WHAT WAS THE REASON? THE NATIONAL DISREGARD FOR EVIDENTIARY STANDARDS AND DUE PROCESS PROTECTIONS UNDER CRIME-FREE HOUSING ORDINANCES

FORTHCOMING 2024

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The views and opinions expressed in this Article are solely those of the author, and do not purport to reflect the views or opinions of any entities or individuals she is affiliated with or represents.

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Abstract

Crime-free housing ordinances, common in municipalities across the country, allow–and sometimes mandate–that private landlords evict tenants based on accusations of criminal conduct. These ordinances are often subject to challenge based on discriminatory intent and disparate impact on racial minorities. This Article presents additional grounds on which to seek injunctions and generally challenge these ordinances: the evidentiary and due process issues that arise from evicting individuals based on criminal conduct "proved" in eviction courts, one of the most cursory and overwhelmed parts of our court system.

Introduction

In 2018, the city of Rantoul, Illinois, passed a new law.[1] This new crime-free housing ordinance ("CFHO") required private landlords to evict their tenants if said tenants had committed a crime, had a child or friend who lived with them who committed a crime, or invited a guest into their home who had recently committed a crime.[2] Rantoul's CFHO was hailed by the local police as a solution to high crime rates.[3] Rantoul police chief Tony Brown declared that "if you properly educate landlords, and you give the landlords and property owners tools that they need and information they need, then that's probably half the battle right there of reducing crime."[4]

Rantoul's ordinance closely mirrors laws in place across thousands of municipalities throughout the United States.[5] In Illinois alone, more than 100 municipalities have either CFHOs or nuisance ordinances in place.[6] There are increasing challenges to CFHOs across the country over their apparent disparate impact,[7] but CFHOs

1 City of Rantoul, Ill., Ordinance No. 2569, *An Ordinance Supplementing and Amending Division 2 of Article X of Chapter 20 of the Rantoul Code* (Apr. 17, 2018), https://www.myrantoul.com/DocumentCenter/View/4699/Ord-2569?bidId=.

2 *See id.* Sec. 20-130(c-d); *Crime Free Lease Addendum*, City of Rantoul, Ill., https://www.village.rantoul.il.us/DocumentCenter/View/4746/Crime-Free-Lease-Addendum (last visited Dec. 5, 2023) [hereinafter *Rantoul Addendum*].

3 Mary Hansen, *'Crime-Free Housing' Rules Spread in Illinois*, NPR Ill. (Mar. 14, 2019), https://www.nprillinois.org/illinois/2019-03-14/crime-free-housing-rules-spread-in-illinois ("If someone wants to move into the community and wants to commit crimes and wants to victimize their neighbors, victimize the rest of the community, then we'd rather them live in other communities," said Rantoul Police Chief Tony Brown, who pushed for the measure and is overseeing its implementation.").

4 *Id.*

5 *See Crime Free Multi-Housing*, Int'l Crime Free Ass'n, http://www.crime-free-association.org/multi-housing.htm (last visited Dec. 5, 2023); *see also* Deborah N. Archer, *Exile from Main Street*, 55 Harv. C.R.C.L. L. Rev. 788, 804–08 (2020).

6 Hansen, *supra* note 3.

7 *See, e.g.*, *Justice Department Secures Landmark Agreement with City and Police Department Ending "Crime-Free" Rental Housing Program in Hesperia, California*, U.S. Dep't of Just (Dec. 14, 2022), https://www.justice.gov/opa/pr/justice-department-secures-landmark-agreement-city-and-police-department-ending-crime-free [hereinafter *DOJ Hesperia Release*] ("'So-called "crime-free" ordinances are often fueled by racially discriminatory objectives, destabilize communities and promote modern-day racial segregation,' said Assistant Attorney General Kristen Clarke."); Christopher O'Donnell, *Department of Justice Investigates Tampa Police's Crime-free Housing Program*, Tampa Bay Times (May 2, 2022), https://www.tampabay.com/news/tampa/2022/05/02/department-of-justice-investigates-tampa-polices-

remain widespread. However, because there is a lack of governmental recordkeeping of eviction filings generally and their specific underlying causes, the number of eviction filings under CFHOs is undocumented.[8] The existing data is compiled on a city-by-city basis, often by nonprofits or attorneys attempting to challenge the ordinances; where data is available, it shows frighteningly racist enforcement.[9]

The specifics of CFHOs vary widely, but they universally allow for—or mandate—tenants' evictions based on some degree of interaction with the criminal legal system.[10] Although CFHOs create grounds for an eviction based on alleged criminal behavior, evictions themselves are almost always litigated in civil court.[11] The civil and criminal court systems have long provided different degrees of protection for defendants. This is due in part to the different interests at stake in proceedings—liberty for criminal defendants and contract for tenants. Due to the important liberty interests at stake, defendants in criminal proceedings are entitled to additional safeguards, and the prosecution in criminal proceedings is typically required to prove the conduct beyond a reasonable doubt, a higher burden of proof than what is required in civil court.[12] In addition, criminal court requires adherence to stricter evidentiary rules, excluding evidence that might be admissible in civil court to preserve the constitutional rights of the accused.[13] At first glance, one might assume that these more stringent standards in criminal cases mean that landlords evicting under CFHOs, which purport to evict tenants based on underlying criminal conduct, automatically have sufficient

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crime-free-housing-program/ ("An investigation by the *Tampa Bay Times* found that during the eight-year anti-crime initiative officers 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. That's despite Black residents averaging only 54 percent of all arrests in Tampa over the same period.").

8 *See Eviction Tracking*, Eviction Lab, https://evictionlab.org/eviction-tracking/ (last visited Dec. 5, 2023).

9 *See, e.g.*, *DOJ Hesperia Release*, *supra* note 7; Brief for Petitioner, Hope Fair Hous. Ctr. v. City of Peoria, Ill., No. 1:17-cv-01360-SLD-JEH (C.D. Ill. May 14, 2018).

10 *See infra* Part I.

11 *Eviction Q&A*, Eviction Lab, https://evictionlab.org/why-eviction-matters/#what-is-the-eviction-process ("Almost everywhere in the United States, evictions take place in civil court, where renters have no right to an attorney.").

12 *See, e.g.*, *Concurrent Civil and Criminal Proceedings*, 67 Colum. L. Rev. 1277, 1277 (1967) ("The criminal process is unique. The burden of proof on the prosecution, the constitutional protections afforded the accused, and the governing procedural rules all make a criminal case fundamentally unlike a civil one . . . Generally the prosecution is said to be required to prove guilt beyond a reasonable doubt.").

13 *Id.*

admissible evidence to meet their requisite burden of proof in civil court. But CFHOs rarely, if ever, include a requirement that individuals evicted under them have been convicted of the underlying criminal conduct that instigates the proceeding.[14] Instead, CFHO-based eviction proceedings may be initiated by arrests or charges being brought in criminal court, actions that are subject to an entirely different standard of proof than criminal *or* civil court proceedings.[15]

The tangled web of evidentiary standards across criminal, civil, and pre-trial proceedings is confusing. CFHOs exist in a liminal space where multiple burdens of proof and evidentiary standards are at play simultaneously. Instead of being litigated with time and care, they are litigated in one of the most overburdened areas of the American court system: eviction court, where only three percent of tenants nationwide are represented.[16] As this Article outlines, this confusing posture and lack of representation in the underlying eviction proceedings has created an environment where CFHOs have proliferated unchecked, despite deep issues with the constitutionality of their implementation.

This Article urges practitioners to challenge CFHOs on multiple grounds—on the disparate impact grounds mentioned above, but also, if possible, via avenues that require less time-intensive data collection. This Article outlines a new ground on which to challenge CFHOs: their improper conflation of different evidentiary standards. This rights violation has gone unchallenged for decades due in large part to individuals being forced to essentially litigate criminal charges in civil court without guaranteed access to representation.[17] Eviction courts are significantly overburdened, and the speed of eviction hearings heavily imply that the courts are not requiring plaintiff-landlords to meet the preponderance of the evidence burden required in civil court.[18] Our

14 *See, e.g.*, *Rantoul Addendum*, *supra* note 2; *infra* Part I.

