutional); *Austin*, 509 U.S. at 621–22 (finding that a statute which went beyond a remedial purpose is subject to the limitations of the Eighth Amendment).

133. *Halper*, 490 U.S. at 448.

134. *See Austin*, 509 U.S. at 622 ("We therefore conclude that forfeiture under these provisions constitutes 'payment to a sovereign as punishment for some offense,' and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." (citation omitted)).

135. *Id.* at 609.

136. *Id.* at 610 (quoting *Halper*, 490 U.S. at 448). Professor Aaron Xavier Fellmeth has advocated for another similar approach for determining whether a law is civil or criminal, which he calls the Systemic Social Effect Test, or SSET. *See* Fellmeth, *supra* note 96, at 42–44. Under this test, courts should undertake a four-part analysis to determine if a sanction is civil:

> 1. Whenever sanctions are labeled as "penalties" or as "criminal," such sanctions should be rebuttably presumed not to approximate any actual damages, so that the burden is on the plaintiff or prosecutor to show the penalties are remedial rather than punitive. . . . 2. . . . [T]he state must demonstrate that the defendant infringed on a property or contract right, rather than a police power interest, of the state. . . . 3. Regardless of how the sanction is labeled, the sanction must not exceed *restitutio in*

Despite this recognition that civil statutes can have unconstitutionally punitive consequences, the Court has declined to rule that other civil, yet arguably punitive, laws are unconstitutional. Two cases in which plaintiffs have unsuccessfully challenged the civil designation of a statute are *Hudson v. United States*[137] at the Supreme Court and *Artway v. Attorney General of New Jersey*[138] at the Third Circuit. *Hudson* involved bank officers who were indicted for mishandling funds.[139] The central issue was whether they were entitled to double jeopardy protection because they had already been subject to monetary penalties and loss of their professional licenses in civil administrative proceedings prior to the criminal case.[140] The Court, citing the rebuttable presumption it laid out in *Ward*,[141] found that, because the first proceedings were unquestionably civil in nature, the Double Jeopardy Clause did not apply.[142] In *Artway*, the petitioner challenged New Jersey's enactment of Megan's Law, which imposed registration and community notification requirements on sex offenders.[143] The Third Circuit explained that, "Protecting the public and preventing crimes are the types of purposes . . . [considered to be] 'regulatory' and not punitive."[144] It then held that, because the statute's primary purpose was to enhance public safety and

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> *integram*—the amount necessary to compensate the harm caused . . . . 4. Finally, any valuable resources derived from the sanction must be used to compensate the person injured by the act . . . .

Id.

137. 522 U.S. 93 (1997).

138. 81 F.3d 1235 (3d Cir. 1996).

139. *See Hudson*, 522 U.S. at 95 ("The Government administratively imposed monetary penalties and occupational debarment on petitioners for violation of federal banking statutes, and later criminally indicted them for essentially the same conduct.").

140. *See id.* at 97–99.

141. *See* United States v. Ward, 448 U.S. 242, 249 (1980).

142. *See Hudson*, 522 U.S. at 105 ("In sum, there simply is very little showing, to say nothing of the 'clearest proof' required by *Ward*, that OCC money penalties and debarment sanctions are criminal. The Double Jeopardy Clause is therefore no obstacle to their trial on the pending indictments, and it may proceed.").

143. *See Artway*, 81 F.3d at 1242.

144. *Id.* at 1264; *see also* Sarat et al., *supra* note 106, at 2–5 (analyzing the court's decision in *Artway*).

not to punish, these requirements did not violate the Double Jeopardy Clause.[145]

In addition to the convoluted rationale that courts employ to draw the civil-criminal distinction, there is another disturbing trend revealed through this jurisprudence. This line of cases has revealed the tendency of courts to "associate themselves with those who exercise state power rather than those on whom the state power is exercised. For them, what is crucial is the perspective of those who authorize or administer the state's regulatory and punitive power."[146] Therefore, regardless of what may actually be significant effects of laws that are nominally civil, courts are reluctant to afford greater constitutional protections to people who are subject to those laws.[147] By categorizing laws that fall into the middle ground as civil, courts have sided with the government that implements and enforces the laws against the citizens whose rights are at stake.

B. *The Constitutional Protections Missing from Civil Eviction Proceedings*

In light of both the legal and social consequences of evictions based on criminal behavior, it is time for courts to revisit the question of whether tenants in eviction actions under crime-free rental housing ordinances should be afforded greater constitutional protections. While some tenants have challenged these actions on other grounds, including whether it is lawful to evict an "innocent tenant" for criminal activity she did not know

145. *See Artway*, 81 F.3d at 1242, 1264.

146. Sarat et al., *supra* note 106, at 5.

147. For an interesting discussion about whether the bifurcated civil-criminal distinction actually needs to exist, at least regarding procedure, see generally Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79 (2008). *See id.* at 84

> We will propose, therefore, to cut the Gordian knot tying substance to procedure and replace the current bifurcated civil-criminal procedural regime with a model that runs along two axes that are more compatible with the actual goals of our justice system: the balance of power between the parties and the severity of the sanction or remedy.

about or have control over[148] and whether a civil eviction action can deprive a defendant of his Fifth Amendment right against self-incrimination,[149] few, if any, tenants have successfully argued that these evictions are unconstitutionally punitive.[150] However, given the crisis of evictions for low-income people of color that social science research has revealed, it is time to reconsider whether tenants are entitled to increased constitutional protections in these cases.

For defendants in legal actions, be they civil or criminal, one of the most important considerations is which constitutional protections they are entitled to. Since the authors of the Constitution designated certain rights to only apply to criminal defendants[151] and courts have subsequently found that others do not apply in the civil context,[152] civil defendants are entitled to access a much narrower set of rights than their criminal counterparts. This subpart overviews the constitutional rights for criminal defendants that are potentially implicated by people facing eviction under crime-free rental housing ordinances.

1. Fourth Amendment Exclusionary Rule

The Fourth Amendment of the Constitution reads,

148. *See, e.g.*, Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 130 (2002) (holding that public housing authorities have discretion to terminate a lease for drug-related activity, regardless of whether tenant knew).

149. *See, e.g.*, 1895 Grand Concourse Assocs. v. Ramos, 685 N.Y.S.2d 580, 583 (Civ. Ct. 1998) ("While personal consumption of a controlled substance by respondent's husband in the apartment is a violation of criminal law, it cannot stand as predicate for respondent's eviction . . . .").

150. There are some cases, especially housing authority termination of tenancy actions for public or subsidized housing tenants, where New York courts have ruled that the decision to evict low-income tenants is a disproportionate punishment. *See, e.g.*, Dickerson v. Popolizio, 168 A.D.2d 336, 337 (N.Y. App. Div. 1990) ("[I]n the instant case, we find the penalty [of eviction] to be disproportionate to the offense . . . .").

151. *See, e.g.*, U.S. CONST. amend. VI ("In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial . . . ." (emphasis added)).

152. *See, e.g.*, United States v. Hansen, 428 F. Supp. 3d 1200, 1202 (D. Utah 2019) ("After all, the Sixth Amendment expressly secures the right of criminal defendants 'to be informed of the nature and cause of the accusation' against them. Civil defendants have no comparable constitutional right." (citation omitted)).