15 *See Probable Cause*, Legal Info. Inst., https://www.law.cornell.edu/wex/probable_cause (last visited Dec. 5, 2023) ("Probable cause is a requirement found in the Fourth Amendment that must usually be met before police make an arrest, conduct a search, or receive a warrant."); *see also Rantoul Addendum*, *supra* note 2, at § 2-3 (stating "proof of such a violation shall not require a criminal conviction" and indicating that police reports alone may be used as evidence in CFHO proceedings).

16 *No Eviction Without Representation*, ACLU (May 11, 2022), https://www.aclu.org/report/no-eviction-without-representation?redirect=evictionbrief.

17 *See, e.g.*, Rachel Kleinman, *Housing* Gideon*: The Right to Counsel in Eviction Cases*, 31 Fordham Urb. L.J. 1507, 1507 (2004) ("Neither the legislative nor the judicial branch, however, has recognized an analogous [to *Gideon v. Wainwright*] right to counsel in civil matters.").

18 *See No Time for Justice*, Laws.' Comm. for Better Hous., 4, (Dec. 2003), https://

system seems to be allowing evictions based on evidence that may be inadmissible and may not meet the appropriate burden, something possible because defendant-tenants are rarely represented in these proceedings.[19]

Part I of this Article provides examples of CFHOs, how they operate, and common elements of the mandatory lease addenda that are hallmarks of the CFHO structure. Part II examines caselaw outlining relevant evidentiary standards and how they are being improperly applied in eviction court, with arrest records and filed charges, government actions that require a showing of probable cause, seemingly taken as sufficient evidence to show criminal activity by a preponderance of the evidence. This Part also briefly discusses arguments for a heightened evidentiary standard in eviction hearings based on federal caselaw. Part III explores additional due process concerns that arise in large part from the use of probable cause-based documents to meet a preponderance burden. This Article concludes by evaluating how these additional arguments will allow for more widespread challenges to CFHOs across the country.

I. The Advent of "Crime-Based" Evictions

The CFHOs scattered across the country are largely based upon a federal statute that created a "one strike" policy during the "tough on crime" era of the 1980s.[20] In response to high crime rates in federally subsidized public housing units, the U.S. government implemented this harsh one-strike policy,[21] which allows housing authorities to evict tenants based on a single instance of "any criminal activity" committed by the tenants, their household members, or any guest.[22] The definition

www.lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf (outlining the length of a typical eviction hearing); Grogan v. Garner, 498 U.S. 279, 286 (1991) (explaining that civil courts require plaintiffs prove their case by a preponderance of the evidence); *infra* Section II.B.

19 *See* Heidi Schultheis & Caitlin Rooney, *A Right to Counsel is a Right to a Fighting Chance*, Ctr. for Am. Progress (Oct. 2, 2019), https://www.americanprogress.org/article/right-counsel-right-fighting-chance/ ("In eviction lawsuits nationwide, an estimated 90 percent of landlords have legal representation, while only 10 percent of tenants do. Without representation, the majority of tenants lose their cases and are ultimately evicted."); *infra* Section III.A.

20 Kathryn V. Ramsey, *One Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law*, 65 UCLA L. Rev. 1146, 1149 (2018).

21 *Id.* at 1149–50.

22 42 U.S.C. § 1437d(l)(6).

of criminal activity under the authorizing statute is incredibly broad.[23] These one-strike policies may be triggered if, among other things, the individual in question was convicted of any crime or if the tenant had knowledge of alleged criminal conduct committed by their household members or guests, and even in some cases if the individual was not arrested and did *not* have knowledge of alleged criminal conduct.[24] Much like the city of Rantoul in 2019, the federal government implemented this policy with little regard for the human cost and potential to worsen housing crises, racial injustice, and crime rates in the United States.[25]

These policies, which strip individuals of their housing based on contact with the criminal legal system in a country where contact with the criminal legal system is largely a function of race,[26] exacerbate racial injustice in the United States. Where data is available, it is evident that these policies, already rife with disproportionate impact on non-white Americans due to the nature of the criminal legal system, are yet another layer of law weaponized against people of color at far greater rates than their white peers.[27] While national recordkeeping on the

23 *Id.*

24 *See id.*; Austin Berg, *How Illinois Families Can Face Eviction for Crimes They Didn't Commit*, Ill. Pol'y, (Aug. 16, 2019), https://www.illinoispolicy.org/how-illinois-families-can-face-eviction-for-crimes-they-didnt-commit/ (detailing the eviction of the Barron family because one of their children's friends came to stay with them after committing a crime); Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 128–29 (2002) (outlining the underlying offenses triggering eviction for the tenants, including their grandsons being caught smoking marijuana in the parking lot of the complex).

25 Ramsey, *supra* note 20, at 1150 ("For many years, policymakers have overlooked the human consequences of eviction . . . .Despite harsh criticism of the one-strike policy from tenant advocates and some policymakers after it was implemented for public housing tenants, public housing authorities across the country embraced the "one strike and you're out" concept, proceeding with eviction actions against tenants on the basis of events such as a single arrest.").

26 *See, e.g.*, The Sent'g Project, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System (Apr. 19, 2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/ ("African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and [sic] they are more likely to experience lengthy prison sentences. African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely."); *see also* Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 Mich. L. Rev. 173, 211 (2019) (using statistics on racialized police stops under stop and frisk and arrests to demonstrate the disparate impact of one-strike housing policies on Black Americans).

27 *See, e.g.*, Complaint at 1–2, 13, Hope Fair Hous. Ctr. v. City of Peoria, Illinois, No. 1:17-

impact of one-strike housing policies is nearly nonexistent,[28] in 2016, the Department of Housing and Urban Development ("HUD") noted that ordinances based on contact with the criminal legal system, like nuisance ordinances[29] or CFHOs, may "deny access to housing by

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cv-1360 (C.D. Ill. 2017) (showing that the city of Peoria overwhelmingly enforced its "nuisance ordinance," which required landlords to evict tenants based on multiple police contacts, in majority-minority ZIP codes despite violations occurring across the city); *Advocacy by the Civil Rights Clinic Helps End a Crime-Free Housing Program with Racially Disparate Impact*, NYU L. (July 1, 2022), https://www.law.nyu.edu/news/-civil-rights-clinic-tampa-crime-free-housing ("Despite the Tampa police department's promise that the program would focus on reducing violent crime, landlords were notified when tenants were arrested for misdemeanors or even just stopped by police. In many cases, these notices led to evictions, even when charges were later dropped. Police records also showed that 90 percent of the 1,100 people flagged by the program were Black, despite the fact that arrests of Black residents made up only 54 percent of arrests in the past eight years.").

28 Archer, *supra* note 26, at 819–20.

29 In the early 2010s, substantial attention was focused on nuisance ordinances, which allowed or mandated eviction based on "nuisance" conduct taking place on a property. U.S. Dep't of Hous. & Urb. Dev., Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others who Require Police or Emergency Servs. 2 (Sept. 13, 2016), https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF [hereinafter 2016 HUD Guidance]. The "nuisance" conduct under which individuals could be evicted often included some set number of calls to emergency services being placed from the property. *Id.* at 3; *see also* Emily Werth, *The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances*, Shriver Ctr. on Poverty L. (Aug. 2013), https://www.povertylaw.org/wp-content/uploads/2019/09/cost-of-being-crime-free.pdf. These nuisance ordinances were widely challenged when attention was brought to their enforcement against survivors of domestic violence, who were being evicted based on calls to the police to get help when they were being attacked by their abusers. *See, e.g.*, *I Am Not a Nuisance: Local Ordinances Punish Victims of Crime*, ACLU (Oct. 6, 2020), https://www.aclu.org/other/i-am-not-nuisance-local-ordinances-punish-victims-crime (listing ACLU challenges to nuisance ordinances based on their enforcement against crime victims); *Ordinances in More than 40 Illinois Municipalities Conflict with New Illinois Law*, ACLU Ill. (Sept. 21, 2015), https://www.aclu-il.org/en/press-releases/ordinances-more-40-illinois-municipalities-conflict-new-illinois-law (discussing an Illinois law passed in 2015 to bar evictions of domestic violence survivors under nuisance ordinances, which conflicted with laws in at least 40 Illinois municipalities in effect at the time of the state law's passage). Where possible, this paper focuses on CFHOs exclusively, as opposed to including nuisance ordinances, as the conduct at issue in nuisance ordinances is rarely, if ever, connected to proving the violation of a law and thus less connected to evidentiary standards and burdens of proof. The author would like to stress that nuisance ordinances are just as flawed and generally gross as CFHOs, and these flaws are even more well-documented due to

requiring or encouraging evictions" based on protected characteristics, and encouraged municipalities to consider repealing them "as part of a strategy to affirmatively further fair housing."[30]

"The United States Supreme Court has held that housing is a life necessity."[31] Removing this life necessity when individuals come into contact with the criminal legal system means that it is disproportionately removed from people of color, particularly Black Americans, even where municipalities and housing authorities enforce the one-strike policy in every instance where it applies. Challenges to CFHO implementation based on disparate racial impact have led to policy changes, or to settlements.[32]

A. *Department of Housing and Urban Development v. Rucker*

Despite this disparate impact, in 2002, the federal one-strike policy as applied was upheld by the Supreme Court in *Department of Housing and Urban Development v. Rucker*,[33] giving municipalities the mistaken impression that these ordinances are constitutional as currently enforced. In reality, the Supreme Court did not rule on the disparate impact issues at the heart of many challenges to CFHOs,[34] nor did the Court address the due process issues at the heart of this article.

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the collective consciousness' attention on their impact on survivors of domestic violence. *See generally* Amanda K. Gavin, *Chronic Nuisance Ordinances: Turning Victims of Domestic Violence into "Nuisances" in the Eyes of Municipalities*, 119 Pa. State L. Rev. 257 (2014); Cari Fais, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 Colum. L. Rev. 1181 (2008); Filomena Gehart, *Domestic Violence Victims a Nuisance to Cities*, 43 Pepp. L. Rev. 1101 (2016).

30 2016 HUD Guidance, *supra* note 29, at 13.

31 Archer, *supra* note 5, at 819.

32 *See, e.g.*, *ACLU Wins Settlement to End Housing Discrimination Case*, ACLU (June 15, 2022), https://www.aclu.org/press-releases/aclu-wins-settlement-end-housing-discrimination-case (discussing settlement in a case brought by the ACLU against the city of Faribault, Minnesota); Hassan Kanu, *'Crime-Free' Housing Law Settlement with U.S. Justice Dept Puts Cities on Notice*, Reuters (Dec. 19, 2022), https://www.reuters.com/legal/government/crime-free-housing-law-settlement-with-us-justice-dept-puts-cities-notice-2022-12-19/ (discussing settlement in a case brought by the Department of Justice against the city of Hesperia, California); *Case Profiles: HOPE Fair Housing Center v. City of Peoria, Illinois*, Relman Colfax, https://www.relmanlaw.com/cases-peoria#:~:text=The%20lawsuit%2C%20filed%20in%20the,with%20predominantly%20African%2DAmerican%20tenants (last visited Dec. 5, 2023).

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

34 *Id.* at 136 (basing the ruling on the *Chevron* doctrine as "Congress has directly spoken to the precise question at issue" (internal citation omitted)).

In *Rucker*, four public housing residents challenged evictions based on alleged criminal conduct by their household members or guests.[35] Two plaintiffs were grandparents evicted because their grandchildren had been caught smoking marijuana in the parking lot.[36] Another was a woman who was evicted because her adult daughter, who was also listed on her lease, was found with cocaine and a pipe three blocks from the building.[37] Perhaps most strikingly, a disabled man was evicted because his caregiver brought cocaine to his apartment.[38] None of the petitioners participated in the conduct underlying their evictions, and each alleged they were a so-called "innocent" tenant, without knowledge of the underlying conduct at all.[39]

The petitioners challenged their evictions based on this lack of knowledge of the underlying conduct, and argued that HUD was misinterpreting congressional intent by evicting "innocent" tenants under the statute.[40] Crucially, the Court focused on this argument at the exclusion of arguments related to due process or property rights.[41] With that statutory interpretation framing in mind, the Court performed a *Chevron* analysis, requiring it to determine whether "Congress has directly spoken to the precise question at issue": whether the statute was intended to allow for the eviction of an innocent tenant.[42] This framework led the Court to find for HUD, but only because the Court determined the statute was unambiguous in its intent to allow for evictions of all tenants, including those without knowledge of the conduct that was the cause of their eviction.[43]

The Court issued a narrow decision, noting that its analysis would be different were the government acting as sovereign, as opposed to as a landlord, and deflecting due process concerns to the adjudicators in individual eviction proceedings.[44] The decision explicitly notes that

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35 *Id.* at 128.
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.* at 130–31.
40 *Id.* at 130.
41 *Id.* at 135–36.
42 *Id.* at 136 (quoting Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)); *see also id.* at 130 (identifying the question as whether the plain language of the statute "unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity").
43 *Id.* at 136.
44 *Id.* at 135–36; *infra* Part III.

individual factual disputes about the underlying conduct ought to be litigated in the state court (*i.e.*, eviction court).[45] *Rucker* did not examine whether the structure of the one-strike policy is constitutionally acceptable, nor did it address a one-strike policy passed by a municipality and used to force evictions by private landlords; it only decided that individuals without knowledge of the conduct underlying the strike may be evicted, where the one-strike policy was congressionally established and enforced in federal public housing.[46]

B. Anatomy of a CFHO

Despite the specificity of the *Rucker* decision, which was steeped in interpretation of congressional intent and thus likely does not apply to ordinances passed by municipalities rather than by Congress, municipal ordinances modeled on the federal one-strike policy spread widely.[47] The International Crime Free Association ("ICFA"), a police-founded organization that works to "keep illegal activity off rental property,"[48] began advocating for CFHOs a decade before *Rucker*,[49] but the Court's apparent sign-off on the structure used by HUD made the CFHO pitch even more enticing to local politicians and police officers. Today, the ICFA claims that more than 3,000 cities internationally have CFHOs.[50] It also claims, apropos of nothing, that "[t]he Media frequently reports the Crime Free Program is a form of structural racism that makes it harder for persons of color to find apartments and stay in them. . . . Could it be the Media uses trumped-up claims of structural racism to play on your emotions and divorce you from your logic?"[51]

CFHOs take a variety of forms, but typically require a mandatory lease addendum landlords must include in their leases in order to be in compliance with municipal law.[52] These addenda typically provide a list of criminal activities that, if committed by the tenant, other

45 Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 135–36 (2002).

46 *Id.*

47 Ramsey, *supra* note 20, at 1151.

48 *Crime Free Programs*, Int'l Crime Free Ass'n, http://www.crime-free-association.org/ (last visited Oct. 30, 2023).

49 Ramsey, *supra* note 20, at 1153.

50 *Crime Free Programs*, *supra* note 48.

51 *About Crime-Free (Media Information)*, Int'l Crime Free Ass'n (last visited Oct. 30, 2023), http://www.crime-free-association.org/about_crime_free.htm. "The lady doth protest too much, methinks." William Shakespeare, Hamlet act 3, sc. 2, l.236.