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[153]

While the Supreme Court has typically considered protection of the home to be paramount in its Fourth Amendment jurisprudence, the level of protection varies according to whether the person occupying the home owns or rents it.[154] For example, the Supreme Court has ruled that the curtilage of a home, "the area around the home to which the activity of home life extends,"[155] is protected under the Fourth Amendment.[156] For most homeowners, the curtilage would provide a buffer zone between the area subject to a warrantless search and the actual dwelling.[157] For tenants in multifamily buildings, however, areas like hallways and stairwells, which may abut the actual dwelling area, are not considered to be curtilage for the purposes of Fourth Amendment protections.[158] The Supreme Court has also held that if evidence is illegally seized by the police during the course of a search, it cannot be used in support of a criminal prosecution.[159] This is known as

153. U.S. CONST. amend. IV.

154. *See* Sarah Schindler & Kellen Zale, *The Anti-Tenancy Doctrine*, 171 U. PENN. L. REV. 267, 314 (2023) ("[T]his is yet another context in which owners and renters are treated differently under the law, based on whether their 'home' is a space they own or rent.").

155. Oliver v. United States, 466 U.S. 170, 182 n.12 (1984).

156. *See id.* at 177 ("We conclude . . . that the government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment.").

157. *See* Schindler & Zale, *supra* note 154, at 315 ("As scholars have recognized, this means that only citizens living in places with curtilage—i.e., most privately owned single-family homes—are afforded Fourth Amendment protection from police dogs sniffing for narcotics." (internal quotations omitted)).

158. *See id.* ("The majority of circuit courts that have considered the issue have found that tenants do not have a reasonable expectation of privacy in these common areas.").

159. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 398 (1914) ("In holding [illegally seized documents] and permitting their use upon the trial, we think prejudicial error was committed."); Mapp v. Ohio, 367 U.S. 643, 657–60 (1961)

the exclusionary rule, and its "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."[160]

The Supreme Court has considered whether to apply the Fourth Amendment exclusionary rule to civil cases several times, though never in the context of an eviction case.[161] In *United States v. Janis*,[162] the first case where the Court was asked to consider whether the application of the exclusionary rule was appropriate in the civil context, it ruled that the exclusionary rule should not be extended to civil cases if the deterrent effect of excluding the evidence did not outweigh the social benefit of allowing the evidence to be admitted.[163] Since then, the Court has taken a "limited approach to applying the exclusionary rule in civil cases."[164] However, lower courts have been more willing to expand the ambit of the exclusionary rule. In *Tirado v. Commissioner of Internal Revenue*,[165] the Second Circuit considered whether "evidence allegedly seized unlawfully by federal narcotics agents for use in a narcotics prosecution is barred by the exclusionary rule in a subsequent federal civil tax proceeding."[166] The court disallowed the evidence, positing that,

> [I]n order to decide whether application of the exclusionary sanction is likely to have a significant deterrent effect, the key question is whether the particular challenged use of the

(explaining why the federal exclusionary rule for illegally seized evidence must likewise apply to the states).

160. United States v. Calandra, 414 U.S. 338, 347 (1974).

161. *See* Andrew Waks, Note, *Eviction and Exclusion: An Argument for Extending the Exclusionary Rule to Evictions Stemming from a Tenant's Alleged Criminal Activity*, 26 GEO. J. ON POVERTY L. & POL'Y 185, 189–91 (2018) (discussing the case of *United States v. Janis*, 428 U.S. 433 (1976), and the balancing test that the Supreme Court developed thereafter).

162. 428 U.S. 433 (1976).

163. *See id.* at 459–60 ("We therefore hold that the judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign.").

164. Waks, *supra* note 161, at 190 (citing Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 362–63 (1998)).

165. 689 F.2d 307 (2d Cir. 1982).

166. *Id.* at 308.

> evidence is one that the seizing officials were likely to have had an interest in at the time—whether it was within their predictable contemplation and, if so, whether it was likely to have motivated them.[167]

In jurisdictions with crime-free rental housing ordinances, the interest of a local government in the enforcement of the ordinance might well meet this criteria.

Since the Supreme Court has not ruled on a case involving a crime-free rental housing ordinance, most of the discussion of the application of the Fourth Amendment in that particular context has happened in state courts. In a 2018 case from Minnesota, *Nationwide Housing Corporation v. Skoglund*,[168] the defendant-tenant, Wayne Skoglund, was facing eviction from his rental property because police had discovered a substance they suspected was marijuana in his apartment.[169] The police had entered Skoglund's apartment without a warrant, but with the permission of the landlord, and destroyed the marijuana-like substance without testing it to confirm what it was.[170] Skoglund was never charged with a crime.[171] However, Skoglund had signed a "Drug/Crime-Free Housing Addendum" to his lease, which prohibited him from "engag[ing] in criminal activity, including drug-related criminal activity, on or off the premises."[172] After it received the police report related to the incident, Skoglund's landlord filed an eviction case against him, claiming that Skoglund had violated his lease by "possessing illegal drugs on the property."[173] The trial court ruled in the landlord's favor after hearing testimony from a police officer involved in the incident, who stated that he believed that the

167. *Id.* at 311.

168. 906 N.W.2d 900 (Minn. Ct. App. 2018).

169. *See id.* at 902–03.

170. *See id.*

171. *See id.* at 903 ("Although the officers seized the suspected marijuana, they destroyed it without testing its contents and did not charge Skoglund with a crime.").

172. *Id.* at 908. Crime-free lease addendums are common features of crime-free rental housing ordinances. *See* Ramsey, *supra* note 10, at 1151. Often, the ordinance itself provides proscribed text for the lease addendum and requires that tenants sign the addendum in addition to the regular lease. *See id.* at 1162–63.

173. *Skoglund*, 906 N.W.2d at 903.

substance found in Skoglund's apartment was marijuana, even though it was destroyed and never tested.[174]

At trial, Skoglund filed a motion to suppress the evidence of marijuana found in his apartment, stating that his Fourth Amendment rights were violated because "the police officers illegally entered and searched his apartment."[175] The district court denied the motion, and the Minnesota Court of Appeals considered the question on appeal.[176] The appellate court upheld the lower court's ruling and, since the question of whether the Fourth Amendment exclusionary rule and its Minnesota state equivalent applied in a civil case was unresolved in Minnesota, the court engaged in a lengthy analysis.[177] Ultimately, the court ruled that the exclusionary rule cannot be invoked in the civil context because the primary purpose of the exclusionary rule is to deter unlawful police conduct.[178] Skoglund had argued that there was a deterrent purpose in excluding the evidence since it would dissuade the police from illegally seeking evidence that could be used in eviction cases, but the court stated that "the police have no stake in a private eviction proceeding between property management . . . and a tenant."[179]

In this ruling, the Minnesota Court of Appeals aligned itself with the United States Supreme Court's trend towards siding with the government against the citizens whose rights are at stake.[180] The court's holding implies that, since the government is not a party to an eviction action, the exclusionary rule's deterrence policy is inapplicable because the government has no interest in, or opinion on, whether the landlord evicts a

174. *See id.* at 908 ("Based on Officer Leibel's testimony, the district court determined that he had the necessary knowledge to conclude that the substance in the containers was marijuana.").

175. *Id.* at 903.

176. *Id.*

177. *See id.* at 903–07.

178. *See id.* at 903–04 ("Despite having a broad deterrent purpose, the exclusionary rule does not apply to all proceedings or against all persons and is generally restricted to areas in which the goal of deterring unlawful police conduct is 'most efficaciously served.'" (quoting United States v. Calandra, 414 U.S. 338, 348 (1974))).

179. *Id.* at 905.