52 *See, e.g.*, Archer, *supra* note 26, at 187–94; *Rantoul Addendum*, *supra* note 2; Ramsey, *supra* note 20, at 1159.

residents, or even guests or invitees, constitute automatic grounds for eviction.[53] Many addenda, including the mandatory addendum in Rantoul, Illinois,[54] incorporate the entire state criminal code, state or federal controlled substances acts, and other statutes by reference. In Rantoul, the addendum prohibits "any criminal activity," defined not only as commission or attempt of twenty-six explicitly listed crimes, but also as "the commission of two (2) or more of any other offenses under the Illinois Criminal Code of 2012 not specifically listed."[55] The Rantoul addendum also requires tenants to prospectively waive all potential hearsay objections to any police reports used in eviction court,[56] and to accept responsibility for "the actions of Tenant's occupants, Tenant's guests and invitees, and Tenant's occupant's guests and invitees, regardless of whether Tenant knew or should have known about any such actions."[57] Finally, most CFHO addenda state that proof of a criminal violation does not require a criminal conviction, and that landlords need only prove criminal violations by a preponderance of the evidence.[58]

CFHOs also often include a mechanism of enforcement against landlords who do not wish to evict their tenants. Per Rantoul's municipal website:

> [Rantoul's] ordinance declares it a public nuisance for a property owner or their agent to allow or permit criminal activity to take place on or within any rental property if the property owner or their agent had knowledge or reasonably should have known of facts indicating a reason to believe that such criminal activity was about to occur or was occurring and took no action reasonably calculated to prevent or stop such

53 *See, e.g.*, *Rantoul Addendum*, *supra* note 2; *Lease Addendum for Crime Free Housing*, Granite City, Ill., https://cms3.revize.com/revize/granitecity/docs/CFMH/LEASE%20ADDENDUM%20FOR%20CRIME%20FREE%20HOUSING%202020.pdf (last visited Dec. 5, 2023) [hereinafter *Granite City Addendum*]; *City of Oak Forest Crime-Free Housing Addendum,* Oak Forest, https://www.oak-forest.org/DocumentCenter/View/44/Lease-Addendum?bidId= (last visited Dec. 5, 2023) [hereinafter *Oak Forest Addendum*]; Crime-Free Lease Addendum, Country Club Hills, https://countryclubhills.org/wp-content/uploads/2013/12/CF-Lease-Addendum-Revised-2016.pdf (last visited Dec. 5, 2023) [hereinafter *Country Club Hills Addendum*].

54 *Rantoul Addendum*, *supra* note 2, at § 1(a); *see also Oak Forest Addendum*, *supra* note 53, at § 2.

55 *Rantoul Addendum*, *supra* note 2.

56 *Rantoul Addendum*, *supra* note 2.

57 *Id.*

58 *See, e.g.*, *id.*; *Granite City Addendum*, *supra* note 53; *Oak Forest Addendum*, *supra* note 53; *Country Club Hills Addendum*, *supra* note 53.

> criminal activity, or occurred and took no action reasonably calculated to prevent the same or similar criminal activity from happening again.[59]

Simply put: Rantoul makes it a "public nuisance" for a landlord to knowingly rent to a person who has supposedly committed criminal activity (or whose guest has supposedly committed criminal activity); landlords who violate the ordinance are issued a notice and a fine.[60]

In the mid-2010s, advocacy organizations began to successfully draw the public eye to one of the collateral consequences of nuisance ordinances and CFHOs: the risk of eviction for survivors of domestic violence who call 911 for assistance.[61] Indeed, the ACLU found that because CFHOs allow or mandate landlords to evict based on crimes committed by anyone on the property, survivors who called the police against their partners, whose partners were subsequently arrested for abusing them, could be evicted.[62]

In 2015, in response to reports detailing, among other things, the impacts of CFHOs on survivors of domestic abuse,[63] the state of Illinois passed a law barring CFHOs from being enforced against survivors of domestic or sexual violence.[64] In 2016, HUD issued a press release that outlined potential Fair Housing Act ("FHA") violations arising from CFHO enforcement against survivors of domestic violence.[65] Despite the attention paid to the harmful effects of CFHOs, few, if any, municipalities repealed them. Instead, they made nominal attempts to bring their CFHOs in compliance with the FHA and any modified state laws[66] and then waited for attention to die down. Some cities,

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59 *Crime Free Housing*, Village of Rantoul, Ill., https://www.village.rantoul.il.us/656/Crime-Free-Housing (last visited Dec. 5, 2023).

60 *Id.* Sec. 20-312.

61 *How Nuisance Ordinances and Crime-Free Leases Undermine Safety and Housing of Crime Victims*, ACLU, https://www.aclu.org/sites/default/files/field_document/2016.12_aclu_nuisance_ordinances.pdf (last updated Dec. 2016).

62 *Id.*

63 Emily Werth, *The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances*, Shriver Ctr. (Aug. 2013), https://www.povertylaw.org/wp-content/uploads/2019/09/cost-of-being-crime-free.pdf.

64 65 Ill. Comp. Stat. Ann. LCS 5/1-2-1.5 (West 2023).

65 *HUD Issues Fair Housing Act Guidance to Help Domestic Violence Victims*, U.S. Dep't of Just. (Nov. 21, 2016), https://www.justice.gov/archives/opa/blog/hud-issues-fair-housing-act-guidance-help-domestic-violence-victims; *see also* 2016 HUD Guidance, *supra* note 29.

66 *Granite City Rental Property Ordinance #8910 Training* 5–6, Granite City, Ill. (June 1, 2020), https://cms3.revize.com/revize/granitecity/docs/CFMH/Training/

like Rantoul, watched as evidence of the harmful impacts of CFHOs proliferated—then decided to pass CFHOs of their own anyway.

C. Eviction Overview

There is a striking lack of national data about eviction proceedings,[67] but the Eviction Lab at Princeton University has identified ten states and thirty-four metropolitan areas whose data infrastructure is sufficient for weekly data pulls.[68] As of June 2023, there had been over 2.3 million evictions filed in these jurisdictions since March 2020, the onset of the COVID-19 pandemic.[69] This eviction rate is true despite the fact that every single one of the jurisdictions tracked had a COVID-19 related eviction moratorium at some point in 2020, and often into 2021 or 2022.[70] These statistics do not specify the underlying cause behind the eviction, but they paint a picture of a nationwide eviction epidemic

RENTAL%20LICENSE%20TRAINING%208910.pdf [hereinafter *Granite City CFHO Training*] ("Due to recent changes in Illinois Human Rights Act, we can no longer require landlords to evict tenants in most cases . . . So, since we can no longer require lanlords [sic] to evict, how does the city protect it's [sic] citizens from potential criminal element ending up in rental property?").

67 Eviction Lab is widely cited in legal scholarship as the most reliable source of eviction data in the country. *See, e.g.*, Caroline Pappalardo, *A Right to Counsel for Tenants in Iowa: How to Solve a Growing Access to Justice Problem Exacerbated by the COVID-19 Pandemic*, 25 J. Gender, Race & Just. 205, 214 (2022) ("Princeton University's Eviction Lab currently provides the most comprehensive eviction data available in the country."); Andrew Scherer, *The Case Against Summary Eviction Proceedings: Process as Racism and Oppression*, Seton Hall L. Rev. 1, 43 (2022). But Eviction Lab itself is unable to collect consistent data nationwide due to inaccessibility and policy. *See Supplementary Information*, Eviction Lab, S-4 (2022), https://evictionlab.org/docs/Eviction_Lab_Methodology_Report_2022.pdf ("We were not able to collect data via bulk records requests from all states for two primary reasons. First, not all states maintain statewide electronic case management systems that compile records across courts. In some states, these systems are just beginning to be implemented (e.g., the Maryland Electronic Courts [MDEC] system) and do not include digitized historical records. Second, some states have policies prohibiting bulk collection of court records by third parties, including researchers.").

68 *See Eviction Tracking*, *supra* note 8.