180. *See supra* notes 122–123 and accompanying text.

tenant.[181] But in cities with crime-free housing schemes, this is not the case. First, many cities have administrative procedures in place to determine whether a tenant has violated a crime-free rental housing ordinance.[182] In Granite City, Illinois, for example, a hearing officer who is an employee of the city hears a grievance filed by either the tenant or the landlord.[183] If the city determines that the tenant violated the crime-free ordinance, it requires the landlord to evict the tenant through the state court eviction process.[184] The enforcement of the ordinance depends on the landlord filing an eviction action against the tenant, and so the government absolutely has an interest in whether or not the landlord can use illegally obtained evidence.[185] Therefore, it would be entirely appropriate for courts to apply the *Janis* balancing test.[186]

Even in jurisdictions where there is not an administrative hearing process as part of the crime-free ordinance, the local government is still acting behind the scenes. At the very least, the local police department plays the role of notifying the landlord that the criminal activity has occurred.[187] For example, in Elgin, Illinois, as part of its chronic nuisance property ordinance, the police chief is responsible for reviewing "reports and/or documentation of enforcement action[s] to determine whether they describe offenses constituting nuisance activities."[188] In the event that the police chief does determine that nuisance activities have occurred, the city may take legal

181. *See* U.S. Residential Mgmt. & Dev., LLC v. Head, 922 N.E.2d 1, 5 (Ill. App. Ct. 2009) ("[T]he focus of [Illinois's Forcible Entry and Detainer Act] is not to punish defendant [tenant], but rather to set forth a mechanism for the peaceful adjudication of possession rights in the circuit court.").

182. *See* Granite City Complaint, *supra* note 1, paras. 36–40 (explaining Granite City's procedural process for determining whether the landlord must begin eviction proceedings against the tenant).

183. *Id.* at paras. 37–38.

184. *Id.* para. 28. While the government would not be a party to the eviction action filed in state court, the landlord does not have the ability to refuse to comply with the order to evict without the risk of losing their business license or incurring monetary fines.

185. *See generally* Waks, *supra* note 161.

186. *See id.* at 189–91 (discussing the *Janis* balancing test and its application in federal and state court cases).

187. *See, e.g.*, ELGIN, ILL., MUN. CODE § 10.44.040 (2023).

188. *Id.*

action to abate the nuisance.[189] However, the property owner can avoid the city's legal action by agreeing to "abate the nuisance."[190] Nearly always, the agreed upon abatement involves evicting the tenants.[191] In the *Skoglund* case from Minnesota, discussed above, it was the police report that formed the basis of the landlord's eviction case.[192] The government could also be pressuring the landlord, directly or indirectly, to evict the tenant under a crime-free housing framework either by explicitly ordering the landlord to evict the tenant or by threatening the landlord with economic sanctions, including monetary fines or loss of the landlord's business license.[193]

These cases demonstrate that the government is very much involved in evictions that happen under crime-free rental housing ordinances. The idea that applying the Fourth Amendment exclusionary rule to eviction actions where crime-free ordinances exist would have no deterrent effect on the police department's illegal searches is completely misguided—under these ordinances, the lines between civil and criminal law, and government action versus private action, are so blurred as to be indistinguishable. Given this reality, courts must consider extending the exclusionary rule to apply to this category of eviction cases.

2. Sixth Amendment Right to Counsel

Another right that the Supreme Court has created for criminal defendants that does not apply to most civil defendants

189. *Id.* § 10.44.040(B)(2).

190. *Id.*

191. *See* Ramsey, *supra* note 10, at 1181.

192. *See* Nationwide Hous. Corp. v. Skoglund, 906 N.W.2d 900, 908 (Minn. Ct. App. 2018) (explaining that the court's ruling was based on the police officer's testimony about drugs and drug paraphernalia he discovered in the defendant's bedroom); *see also* notes 169–174 and accompanying text.

193. *See, e.g.*, Mailand v. City of West St. Paul, No. A17-1598, 2018 WL 2470698, at *4 (Minn. Ct. App. June 4, 2018). In this unreported case out of Minnesota, a property owner faced sanctions for an "excess number of police calls" to the property he owned. *Id.* at *1. The city council of West St. Paul "voted unanimously to revoke [the landlord's] rental-dwelling license . . . [and] ordered tenants to vacate no later than December 31, 2017." *Id.* The Minnesota Court of Appeals found that the landlord established that the "city council's decision is not supported by substantial evidence," and ordered the city to reinstate the landlord's rental-dwelling business license. *Id.* at *4.

is the right to counsel under the Sixth Amendment of the Constitution. The Sixth Amendment reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[194] In the monumental case of *Gideon v. Wainwright*,[195] decided in 1963, the Supreme Court held that indigent criminal defendants have the right to be appointed counsel at the expense of the state.[196] Since *Gideon*, the Supreme Court has only extended the constitutional right to counsel to two additional categories of people: "criminal defendants facing incarceration [for misdemeanor offenses] and juvenile defendants in delinquency proceedings."[197] It has declined to extend the federal right to counsel to parents facing termination of their parental rights or incarceration for failure to pay child support, but the majority of states do provide a right to counsel in cases involving loss of parental rights or loss of liberty through proceedings like involuntary commitment or conservatorship.[198] However, the right to counsel in most civil proceedings, including eviction cases, is nonexistent for the majority of Americans.[199]

More recently, the movement for a right to counsel in eviction cases, also known as "civil *Gideon*," has gained momentum. In 2017, New York City became the first jurisdiction in the country to pass legislation that guarantees a right to counsel for indigent tenants facing eviction.[200] Since

194. U.S. CONST. amend. VI.

195. 372 U.S. 335 (1963).

196. *See id.* at 344 ("This noble idea [of fair trials before impartial tribunals] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."). For an interesting discussion of the racial considerations that went into the Supreme Court's *Gideon* decision in the midst of the Civil Rights Movement, see Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1389–99 (2004).

197. Sabbeth, *Housing Defense*, *supra* note 79, at 73.

198. *See id.* at 74–75.

199. According to the National Coalition for a Civil Right to Counsel, currently seventeen cities, four states, and one county recognize a right to counsel for tenants in eviction proceedings. *Tenant Right to Counsel*, NAT. COAL. FOR CIV. RIGHT TO COUNS., https://perma.cc/AG8C-K9FZ (last visited July 13, 2023).

200. N.Y.C., N.Y., ADMIN. CODE § 26-1302 (2024). Most evictions across the country are based on nonpayment of rent, not the types of lease violations that

then, other cities, including San Francisco,[201] Cleveland,[202] and Kansas City,[203] have enacted similar laws. The rationale for providing legal representation to tenants at risk of eviction is compelling—eviction has devastating consequences for individuals, families, and communities.[204] Although tenants facing eviction are not facing loss of their liberty in the way that criminal defendants are, the loss of housing has lasting impacts.[205] Research has shown correlations between higher numbers of eviction filings and worse mental health outcomes in low-income Black neighborhoods.[206] With growing recognition of the eviction and housing displacement crisis, especially among low-income tenants of color, advocates have pushed for greater access to legal representation for tenants facing eviction.[207] In the jurisdictions that have implemented a right to counsel for tenants, data has shown that eviction filing rates have decreased and that fewer tenants are displaced from their housing.[208]

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are invoked in evictions under crime-free rental housing ordinances. *See* Ramsey Mason, *supra* note 66, at 425.