69 *Id.*

70 *Id.*; *see also, e.g.*, *New Mexico*, Eviction Lab, https://evictionlab.org/eviction-tracking/new-mexico/ (last visited Dec. 15, 2023) (indicating that New Mexico's eviction moratorium remained in effect until early 2022); *Minnesota*, Eviction Lab, https://evictionlab.org/eviction-tracking/minnesota/ (last visited Dec. 15, 2023) (noting that Minnesota's eviction moratorium remained in effect until June 2021).

that is even worse than the available data can fully quantify.[71]

As noted by the Court in *Rucker*, eviction proceedings take place in civil court, typically at the state level,[72] where they could conceivably be thoroughly litigated, to protect due process rights and address any factual disputes. Though the American Bar Association "urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody," individuals in civil proceedings typically do not have a government-provided attorney, no matter what interests are at stake in the proceeding.[73] Various scholars have argued that the seriousness of the interests at stake in general eviction proceedings—and many other civil court proceedings—necessitate that the Constitution be interpreted to provide a right to counsel in these proceedings.[74]

Evictions are "viewed . . . largely as a civil remedy in an action based on the breach of a lease contract."[75] Although public housing,

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71 *See generally Eviction Tracking*, *supra* note 8.

72 *Eviction Q&A*, EVICTION LAB, https://evictionlab.org/why-eviction-matters/#what-is-the-eviction-process (last visited Dec. 5, 2023) ("Almost everywhere in the United States, evictions take place in civil court, where renters have no right to an attorney.").

73 *ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings*, AM. BAR ASS'N (Aug. 2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf; *see also* Rachel Kleinman, *Housing* Gideon*: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1507 (2004) ("Neither the legislative nor the judicial branch, however, has recognized an analogous [to *Gideon v. Wainwright*] right to counsel in civil matters.").

74 *See, e.g.*, Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. C.R. & C.L. 63, 84–88 (2022) ("Equality before the law is basic to the very idea of democracy and we must find a way to fund it. Few things violate these basic principles like the eviction mill, especially given the devastating and dire consequences of the loss of home."); Jack Newton et al., *Civil* Gideon *and NYC's Universal Access: Why Comprehensive Public Benefits Advocacy is Essential to Preventing Evictions and Creating Stability*, 23 CUNY L. REV. 200, 222 (2020) ("For years, advocates, bar associations, academics, jurists and others have fought for the right to counsel that exists for people in criminal proceedings to be extended to people in certain essential civil proceedings."); Stephen H. Sachs, *Seeking a Right to Appointed Counsel in Civil Cases in Maryland*, 37 U. BALT. L. REV. 5, 14 (2008) ("[T]he logic that supports the holding of Gideon—that the right to be heard means little without the right to be heard by counsel, and that lawyers are necessities, not luxuries—is often as applicable to civil cases as it is to criminal ones. Fairness is not a function of the label on the proceedings.").

75 Ramsey, *supra* note 20, at 1150.

like that at issue in *Rucker*, is subject to some federal oversight by HUD due to its receipt of federal funding, the vast majority of renters live in private market rentals.[76] Private market evictions are governed primarily by general state-level property and contract law, as well as state- and municipality-level laws and ordinances, which may create additional protections for tenants or procedures to follow in eviction proceedings.[77] Because these proceedings are litigated in the civil court system, winning an eviction proceeding theoretically requires the plaintiff-landlord to demonstrate that the defendant-tenant is in violation of a lease or otherwise subject to eviction by a preponderance of the evidence.[78] This pleading standard warrants more-likely-than-not proof and is the default for civil cases that "results in a roughly equal allocation of the risk of error between litigants."[79] If a plaintiff-landlord shows it is more likely than not that a defendant-tenant is in violation of a lease or otherwise subject to eviction, the state typically issues an order requiring the tenant to vacate the premises and eventually assists

76 About two million people live in public housing in the United States—a relatively small percentage of U.S. renters, but still a strikingly high number of people subject to the one-strike policy, many of whom are particularly vulnerable. *See* Ramsey, *supra* note 20, at 1176–77 ("The silver lining in the cloud of the federal one-strike policy is that, as devastating as it can be for the public housing tenants who are subject to it, it actually applies to a relatively small percentage of the American public. There are approximately two million public housing tenants across the country, more than half of whom are elderly or disabled."); *see also* *HUD's Public Housing Program*, U.S. Dep't of Hous. & Urb. Dev., https://www.hud.gov/topics/rental_assistance/phprog (last visited Nov. 8, 2023) ("The U.S. Department of Housing and Urban Development (HUD) administers Federal aid to local housing agencies (HAs) that manage the housing for low-income residents at rents they can afford. HUD furnishes technical and professional assistance in planning, developing, and managing these developments.").

77 Ramsey, *supra* note 20, at 1177–79; *see also, e.g.*, *Cook County's First Residential Tenant Landlord Ordinance Goes into Effect June 1*, Cook Cnty. Gov. (June 2, 2021), https://www.cookcountyil.gov/news/cook-countys-first-residential-tenant-landlord-ordinance-goes-effect-june-1 ("The RTLO is a roadmap of the rights, responsibilities, and remedies for landlords and renters where none existed in most suburban Cook County communities. It focuses on creating a resolution framework for renters in financial crisis who are unable to pay their rent, the conduct of landlords, the conditions of the home and responsibilities and remedies for both the landlord and tenant to ensure safe habitability and protect against property damage."); *Landlord-Tenant Issues*, State of Cal. Dep't of Just., https://oag.ca.gov/consumers/general/landlord-tenant-issues (last visited Dec. 5, 2023) (discussing California's statutes governing landlord-tenant protections).

78 *See* Lawrence R. McDonough, *Wait a Minute! Residential Eviction Defense is Much More than "Did you Pay the Rent?"*, 28 Wm. Mitchell L. Rev. 65, 69 (2001) ("At trial, the plaintiff has the burden of proof by preponderance of the evidence . . .").

79 Grogan v. Garner, 498 U.S. 279, 286 (1991).

the landlord in enforcing this order on a timeline that is jurisdiction-dependent.[80] For example, in Rantoul, the landlord may take an eviction judgment to the sheriff to enforce immediately after the judgment is entered, at which point "[t]he Sheriff usually enforces an eviction judgment by first notifying the Tenant, at the premises, that an eviction judgment has been entered against them."[81] After that, typically "the Sheriff returns to the premises a second time, a few days later. If the Tenant or their property is still there, the Sheriff supervises the removal of the Tenant or their property."[82]

There are many routes landlords may take to pursue one of the 3.6 million evictions filed every year in the United States,[83] ranging from the end of a lease the landlord does not wish to extend to failure to pay rent to change in use.[84] CFHOs, justified by a belief that they reduce crime, create an additional pathway through which landlords may initiate eviction proceedings.[85] In a municipality with a CFHO, the plaintiff-landlord may be able to evict a tenant for alleged violations of the CFHO, or even be required to initiate eviction proceedings against tenants based on an alleged violation.[86] There is little-to-no evidence, however, that CFHOs reduce crime, and common sense indicates they do not. Evictions under a CFHO take place *after* alleged criminal activity, as opposed to before, and thus serve little purpose in crime *prevention*.[87] If anything, CFHOs may *increase* crime, given that people experiencing homelessness are disproportionately *more* likely to have interactions with the criminal legal system,[88] as both victims and alleged

80 *See* Abigail Higgins & Olúfémi O. Táíwò, *Enforcing Eviction*, The Nation (Aug. 19, 2020), https://www.thenation.com/article/society/police-eviction-housing/ ("Depending on the state, sheriffs, constables, marshals, or police departments will be charged with executing legal writs of eviction: that is, with removing people and their belongings from their homes by force of law.").

81 *Eviction for Breach of Lease* 5, Vill. of Rantoul, Ill., https://www.village.rantoul.il.us/DocumentCenter/View/4813/Eviction-for-Breach-of-Lease (last visited Dec. 5, 2023).

82 *Id.*

83 *See Eviction Tracking*, *supra* note 8.