201. S.F., CAL., ADMIN. CODE. § 58.4 (2023).

202. CLEVELAND, OHIO, ORDINANCES § 375.12 (2024).

203. KANSAS CITY, MO., MUN. CODE §§ 35-20 to -25 (2024).

204. *See* Desmond, *Eviction and the Reproduction of Urban Poverty*, *supra* note 88, at 89 ("Increased residential mobility is associated with a host of negative outcomes, including higher rates of adolescent violence, poor school performance, health risks, psychological costs, and the loss of neighborhood ties." (citations omitted)). *See generally* DESMOND, *supra* note 18.

205. *See* Ramsey Mason, *supra* note 66, at 421–23. In addition to the health consequences of eviction, tenants who have been evicted, or even have an eviction case filed against them, experience detrimental impacts to their credit histories and rental histories, making it more difficult for them to be approved for new housing. *See* Desmond & Kimbro, *supra* note 87, at 299.

206. *See* Courtnee Melton-Fant et al., *Race, Mental Health, and Evictions Filings in Memphis, TN, USA*, PREVENTATIVE MED. REPS., Apr. 2022, at 1, 1 ("Poor mental health was significantly associated with higher eviction [filing] rates in majority Black neighborhoods but not in majority white and racially mixed neighborhoods.").

207. *See* Sabbeth, *Housing Defense*, *supra* note 79, at 76 ("In 2006, the American Bar Association adopted a resolution advocating for the appointment of counsel in civil matters in which 'basic human needs' are at stake. The ABA Resolution identified five such needs: shelter, sustenance, safety, access to healthcare, and child custody and parental rights.").

208. *See* NAT'L COAL. FOR CIV. RIGHT TO COUNS., THE RIGHT TO COUNSEL FOR TENANTS FACING EVICTION: ENACTED LEGISLATION 1–2, https://perma.cc/58FK-

While it is certainly promising to see the reduction in evictions associated with right to counsel programs, one major difference is that they are all the product of enacted legislation, not a judicially created constitutional right, as the criminal equivalent was in *Gideon*.[209] This means that the programs are subject to the whims of legislative monetary allocations. In the past couple of years, New York City's right to counsel program has faced funding and staffing challenges, leading to tens of thousands of tenants being turned away or provided only with limited legal services.[210] During the COVID-19 pandemic, some cities started right to counsel, or quasi-right to counsel, programs with the influx of federal funds from the pandemic relief legislation.[211] When the funding ran out, however, these programs ended as well.[212] Of course, public defender offices across the country face similar challenges, despite the Supreme Court's ruling in *Gideon*.[213] While a judicially created right to counsel is not a magic bullet, it could be a tremendous benefit for tenants facing eviction under crime-free rental housing ordinances.

SQLB (PDF) (last updated Nov. 2023) (detailing statistics from cities and states that have implemented a tenant right to counsel that demonstrate a decrease in the likelihood of eviction).

209. *See supra* notes 196–198 and accompanying text.

210. *See* Frank Festa & Annie Iezzi, *NYC's Floundering 'Right to Counsel' Fails to Keep Pace with Eviction Cases*, CITY LIMITS (Jan. 3, 2023), https://perma.cc/J3P4-9ECA (explaining that New York's Right to Counsel program began to "decay" due to a high turnover rate of nonprofit housing lawyers that accelerated during the COVID-19 pandemic and a backlog of cases courts tried to get through by scheduling faster than tenants could get representation).

211. For example, Memphis, Tennessee, which sees on average 27,000 eviction filings per year, used part of its Emergency Rental Assistance ("ERA") allocation to provide all tenants who applied for financial assistance for their rent arrears with access to legal assistance. *See* Jacob Steimer, *The Rental Assistance Program Improved, But Problems Persist and Evictions Are Climbing*, MLK 50 (Apr. 25, 2022), https://perma.cc/9WCA-YDE2. When the ERA funding ran out, though, the legal assistance ended as well. *Id.*

212. *See id.*

213. *See, e.g.*, Kevin Johnson, *'Invisible' Crisis: Public Defenders Still Underfunded, Understaffed 60 Years After Key SCOTUS Ruling*, USA TODAY (Mar. 17, 2023), https://perma.cc/3KQN-F8YS. In federal courts, 98 percent of criminal cases result in a plea bargain instead of a trial. Nathan Denzin, *The Legal Impact of Wisconsin's Shortage of Prosecutors and Public Defenders*, PBS NEWS WEEKEND (Apr. 1, 2023), https://perma.cc/JBM7-F2S4.

Although it is highly unlikely that the Supreme Court will mandate a civil right to counsel in the foreseeable future, there are arguments in favor of guaranteeing legal representation for tenants facing evictions under crime-free rental housing ordinances. First, a tenant may be facing both a criminal prosecution and an eviction under a crime-free ordinance for the same underlying conduct.[214] Because eviction proceedings are summary proceedings and are therefore designed to move quickly through the courts, it is entirely likely that the civil eviction case may come to trial before the criminal case.[215] If a tenant is seeking to defend against the eviction action, they may present evidence in the civil eviction trial that could later be used against them in a criminal prosecution.[216] Conversely, if the criminal prosecution concludes prior to the adjudication of the civil eviction case, evidence presented at the criminal trial can be used against the tenant to sustain the eviction claim,

214. *See supra* notes 127–144 and accompanying text.

215. *See* Glendon, *supra* note 68, at 512; *see also* Ramsey Mason, *supra* note 66, at 393 (arguing that summary judgement proceedings prioritize landlords' claims to possession and cut out traditional aspects of civil litigation, resulting in limitations on defenses, counterclaims, discovery, and motion practice).

216. *See* Scott Duffield Levy, *The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 555–56 (2008). The Fifth Amendment of the Constitution protects a criminal defendant from self-incrimination by allowing the defendant to decline to testify if they so choose. U.S. CONST. amend. V. The Amendment reads, "No person shall be . . . compelled in any criminal case to be a witness against himself." *Id.* This privilege is extended to state proceedings through the application of the Fourteenth Amendment. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964) ("We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."). Scholars have debated exactly where and when the privilege applies, *see generally* Thea A. Cohen, *Self-Incrimination and Separation of Powers*, 100 GEO. L.J. 895 (2012) (discussing when a criminal case begins and who is capable of violating the privilege against self-incrimination), and what constitutes compulsion of testimony against oneself. *See generally* Lawrence Rosenthal, *Compulsion*, 19 U. PA. J. CONST. L. 889 (2017) (discussing the lack of clarity around what it means to "compel" testimony). For the purposes of this Article, the Supreme Court has ruled that the privilege against self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 444–45 (1972).

even if the tenant was not convicted of a crime.[217] Moreover, "unlike in criminal cases, landlords are entitled to adverse inferences if the tenant does not take the stand."[218] Without the assistance of counsel, tenants will simply not have the legal knowledge to make decisions about presentations of evidence and potential waiver of rights in parallel criminal and civil actions.[219]

While the Supreme Court has balked at extending the right to counsel much beyond the criminal context, it has recognized that effective legal representation is necessary for people facing both civil and criminal sanctions based on the same set of underlying facts. In its 2010 ruling in *Padilla v. Kentucky*,[220] the Court held that a criminal defense attorney who had failed to properly advise his client about the immigration consequences of his guilty plea to drug charges had failed to provide effective assistance of counsel under the Sixth Amendment.[221] The defendant was subject to deportation as a result of the guilty plea in the criminal case, and while the Court did not go so far as to say that deportation should be considered a criminal sanction, it did acknowledge that because deportation is "a particularly severe 'penalty,'" it should be considered within the "ambit of the Sixth Amendment right to counsel."[222] Arguably, displacement from one's housing under a crime-free rental housing ordinance, and all of its attendant consequences, could

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217. *See* Levy, *supra* note 216, at 555 ("[T]he exclusionary rule for evidence obtained in an illegal search does not generally apply in civil cases."); *see also infra* Part II.B.3.

218. Levy, *supra* note 216, at 555 (citing Marine Midland Bank v. John E. Russo Produce Co., 50 N.Y.2d 31, 34–44 (1980)).

219. *See* Barbara Mule & Michael Yavinsky, *Saving One's Home: Collateral Consequences for Innocent Family Members*, 30 N.Y.U. REV. L. & SOC. CHANGE 689, 689–90 (2006)

> Given the scope and complexity of the applicable federal, state, and local laws, . . . tenants are placed in an untenable situation. They must fend for themselves in forums that have been designed by and for attorneys, in which the culture and language are alien to them, and where they face experienced counsel who represent [the government] or other landlords. Without the assistance of counsel, these tenants are unable to fully access the courts and thus ensure their right to equal justice.

220. 559 U.S. 356 (2010).

221. *See id.* at 374.

222. *Id.* at 365–66.

be considered a severe enough penalty to trigger application of the principles established in *Padilla*. This would require, as a constitutional matter under the Sixth Amendment, that an attorney be provided for any tenant who is at risk of eviction based on an allegation of criminal activity.

3. Burden of Proof: Beyond a Reasonable Doubt vs. Preponderance of the Evidence

For criminal defendants, the Constitution requires that the prosecution prove guilt beyond a reasonable doubt.[223] The Supreme Court has held that this burden of proof is required by the Due Process Clauses of the Fifth and Fourteenth Amendments.[224] In civil proceedings, however, the burden of proof is much lower—a plaintiff must only prove their case by a preponderance of the evidence, which means that "there is a greater than 50% chance that the claim is true."[225] Since eviction cases are civil proceedings, even those that are based on alleged criminal activity, the evidence needed to prove the case is much less than for a criminal case.[226] Simply put, it is easier to prove civil liability than criminal responsibility.

The difference in the evidentiary standards for criminal and civil cases is one of the incentives for governments to pursue civil

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223. *See In re* Winship, 397 U.S. 358, 362 (1970) (explaining that the government has the duty of establishing guilt beyond a reasonable doubt for criminal defendants to safeguard defendants from unjust convictions that can cost them life, liberty, and property).

224. *See id.* at 363 ("The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.").

225. *Preponderance of the Evidence*, CORNELL L. SCH.: LEGAL INFO. INST., https://perma.cc/RGJ6-ZDZ5 (last updated Dec. 2023).

226. *See* Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO. J. POVERTY L. & POL'Y 1, 50 (2015)

> Currently, the civil burden of proof—preponderance of the evidence—is not adequately responding to rapidly changing private and public housing instability for the poor in light of the sociological research evidencing disproportionate impacts on low-income single mothers. The current standard is simply ill-equipped to handle . . . eviction proceedings that, inherently, involve criminal conduct.

sanctions against people who are allegedly involved in criminal activity.[227] One scholar articulates this tension as follows:

> In ordinary civil suits, . . . procedural due process requirements are satisfied under the interest balancing approach of *Mathews v. Eldridge*,[228] which requires notice, an opportunity to be heard, and such other procedures as will ensure an accurate and rational action. Ordinarily this means a predeprivation hearing, allocation of the evidentiary burden to the moving party, a preponderance standard for the burden of proof, and no right to appointment of counsel. Civil proceedings that work in tandem with the criminal laws, however, include novel remedies: double and treble damage awards, magnificent forfeitures, branding of persons as "racketeers" or "unfit," and summary seizures of property. The enormity of the impact of these "new penalties" calls into question whether the ordinary civil due process formulae adequately fulfill the constitutional promises.[229]

Eviction could also be added to the list of "novel remedies" described above.

Since the 1990s, both the federal one-strike policy and municipal crime-free rental housing ordinances have made it easier and more common for local governments to attempt to banish alleged criminals, and anyone associated with them, from their communities through the use of the eviction process.[230] In many municipalities that have passed crime-free rental housing ordinances, it is entirely unclear how much

227. *See* Cheh, *supra* note 20, at 1393 (discussing issues with, and possible solutions to, the problem of "law enforcement authorities . . . relying more heavily on civil proceedings as part of their systematic efforts to fight crime").

228. 424 U.S. 319 (1976).

229. Cheh, *supra* note 20, at 1394–95.

230. *See* Levy, *supra* note 216, at 556–57 (describing New York City's Narcotics Eviction Program, in which the District Attorney can bring eviction cases against tenants suspected of drug crimes in public and private housing throughout New York City); *see also* Ramsey, *supra* note 10, at 1171–72 (describing the implementation of the one-strike policy in public housing). Crime-free rental housing ordinances that punish not just the alleged wrongdoer but also their family and friends may violate the First Amendment right to freedom of association. *See* Prochaska, *supra* note 12, at 283 (discussing the associational rights claim in *Brumit v. Granite City*).

evidence is required to establish a violation of the ordinance.[231] The International Crime-Free Association, which was started by a former Arizona police officer and assists police departments with implementing crime-free programs,[232] includes a sample crime-free lease addendum on its website, which includes language that states, "Unless otherwise provided by law, proof of violation shall not require a criminal conviction, but shall be by a preponderance of the evidence."[233] Many cities with crime-free ordinances do not distinguish between arrests, charges, and convictions, or simply state that an arrest itself is a violation of the ordinance.[234] Some municipalities have attempted to narrow the definition of what constitutes a violation of the ordinance. For example, in Evanston, Illinois, arrests are allowed to be considered violations of the crime-free ordinance but must be "supported by admissible corroborating evidence that activity in violation of [the ordinance] has occurred."[235]

The lower burden of proof required to establish a violation of a crime-free ordinance and to sustain an eviction action in court means that it is often more expedient for local governments to attempt to banish alleged wrongdoers from the community through the eviction process, rather than expend the resources for a criminal prosecution.[236] As a result,

231. *See* Ramsey, *supra* note 10, at 1179 (describing how police departments enforcing crime-free rental housing ordinances often do not differentiate between arrests, criminal charges, and convictions).

232. *See Crime Free Programs*, *supra* note 39.

233. *See Crime Free Lease Addendum*, *supra* note 86.

234. Several cities with these broad crime-free ordinances have faced legal challenges and claims of discrimination against communities of color, which tend to be over-policed. *See generally* Archer, *The New Housing Segregation*, *supra* note 52. Tampa Bay, Florida faced an investigation from the Department of Justice in 2022 after it was revealed that the Tampa Bay Police Department "sent hundreds of letters that encouraged landlords to evict tenants based on arrests, including cases where charges were later dropped. About 90 percent of tenants flagged to landlords were Black renters." Christopher O'Donnell, *Department of Justice Investigates Tampa Police's Crime-Free Housing Program*, TAMPA BAY TIMES (May 2, 2022), https://perma.cc/4GB7-LKK6.

235. EVANSTON, ILL., ORDINANCES § 5-3-4-5(E) (2023).

236. *See* Swan, *Exclusion*, *supra* note 16, at 882–85 (discussing how local governments and landlords have focused on laws that allow exclusion and banishment of certain people from housing as a means of crime prevention).

municipalities have an incentive to pursue the civil remedy of eviction rather than a criminal conviction.