84 *See generally* Colleen Sanson, *Landlord's Right to Evict Tenants or Other Occupants from Residential Property*, *in* 108 Am. Jurisprudence Proof of Facts 449 (3d ed. 2023).

85 Hansen, *supra* note 3, ("[I]f you properly educate landlords, and you give the landlords and property owners tools that they need and information they need, then that's probably half the battle right there of reducing crime").

86 *See* Ramsey, *supra* note 20, at 1149–50; *see, e.g.*, *Crime Free Housing*, *supra* note 59.

87 For a discussion of the differences between proactive and reactive approaches to crime, *see, e.g.*, Mark H. Moore, *Public Health and Criminal Justice Approaches to Prevention*, 19 Crime & Just. 237 (1995).

88 Christopher Mayer & Jessica Reichert, *The Intersection of Homelessness and the*

perpetrators, particularly of low-level survival crimes used to punish people without stable housing.[89] One of the greatest risk-factors for eventual homelessness is, unsurprisingly, being evicted,[90] meaning that evictions under CFHOs may increase overall crime rates.

D. Enforcement Anecdotes

Because the federal government and a majority of state governments do not collect eviction data,[91] it is difficult to reliably generalize about the impacts of any particular eviction ordinance. There are no easily accessible numbers about how many individuals are evicted under CFHOs nationally every year, let alone statistics about which of those evictions were initiated or mandated by municipal government, or databases on what stage the underlying criminal proceedings were in, if they existed at all.[92] But when the media reckons with CFHOs, investigations reveal troubling realities of their enforcement.[93] This Section examines two CFHOs that were subject to well-funded challenges to their enforcement and thus have more accessible data and thorough reporting. There is no reason to believe these municipalities are outliers.[94]

Criminal Justice System, Ill. Crim. Just. Info. Auth. (July 3, 2018), https://icjia.illinois.gov/researchhub/articles/the-intersection-of-homelessness-and-the-criminal-justice-system.

89 *See generally* Nat'l L. Ctr. on Homelessness & Poverty, No Safe Place: The Criminalization of Homelessness in the United States (2019), https://homelesslaw.org/wp-content/uploads/2019/02/No_Safe_Place.pdf.

90 Michael Evangelist & H. Luke Shaefer, *No Place Called Home: Student Homelessness and Structural Correlates*, 94 Soc. Serv. Rev. 4, 9–10 (2020).

91 *See Eviction Tracking*, *supra* note 8 ("Until now, there has been no national data infrastructure that allows policymakers, legal and advocacy organizations, journalists, academics, and community members to track displacement and evictions in real time. The Eviction Lab has built the Eviction Tracking System (ETS) to fill this critical gap and to help monitor and respond to eviction hotspots as they emerge.").

92 *See generally id.*

93 *See, e.g.*, Mary Hansen, *With Crime-Free Rules, Tenants Evicted After Overdose Calls*, NPR Ill. (May 9, 2019), https://news.stlpublicradio.org/2019-05-09/with-crime-free-rules-tenants-evicted-after-overdose-calls#stream/0; KCAL News Staff, *Hesperia Ends Its "Crime-Free" Rental Housing Program Amid Discriminatory Challenges*, CBS L.A. (Dec. 14, 2022), https://www.cbsnews.com/losangeles/news/hesperia-ends-its-crime-free-rental-housing-program-amid-discriminatory-challenges/.

94 *See, e.g.*, *DOJ Hesperia Release*, *supra* note 7 ("'So-called "crime-free" ordinances are often fueled by racially discriminatory objectives, destabilize communities and promote modern-day racial segregation,' said Assistant Attorney General Kristen Clarke of the Justice Department's Civil Rights Division. . . 'As this settlement

1. Granite City, Illinois

In 2019, the Barron family, renters in Granite City, Illinois, called the police to report that a family friend staying with them had committed burglary.[95] Although their landlord did not want to evict them, the city pursued legal action against the landlord when he allowed the family to remain in the rental. Granite City has a CFHO, which includes a mandatory lease addendum and landlord enforcement provisions.[96] The family filed a federal lawsuit that garnered substantial media attention and the city ultimately changed their CFHO so that arrests do not mandate eviction for crimes that occurred off the rental premises, allowing the Barrons to stay in their home, but maintaining the general CFHO structure.[97]

Granite City's lease addendum bars "criminal activity, including drug-related criminal activity on the premises."[98] Although "drug-related criminal activity" is defined in the addendum, "criminal activity" is not. Despite this lack of information, the addendum provides that the commission of "criminal activity" by the lessee, a household member, a guest, or any other person under the lessee's control, is a "serious violation and material noncompliance with the lease."[99] After an arrest, or even a 911 call, police may issue a notice to the landlord instructing them to evict their tenant or face fines and potentially lose their license to lease.[100] As is common in CFHO addenda, proof of criminal activity, whatever it is under the addendum, need only be by a preponderance of the evidence.[101] The local NPR affiliate investigated the enforcement

makes clear, the Justice Department will continue to fight discriminatory and unlawful "crime-free" ordinances across the country and work to ensure that everyone has fair and equal access to housing.'").

95 Austin Berg, *How Illinois Families Can Face Eviction for Crimes They Didn't Commit*, Ill. Pol'y (Aug. 16, 2019), https://www.illinoispolicy.org/how-illinois-families-can-face-eviction-for-crimes-they-didnt-commit/.

96 *Id.*

97 Lexi Cortes, *Granite City Changes "Crime-Free" Rules for Renters Amid Complaints and State Law Update*, St. Louis Pub. Radio (Jan. 8, 2020), https://news.stlpublicradio.org/economy-business/2020-01-08/granite-city-changes-crime-free-rules-for-renters-amid-complaints-and-state-law-update.

98 *Granite City Addendum*, *supra* note 53.

99 *Id.*

100 Mary Hansen, *With Crime-Free Rules, Tenants Evicted After Overdose Calls*, St. Louis Public Radio (May 9, 2019), https://news.stlpublicradio.org/2019-05-09/with-crime-free-rules-tenants-evicted-after-overdose-calls#stream/0 (last visited Dec. 5, 2023).

101 *Granite City Addendum*, *supra* note 53.

of Granite City's CFHO and found that, from 2014 to 2019, the police issued at least 300 notices to evict based on CFHO violations, in a town with a total population of around 30,000 residents.[102] Twenty-eight of these notices originated from emergency calls made for help when someone was overdosing.[103] It is unclear how many of these notices ultimately resulted in evictions, due to the opaque recordkeeping of many municipalities when it comes to evictions.

2. Hesperia, California

In 2015, the city of Hesperia, California, passed a CFHO that was "particularly onerous,"[104] requiring landlords to submit prospective tenants' names to the sheriff in advance of renting to them, in addition to requiring eviction when current tenants had interactions with the criminal legal system.[105] The initial version of the CFHO declared that "[w]hen an Owner or their designee is notified by the Chief of Police, or his or her designee, that a Tenant has engaged in criminal activity . . . the Owner shall begin the eviction process against the Tenant within 10 business days."[106] Said notice would, "to the extent permitted under Applicable Law and at the Chief of Police's discretion, contain the evidence and documents used by the Chief of Police to determine whether a Tenant has engaged in criminal activity."[107] Thus, the evidentiary standard outlined in the law was, for all intents and purposes, the chief of police promising that the tenant had, in fact, committed a crime.

The CFHO, in addition to being incredibly broad, was also allegedly motivated by racism.[108] While discussing the ordinance, elected officials in Hesperia declared it was intended to "correct a demographical

102 Hansen, *supra* note 100.

103 *Id.* Granite City's amendments to its CFHO in 2020 following the Barron family's lawsuit include changes to its CFHO training indicating that evictions ought not be based on 911 calls seeking medical attention for an overdose. *Granite City CFHO Training*.