III. THE QUASI-CRIMINAL MIDDLE GROUND

The question remains: should crime-free rental housing ordinances be categorized as civil laws or criminal laws? Are they regulatory or punitive? Or are they somewhere in between? The lack of clarity that the Supreme Court has provided to elucidate which laws are civil and which laws are criminal has resulted in confusion about which constitutional protections are available to those against whom the laws are being enforced. Crime-free rental housing ordinances fall squarely into the middle ground where the distinctions between the civil and the criminal are murky. To date, no court has closely examined whether crime-free ordinances, which are designated as civil laws by the legislatures that pass them,[237] might, in their implementation, be more appropriately situated in the criminal category.[238] While civil forfeiture cases are substantively and procedurally distinct from eviction cases, they provide a valuable jurisprudential comparison that can establish more protections for residential tenants because they reveal some of the ways that courts have treated the loss of a home as a consequence of criminal activity.[239] One way for courts to analyze evictions under crime-free rental housing ordinances in comparison to civil forfeitures is to consider designating a third category of statutes, beyond the traditional civil and criminal, which some commentators have referred to as "quasi-criminal."[240]

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237. *See* Ramsey, *supra* note 10, at 1150 ("Although eviction continues to be viewed by the civil justice system largely as a civil remedy in an action based on the breach of a lease contract, it has come to be employed in practice as a first-resort method for dealing with the problems of drugs, crime and violence.").

238. *See id.* at 1199 (explaining that crime-free ordinances "have been largely unchecked by the courts").

239. *See infra* Part III.A.

240. *See, e.g.*, Porter, *supra* note 122, at 517–18 ("[T]he law of punitive civil sanctions has emerged as a quasi-criminal 'middleground' between the civil and the criminal law.").

A. *Civil Forfeitures*

Perhaps the closest, extensively litigated comparison to evictions that are based on criminal activity is civil forfeiture.[241] Like evictions, civil forfeitures are civil actions that are inextricably intertwined with the criminal law and involve the loss of a property interest because of alleged criminal activity.[242] Forfeiture, which is a concept deeply rooted in Anglo-American law and maritime law,[243] can be either civil or criminal.[244] It is civil forfeiture, however, which has generated the most controversy.[245] Criminal forfeiture, which is brought *in personam*, or against the person who commits the crime, is considered to be a criminal punishment and thereby triggers the constitutional protections that criminal defendants are entitled to.[246] Civil forfeiture, however, is brought *in rem*, which is a legal fiction that it is the property itself that has committed a crime and can be seized by the government.[247] As it is a civil proceeding, defendants are entitled to fewer constitutional and procedural protections.[248]

The Supreme Court's jurisprudence on the constitutional protections that are available to people subject to civil forfeitures has been mixed. The Court first addressed this

241. *See* Waks, *supra* note 161, at 207 ("Forfeiture and eviction are functionally indistinguishable.").

242. *See* DEE R. EDGEWORTH, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 1 (2d ed. 2008) (explaining that asset forfeiture, including civil forfeiture, occurs when "the government confiscates . . . property because it has been used in violation of the law and to require disgorgement of the fruits of the illegal conduct").

243. *See* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2457–67 (2016) (discussing the history of forfeiture).

244. *See* EDGEWORTH, *supra* note 242, at 3–11 (describing the various types of forfeiture, including civil and criminal).

245. *See* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 5 (2012) (describing civil forfeiture as controversial).

246. *See id.* at 4–5.

247. *See* United States v. Ursery, 518 U.S. 267, 275 (1996) (stating that an *in rem* forfeiture is "the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient").

248. *See id.* at 278 (explaining that a civil proceeding does not include "the full panoply of constitutional protections required in a criminal trial").

question in *Boyd v. United States*,[249] a case from 1886 that involved the seizure of plate glass as part of a civil forfeiture action.[250] In *Boyd*, the Court ruled that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of the offenses committed by him, though they may be civil in form, are in their nature criminal."[251] Eighty years later, in *One 1958 Plymouth Sedan v. Pennsylvania*,[252] the Supreme Court, relying heavily on *Boyd*, held that, because the civil forfeiture in question was "clearly a penalty for the criminal offense and [could] result in even greater punishment than the criminal prosecution,"[253] the matter was quasi-criminal in nature and the defendants could avail themselves of the protections of the Fourth Amendment exclusionary rule.[254] However, in *United States v. Ursery*,[255] the Court held that defendants who were convicted of marijuana manufacturing, drug conspiracy, and money-laundering offenses were not entitled to double jeopardy protection when the government later filed civil forfeitures against them seeking monetary compensation.[256] Similarly, in *Calero-Toledo v. Pearson Yacht Leasing Co.*,[257] the Court found that a defendant whose yacht was confiscated without prior notice in a civil forfeiture proceeding was not denied due process because the yacht was being used for ongoing criminal activity and thus it was an "'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process."[258]

However, there have been other more recent cases where the Court found that civil forfeitures did violate the constitutional rights of defendants. In one case mentioned above, *Austin v. United States*, the Supreme Court sided with a defendant who argued that a federal civil forfeiture action

249. 116 U.S. 616 (1886).

250. *Id.* at 617.

251. *Id.* at 634.

252. 380 U.S. 693 (1965).

253. *Id.* at 701.

254. *See id.* at 700–02.

255. 518 U.S. 267 (1996).

256. *See id.* at 292 ("We hold that these *in rem* civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause.").

257. 416 U.S. 663 (1974).

258. *Id.* at 680.

against his home was unconstitutional because it violated the Eighth Amendment's prohibition against excessive fines.[259] In another case, *United States v. Halper*, the Court held that a monetary punishment that was disproportionate to the actual damage that the government sustained violated the Double Jeopardy Clause.[260] Also, in contrast to the holding in *Calero-Toledo*, in *United States v. James Daniel Good Real Property*,[261] the Court held that, with regard to real property, defendants were entitled to due process consisting of notice and opportunity to be heard before the property could be confiscated.[262] The pattern in these seemingly divergent holdings is that forfeitures that attempt to seize contraband or proceeds of criminal enterprise are generally held to be constitutional because they are viewed as "remedial," while cases involving property that is used to facilitate criminal activity, such as the real property in *Austin* and *James Daniel Good*, are considered to be "punitive" and thus held to a higher constitutional standard.[263]

B. *The Argument for Categorizing Evictions Under Crime-Free Rental Housing Ordinances as Quasi-Criminal Matters*

The Supreme Court's decisions in the civil forfeiture cases, particularly the ones involving real property, have potentially important implications for tenants facing eviction for alleged

259. *See* Austin v. United States, 509 U.S. 602, 622 (1993) ("We therefore conclude that forfeiture under these provisions constitutes 'payment to a sovereign as punishment for some offense,' and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." (citation omitted)).

260. *See* United States v. Halper, 490 U.S. 435, 452 (1989) (finding that monetary punishment imposed on defendant was "sufficiently disproportionate" to the actual damage to "constitute[] a second punishment in violation of double jeopardy").

261. 510 U.S. 43 (1993).

262. *See id.* at 62 ("Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.").

263. *See* EDGEWORTH, *supra* note 242, at 16–17 (explaining punitive and remedial forfeiture statutes and noting that "courts may look at this distinction in determining which Constitutional protections apply").

criminal activity under crime-free rental housing ordinances. In *James Daniel Good*, the Court explicitly recognized the inherent difference between real property and other property that could be subject to forfeiture, such as cash or vehicles.[264] Unlike moveable goods, real property, "by its very nature, can be neither moved nor concealed."[265] To the Court, this indicated that, unless there were truly exigent circumstances, there was no reason to bypass the due process rights that defendants would otherwise be entitled to.[266] Moreover, the Court placed a special emphasis on the unique interest that real property owners enjoy, stating, "The seizure deprived Good of valuable rights of ownership, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents."[267] Of course, residential tenants, while they do not enjoy the right of ownership, do have the rights of occupancy and use and enjoyment of the property, as well as a constitutionally protected property interest in the leasehold.[268]

There are enough parallels between civil forfeitures and crime-free rental housing ordinances that a persuasive argument can be made for treating both of them as quasi-criminal proceedings for purposes of the constitutional rights and protections that apply. Like people who are subject to civil forfeitures of real property that they own, tenants who rent their housing have constitutionally protected property interests.[269] Whether rented or owned, the home occupies a paramount position in the lives of all people.[270] The Anglo-American legal system has traditionally prioritized home ownership over home rentership in terms of the available

264. *See James Daniel Good*, 510 U.S. at 52–53.

265. *Id.* at 53.

266. *See id.* at 54 ("[E]ven if [rent] were the only deprivation at issue, it would not render the loss insignificant or unworthy of due process protection.").

267. *Id.*

268. *See* Aleatra P. Williams, *Real Estate Market Meltdown, Foreclosures and Tenants' Rights*, 43 IND. L. REV. 1185, 1198 (2010) (discussing residential tenants' rights).

269. *See* Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 564–66 (1988) (explaining tenants' property interests).

270. *See* Sabbeth, *Housing Defense*, *supra* note 79, at 64 (discussing housing as "one of the necessities of life").

constitutional rights and protections.[271] However, tenants are also able to access certain constitutional rights. In 1982, the Supreme Court decided the case of *Greene v. Lindsey*,[272] holding that residential tenants are entitled to due process protections in eviction proceedings.[273] In its ruling, the Court stated, "In this case, [the tenants] have been deprived of a significant interest in property: indeed, of the right to continued residence in their homes."[274] More recently, the Court reaffirmed that residential tenants have property rights in their tenancies; in *Department of Housing and Urban Development v. Rucker*, the 2002 case that upheld the constitutionality of the federal one-strike policy,[275] the Court wrote that it "is undoubtedly true" that tenants "have a property interest in their leasehold interest."[276]

There are certainly circumstances where evictions for criminal activity are appropriate and justifiable; for example, if there is ongoing, documented drug manufacturing or trafficking on a property that is endangering other tenants and the community. However, many evictions for so-called criminal activity are nowhere near that level of severity.[277] For example, many so-called "narcotics evictions" that are carried out under a nuisance abatement law in New York City result in the eviction of people who either possess small amounts of narcotics consistent with personal use or end up never being charged with any crime.[278] Under crime-free rental housing ordinances,

271. *See* Ramsey Mason, *supra* note 66, at 396–97 (discussing the subjugation of tenants' interests to landowners' interests in the development of the eviction process in English and early American law).

272. 456 U.S. 444 (1982).

273. *See id.* at 456 ("We conclude that in failing to afford [the tenants] adequate notice of the proceedings against them before issuing final orders of eviction, the State has deprived them of property without the due process of law required by the Fourteenth Amendment.").

274. *Id.* at 450–51.

275. *See supra* Part I.A.

276. 535 U.S. 125, 135 (2002).

277. *See, e.g.*, Sarah Ryley, *The NYPD Is Kicking People Out of Their Homes, Even if They Haven't Committed a Crime*, PROPUBLICA (Feb. 4, 2016), https://perma.cc/P85Z-RKHA (discussing eviction of tenants for possession of small amounts of narcotics in New York City).

278. *See id.* (explaining that, of the 516 residential nuisance abatement actions analyzed, "173 of the people who gave up their leases or were banned from homes were not convicted of a crime, including 44 people who appear to have faced no criminal prosecution whatsoever").

tenants are at risk of eviction, not only for their own alleged criminal activity, but for the criminal activity of other people with whom they are associated.[279] If anything, it is the risk—nay, the real possibility—that innocent people will be forced out of their homes for the behavior of others that they could not control or prevent that makes these concerns even more urgent.[280]

A potential criticism of the quasi-criminal approach to evictions under crime-free rental housing ordinances is that civil forfeitures are brought directly by the government and eviction cases, except for those in public housing, are filed by private landlords.[281] If the case is brought by a private landlord alleging that a tenant has breached the terms of a lease, the analysis is different because the action is then, theoretically, a contract dispute between two private parties and not a direct enforcement action by the government.[282] However, as has been demonstrated in federal court, evictions under crime-free rental housing ordinances are often compelled by the government even though the named plaintiff is a private actor.[283] Viewed from

279. *See* Swan, *Home Rules*, *supra* note 17, at 836 ("Continuing the new tradition of characterizing social problems as criminal issues, cities and municipalities across the nation are increasingly enacting ordinances that piggyback onto criminal behaviors and require third parties to monitor and control the behavior of others.").

280. *See, e.g.*, Lexi Cortes, *Granite City Crime-Free Housing Rules Displace Hundreds—Even Those Not Accused of Crimes*, ST. LOUIS PUB. RADIO (Jan. 28, 2020), https://perma.cc/A8PV-X7HY ("Nearly half of the tenants who were forced out of their homes—239 out of 510, or 46.8%—weren't accused of wrongdoing.").

281. *See generally* Levy, *supra* note 216.

282. *See* Ramsey, *supra* note 10, at 1179–84 (discussing how crime-free rental housing ordinances remove the discretion of whether and when to evict from the landlord and place it with the local police department).

283. *See, e.g.*, Granite City Complaint, *supra* note 1, para. 20 ("Landlords are subject to governmental sanctions if they violate the compulsory-eviction law. These governmental sanctions include monetary fines and suspension or revocation of their business license."); *see also* Complaint for Declaratory and Injunctive Relief and Damages para. 107, Jones v. City of Faribault, No. 18-CV-01643 (D. Minn. June 13, 2018)

> [Faribault's crime-free rental housing ordinance] also allows the City to revoke a landlord's rental license altogether . . . if, among other reasons, a landlord fails "to actively pursue the eviction of a tenant or otherwise terminate the lease with a tenant" who has violated the disorderly conduct provisions or the Lease Addendum or who has "otherwise created a public nuisance" in violation of the

that perspective, it is not a stretch to think that a court could find that many criminal activity evictions, even if initiated by private landlords, are in fact the result of government action.

If we accept that government action impels evictions under crime-free rental housing ordinances, there is a strong basis for advocating for a quasi-criminal designation for these evictions because it is essentially the same approach that the Supreme Court has taken in cases like *Halper*, *Austin*, and *James Daniel Good*.[284] In these decisions, the Court has asked two important questions: "[W]hether the sanction is disproportionate compared to the government's costs and losses" and "whether the statute as a whole demonstrates an intent to punish."[285] Therefore,

> a court should determine whether the sanction is punitive per se using the factors elicited from *Austin* . . . . If the sanction is not punitive per se, then a court would determine, under *Halper*, whether the sanction is grossly disproportionate as applied. If the sanction is punitive in either case, constitutional provisions attach; otherwise the sanction is remedial.[286]

Evictions under crime-free rental housing ordinances can certainly be construed as punitive and, therefore, should trigger additional constitutional protections that civil defendants usually are not afforded.[287] In recent years, social science research has unmasked the legal fiction that evictions are simply legal disputes between equally situated actors.[288] Rather, data now shows that eviction has serious and long-term consequences for tenants.[289] People who are evicted suffer physical and mental health consequences for years after the

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law. (quoting FARIBAULT, MINN., CODE OF ORDINANCES § 7-44(c)(6) (2023)).