104 Deborah Archer, *Jim Crow in the 21st Century: Crime Free Housing Ordinances, Racial Segregation, and Mass Criminalization*, 19 Ohio State J. Crim. L. 173, 177 (2021).

105 KCAL News Staff, *supra* note 93.

106 Ordinance No. 2015-12, § 8.20.050 C.1.b, City of Hesperia (May 12, 2015), https://mcclibraryfunctions.azurewebsites.us/api/ordinanceDownload/16400/745812/pdf?forceDownload=true.

107 *Id.*

108 *See generally* Supplemental Complaint, United States v. City of Hesperia, No. 19-cv-02298, 2022 WL 17968834 (C.D. Cal. Dec. 22, 2022), ECF No. 54 [hereinafter Hesperia Complaint].

problem,"[109] and intended to "work on getting them [people from LA County] out of"[110] Hesperia by "pluck[ing] them out and mak[ing] them go somewhere else," like "call[ing] an exterminator to kill roaches."[111] As in many other municipalities, police were the "driving force" behind the ordinance, functionally conscripting landlords to assist the police in their quest to attack Black and brown residents in Hesperia for perceived criminality.[112]

To be clear—the ordinance *did* attack Black and brown residents specifically, whose "criminality" was perceived as opposed to actual. The Sheriff's department enforced the ordinance "on a case-by-case basis"[113] that evicted Black residents four times more frequently than non-Hispanic white residents.[114] HUD found that "of the Census blocks in Hesperia with at least 25% renters and at least four rental units, 24% were majority-white, but only 2.5% of evictions [under the CFHO] occurred in those blocks."[115] Tenants were "routinely" evicted under the ordinance without being convicted of any crime,[116] including a Black woman who called the police for help when her boyfriend was abusing her[117] (despite the ordinance's supposed carveout for survivors of domestic violence);[118] an older Latinx couple whose adult son was arrested, despite the fact the son did not live with them;[119] and a Latina woman who called 911 for help while her boyfriend was experiencing a mental breakdown.[120]

The evidence of Hesperia's alleged racist intent and enforcement was so egregious that the U.S. Department of Justice ("DOJ") sued the city in 2019, alleging that a HUD investigation established many of the facts outlined herein.[121] In December 2022, the DOJ and Hesperia reached a settlement, which mandated, among other things, that Hesperia immediately cease enforcement of its CFHO[122] and establish

109 *Id.* at 7.
110 *Id.* at 7–8.
111 *Id.* at 7.
112 *Id.* at 9.
113 *Id.* at 12.
114 *Id.* at 14.
115 *Id.* at 15.
116 *Id.* at 12.
117 KCAL News Staff, *supra* note 93.
118 *See* Hesperia Complaint, *supra* note 108, at 13.
119 *Id.* at 13.
120 KCAL News Staff, *supra* note 93.
121 *DOJ Hesperia Release*, *supra* note 7.
122 United States v. City of Hesperia, No. 19-cv-02298, 2022 WL 17968834 (C.D. Cal. Dec. 22, 2022).

a settlement fund for victims of its CFHO.[123] In its press release about the "landmark" settlement, the DOJ declared that "[s]o-called 'crime-free' ordinances are often fueled by racially discriminatory objectives, destabilize communities and promote modern-day racial segregation."[124]

II. Evidentiary Standards in CFHO Proceedings

Challenges to CFHOs take a myriad of forms, because CFHOs are faulty for a myriad of reasons, but they often—understandably—hinge on demonstrable racist intent or on the disparate impact of CFHOs, as discussed in the conclusion below. However, this Article focuses on the evidentiary standards at play in most CFHOs and their mandatory lease addenda.

CFHOs typically declare that *the actual alleged criminal acts* triggering eviction—not the underlying arrest or charges being filed—must be proven by a preponderance of the evidence.[125] Where CFHOs do not explicitly state the requisite burden of proof, the default burden remains a preponderance of the evidence because the proceedings are litigated in civil court.[126] This preponderance of the evidence burden is easier to meet than the burden required to convict someone of alleged criminal acts in criminal court, but CFHOs usually explicitly declare criminal convictions are not required for eviction under their terms.[127] Because CFHO-based evictions may be triggered by arrest or charges being filed, they may take place *before* a conviction or plea,[128] even though proving allegations in civil court requires a higher burden of proof than is required to arrest or charge someone.[129] CFHOs also require that

123 *Id.* at *7.

124 *DOJ Hesperia Release*, *supra* note 7. In its response to the settlement, Hesperia declared that it "vehemently den[ied] all allegations contained within the complaint." *Hesperia Ends Its "Crime-Free" Rental Housing Program*, *supra* note 97.

125 *See, e.g.*, *Rantoul Addendum*, *supra* note 2, at ¶ 2; *Granite City Addendum*, *supra* note 53, at ¶ 10; *Oak Forest Addendum*, *supra* note 53, at ¶ 6; *Country Club Hills Addendum*, *supra* note 53, at ¶ 2.

126 Grogan v. Garner, 498 U.S. 279, 286 (1991) ("Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants . . .").

127 *See, e.g.*, *Rantoul Addendum*, *supra* note 2, at ¶ 2; *Granite City Addendum*, *supra* note 53, at ¶ 10; *Oak Forest Addendum*, *supra* note 53; *Country Club Hills Addendum*, *supra* note 53, at ¶ 2.

128 *See, e.g.*, Berg, *supra* note 95 (describing how the Barron family's eviction was triggered by an arrest as opposed to a conviction).

129 *See* Brinegar v. United States, 338 U.S. 160, 172 (1949) (differentiating burdens of

the underlying *conduct* be proven, as opposed to merely evidencing the filing of an arrest or charge[130] How, then, are cities and eviction courts determining that criminal conduct has been proven? Before delving deeper into this question, one must consider the evidentiary standards at play, and existing evidentiary standards more broadly.

A. *Burdens of Proof*

Meeting a burden of proof in a legal proceeding consists of two nominally distinct elements: "burden of persuasion (i.e., the obligation to persuade the trier of fact of the truth of a proposition), [and] burden of production (i.e., the obligation to come forward with evidence to support a claim)."[131] These two intertwined responsibilities typically fall to the plaintiff in civil cases, as the plaintiff is the litigant seeking to change the status quo.[132] The degree to which a judge or jury must be persuaded in order to find for the plaintiff varies depending on case type, as discussed below. But the persuasion of the judge or jury must always be based on underlying evidence.[133] In court, whether criminal or civil, this burden of proof must be met by evidence that is admissible pursuant to the applicable evidentiary rules.[134]

1. Probable Cause

The first burden of proof relevant to the enforcement of CFHOs is probable cause, because it is applicable to the arrests and charges upon which CFHO-based eviction proceedings are often predicated.[135]

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proof necessary in arrests as opposed to criminal trials because "[t]here is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.").

130 *See, e.g.*, *Rantoul Addendum*, *supra* note 2, at ¶ 2; *Granite City Addendum*, *supra* note 53, at ¶ 10; *Oak Forest Addendum*, *supra* note 53, at ¶ 6; *Country Club Hills Addendum*, *supra* note 53.

131 Dir., Off. of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 268 (1994).

132 Schaffer *ex. rel.* Schaffer v. Weast, 546 U.S. 49, 56 (2005).

133 *See Greenwich Collieries*, 512 U.S. at 268.

134 Michael S. Pardo, *The Paradoxes of Legal Proof: A Critical Guide*, 99 B.U. L. Rev. 233, 243 (2019) ("Burdens of proof provide only half of the proof picture. The other half concerns the evidence itself. Whether a standard of proof is met in a given case depends on whether a factfinder concludes the standard is satisfied *based on the admissible evidence*." (emphasis in original)).