284. *See* Porter, *supra* note 122, at 552–57 (discussing the *Halper-Austin* test for quasi-criminal punishment).

285. *Id.* at 554.

286. *Id.* at 556.

287. *See id.* at 522 ("To the extent that a civil sanction primarily serves the goals of punishment, it too should be subject to constitutional, evidentiary, and procedural constraints.").

288. *Cf.* Lindsey v. Normet, 405 U.S. 56, 65 (1972) (referring to the "simplicity of the issues in the typical [eviction] action").

289. *See generally* DESMOND, *supra* note 18.

eviction happens.[290] Eviction, which remains on tenants' credit histories for years afterwards, limits their ability to find new housing, obtain loans (including student loans), and can result in job loss.[291] For children, eviction can cause interruption of their education, as well as social consequences and detrimental health effects.[292] Given this research, it is difficult to justify the ongoing characterization of eviction as simply a legal dispute, especially when innocent tenants are evicted because of the conduct of others. In fact, innocent tenant evictions may be construed as a disproportionate sanction pursuant to *Halper*.[293] If evictions under crime-free rental housing ordinances were reviewed to determine whether the sanction was disproportionate and punitive, courts may find, consistent with *Halper*, *Austin*, and *James Daniel Good*, that evictions like these are either overly punitive or, at the very least, require additional constitutional protections for tenants.

While the comparison between evictions based on criminal activity and civil forfeitures is not perfect, the jurisprudence dealing with civil forfeitures, especially those involving real property, provides a launching pad for courts and scholars to rethink how criminal activity evictions are treated in the courts. The quasi-criminal designation and protections that have been

290. *See* Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL'Y 59, 64 (2016).

291. *See* Desmond & Kimbro, *supra* note 87, at 299 ("[T]he mark of eviction on one's record not only can prevent one from securing affordable housing in a decent neighborhood, it can also tarnish one's credit rating."); Katelyn Polk, Note, *Screened Out of Housing: The Impact of Misleading Tenant Screening Reports and the Potential for Criminal Expungement as a Model for Effectively Sealing Evictions*, 15 NW. J.L. & SOC. POL'Y 338, 345 (2020) ("Evictions adversely affect a tenant's credit score, making it difficult to find employment opportunities and pursue educational opportunities. Evictions all too often lead to a dangerous cycle of homelessness, job loss, financial insecurity, and family instability.").

292. *See* Desmond & Kimbro, *supra* note 87, at 317 ("[B]ecause the evictions we observed in our sample occurred at a crucial developmental phase in children's lives, we expect them to have a durable impact on children's wellbeing.").

293. *See* United States v. Halper, 490 U.S. 435, 452 (1989) (finding that the civil penalty imposed on defendant was a disproportionate sanction in violation of the Double Jeopardy Clause when defendant had already been criminally convicted).

afforded to defendants in civil forfeiture actions could and should also be applied to residential tenants in eviction cases.

CONCLUSION

The divide between the civil and criminal legal systems is one of the most fundamental distinctions in American law. But the framers of the Constitution, though they reserved certain rights and protections for criminal defendants, failed to articulate what the actual differences are between laws that are criminal in nature and laws that are civil in nature. Crime-free rental housing ordinances fall squarely into the gray area between the civil and criminal law, and there is a lack of clarity over the constitutional rights that people subject to eviction under these ordinances are entitled to. Millions of tenants in the United States live in cities that have implemented crime-free rental housing ordinances.[294] Despite high-profile lawsuits and investigations by the Department of Justice, these laws continue to proliferate in the name of crime prevention.[295] Under crime-free rental housing ordinances, tenants can be evicted for alleged criminal activity that does not result in a criminal conviction—something as low-level as an arrest that never results in a charge or conviction can be the reason that a family loses their home. Moreover, the alleged crime does not need to

294. *See Crime Free Multi-Housing: Keep Illegal Activity Off Rental Property*, INT'L CRIME FREE ASSOC., https://perma.cc/3XNE-7MNK (last visited July 29, 2023) (estimating that there are approximately 2,000 municipalities that have passed crime-free rental housing ordinances).

295. *See* Rene Ray De La Cruz, *Feds Resolve Discrimination Lawsuit Against San Bernardino County Sheriff's Department, City of Hesperia*, VICTORVILLE DAILY PRESS (Dec. 15, 2022), https://perma.cc/5CR6-A7TX (discussing the resolution of the ACLU's lawsuit against Hesperia, California which "alleged that city officials and sheriff's deputies discriminated against Black and Latinx people and communities in Hesperia through the enforcement of a so-called 'crime-free' rental housing program"); Joe Augustine & Kirsten Swanson, *City of Faribault Will Modify Controversial Housing Ordinance, Pay $685K to Settle Lawsuit*, KSTP-TV (June 15, 2022), https://perma.cc/P332-AFSX (reporting that Faribault, Minnesota, agreed to change its crime-free housing ordinance in order to settle ACLU lawsuit); Cortes, *supra* note 280 (discussing the negative impact of a crime-free housing ordinance on Granite City, Illinois residents); Hannah Dineen, *Tampa 'Crime Free Multi-Housing' Program Under Investigation by the DOJ*, 10 TAMPA BAY (May 2, 2022), https://perma.cc/TZV7-N3S5 (reporting on DOJ investigation into Tampa's crime-free housing program).

have been committed by the actual tenant; if a family member, friend, or guest interacts with the criminal legal system, the tenant can be evicted. For many people who live under crime-free rental housing schemes, it is nearly impossible to avoid being caught in the web of these ordinances.

Because crime-free rental housing ordinances are nominally civil statutes, cities routinely use crime-free rental housing ordinances as a method of displacing undesirable people from the community, circumventing the more stringent requirements of the criminal legal system. The state court eviction processes, which allow landlords to legally carry out the enforcement of the crime-free ordinances, are also civil proceedings, and the eviction process typically moves much faster than criminal prosecutions. Local governments designate these laws as civil so that they can accomplish the goal of removing undesirable people, and their associates, from the community in the most expedient way possible. But because evictions under crime-free rental housing ordinances are based on allegations of criminal activity, litigating these cases through the civil courts means that defendant tenants are deprived of important constitutional rights and protections that they would be entitled to as criminal defendants.

These rights and protections include being able to take advantage of the Fourth Amendment exclusionary rule, which would prevent the government from using evidence that was illegally obtained. They also include the Sixth Amendment right to counsel, which would provide tenants with critical legal representation in proceedings that potentially implicate criminal responsibility. Finally, as civil cases, evictions under crime-free rental housing ordinances are subject to a lower burden of proof than criminal prosecutions, which must be proven beyond a reasonable doubt. Civil liability only requires that the allegations be proven by a preponderance of the evidence, which allows governments to pressure landlords into carrying out evictions based on criminal activity without needing to obtain a criminal conviction.

Evictions under crime-free rental housing ordinances straddle the civil-criminal divide, and tenants are left to flounder in the civil legal system where the balance of power under the Constitution is against them. Legislatures and courts should consider treating these cases as quasi-criminal, a third category that the Supreme Court has endorsed in certain civil

forfeiture cases, especially those involving the seizure of real property. There are many parallels between evictions under crime-free rental housing ordinances and civil forfeitures of real property. The quasi-criminal designation would allow tenants facing eviction to access important constitutional protections that could ensure their rights are adequately protected, both in the eviction proceedings and any possible criminal prosecution. Given the severe consequences of housing displacement for individuals and communities, it is essential to clarify the status of these laws in order to safeguard the rights of the people who are subject to them.