135 *See* Beck v. Ohio, 379 U.S. 89, 91 (1964) ("Whether that arrest was constitutionally

When municipalities, like Granite City, issue eviction notices based on arrests, they are issuing eviction notices based on government action that is permitted as long as there is probable cause to believe the alleged criminal action underlying the arrest (or the filing of charges) took place and was perpetrated by the person in question. As will be discussed further below, this evidentiary burden is not equivalent to the preponderance of the evidence burden that civil courts and most CFHO addendums require for a plaintiff-landlord to evict a tenant.[136]

Probable cause arguably involves a burden of both persuasion and production, as it describes an evidence-based "reasonable ground for belief of guilt."[137] The U.S. Constitution requires that police have probable cause in order to make an arrest, a determination based on "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."[138] Illinois, home to more than 100 CFHOs, including Rantoul's and Granite City's, defines probable cause in its statute allowing warrantless arrest as when the police have "reasonable grounds to believe that the person is committing or has committed an offense."[139] The Supreme Court of Illinois has found that this requirement has "the same substantive meaning as 'probable cause.'"[140]

Probable cause is exceptionally broad, because the situations for which it was developed lack the formality of the courts, and rules relating to the admissibility of the evidence upon which determinations of probable cause are made are very different than those governing actual litigation.[141] This is because "[t]here is a large difference between the two things to be proved, as well as between the tribunals which determine

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valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it[.]").

136 *See, e.g.*, *Granite City Addendum*, *supra* note 2; *see also infra* Section II.A.3.

137 Brinegar v. United States , 338 U.S. 160, 172 (1949) (internal citation and quotations omitted).

138 *Beck*, 379 U.S. at 91.

139 725 Ill. Comp. stat. Ann. 5/107-2(1)(c) (West 2020).

140 People v. Wright, 309 N.E.2d 537, 540 (Ill. 1974).

141 *See* United States v. Matlock, 415 U.S. 164, 174–75 (1974) ("Search warrants are repeatedly issued on ex parte affidavits containing out-of-court statements of identified and unidentified persons . . . There is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel.").

them, and therefore a like difference in the quanta and modes of proof required to establish them."[142] Due to its lack of clarity, probable cause is not used in civil or criminal proceedings.[143] It is also a determination often made based upon evidence that would not be admissible in court—the situations where the probable cause standard applies are not formal civil or criminal proceedings.[144]

There is no additional constitutional demonstration of proof necessary to file charges against someone after they are arrested; the Supreme Court has determined that an individual accused of a crime is not "entitled to judicial oversight or review of the decision to prosecute."[145] The American Bar Association ("ABA") recommends that prosecutors only file charges if "the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice."[146] The ABA recommendations are just that—recommended as opposed to required. If someone is arrested, they may be charged.

2. Preponderance of the Evidence

For a tenant to be legally evicted, under a CFHO or otherwise, the plaintiff-landlord must prove their case by a preponderance of the evidence in civil court.[147] This means for a CFHO, the plaintiff-landlord

142 *Brinegar*, 338 U.S. at 172.

143 *See* Erica Goldberg, *Getting Beyond Intuition in the Probably Cause Inquiry*, 17 Lewis & Clark L. Rev. 789, 801 (2013) ("Part of the problem is that no one knows how high a hurdle the standard actually presents. The Supreme Court explicitly refuses to assign probable cause a numerical value, equating it instead to a 'fair probability' that evidence will be found.").

144 *See Brinegar*, 338 U.S. at 174 n.12 ("The inappropriateness of applying the rules of evidence as a criterion to determine probable cause is apparent in the case of an application for a warrant before a magistrate, the context in which the issue of probable cause most frequently arises. The ordinary rules of evidence are generally not applied in *ex parte* proceedings, partly because there is no opponent to invoke them, partly because the judge's determination is usually discretionary, partly because it is seldom final, but mainly because the system of Evidence rules was devised for the special control of trials by jury." (internal quotations and citations omitted)).

145 Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

146 *Standard 3-4.3(a) Minimum Requirements for Filing and Maintaining Criminal Charges*, Am. Bar Ass'n (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/#:~:text=(a)%20A%20prosecutor%20should%20seek,in%20the%20interests%20of%20justice.

147 Grogan v. Garner, 498 U.S. 279, 286 (1991) ("Because the preponderance-of-the-

must prove by a preponderance of the evidence that the underlying criminal conduct took place.[148] CFHO lease addenda, when they articulate a burden of proof for criminal conduct to be a material breach of the lease and thus trigger eviction, typically require that criminal conduct be proven by a preponderance of the evidence as well.[149] Crucially, the preponderance standard is (1) more stringent than the probable cause standard,[150] and (2) subject to the rules of evidence, as it is being proven in court.[151]

Under a preponderance of the evidence standard, the evidence must show it is more likely than not that some conduct or action took place.[152] Even if an addendum does not explicitly articulate a burden, it is likely that a court would resort to the preponderance standard. Proof by a preponderance of the evidence is the norm in civil cases,[153] evidencing society's decision that, in a trial about money damages, the outcomes are not particularly dire one way or the other, and "the litigants should share the risk of error in roughly equal fashion."[154] The preponderance standard that has been held to be "[f]inely tuned . . . [and] useful in formal trials" due to its specificity.[155] The test is neat and quantifiable, and it does not change case-by-case.

3. Probable Cause vs. Preponderance

Probable cause and preponderance are two different approaches to evidence, molded to the different situations in which they are used. Because of this, providing evidence of an arrest or pending charges is

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evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants . . .").

148 *See, e.g.*, *Rantoul Addendum*, *supra* note 2; *Granite City Addendum*, *supra* note 53; *Oak Forest Addendum*, *supra* note 53; *Country Club Hills Addendum*, *supra* note 53.

149 *See, e.g.*, *id.*

150 *See infra* Section II.A.3.

151 *See infra* Section II.A.4.

152 Neil Orloff & Jery Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. Pa. L. Rev. 1159, 1159 (1983) ("In most civil cases, the requisite degree of persuasion is "by a preponderance of the evidence." This traditionally requires demonstrating that the existence of the contested fact is more probable than its nonexistence.").

153 Herman & McLean v. Huddleston, 459 U.S. 375, 387–88 (1983) ("Where . . . proof is offered in a civil action, as here, a preponderance of the evidence will establish the case . . ." (alteration in original)).

154 Santosky v. Kramer, 455 U.S. 745, 755 (1982) (internal quotation marks omitted).

155 Illinois v. Gates, 462 U.S. 213, 235 (1983).

not per se legally sufficient evidence to grant an eviction under a CFHO because the proof necessary to arrest or charge someone is less than the proof necessary to meet a preponderance burden.

Each time the Supreme Court has been asked to opine upon the relationship between these evidentiary standards, it has stressed that they are not interchangeable, or even particularly similar.[156] Probable cause is a standard that exists primarily to govern the police, a standard that is meant to be applied "on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings."[157]

In *Illinois v. Gates*, the Supreme Court considered a "two-pronged test" the Illinois Supreme Court had adopted to determine whether or not it was reasonable for a magistrate to find probable cause to issue a warrant.[158] The test was rejected in large part because of the Court's concerns about implementing *any* tests or rigidity when determining probable cause, a standard they described as "fluid . . . not readily, or even usefully, reduced to a neat set of legal rules."[159] Probable cause was directly contrasted with preponderance, and probable cause was stressed to be a "totality-of-the-circumstances approach,"[160] as opposed to a standard that requires some "*quanta* . . . of proof,"[161] like preponderance. "The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances."[162] Preponderance is definitionally a percentage–anything greater than 50%.[163]

Because probable cause is a standard for lay people, used

156 *See, e.g.*, *id.*; Ornelas v. United States, 517 U.S. 690, 696 (1996) ("We have cautioned that these two legal principles [probable cause and reasonable suspicion] are not 'finely-tuned standards,' comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." (internal citations omitted)).

157 *Gates*, 462 U.S. at 235–36.

158 *Id.* at 227–28.

159 *Id.* at 232.

160 *Id.* at 230–31.

161 *Id.* at 235 (emphasis in original) (quoting Brinegar v. United States, 338 U.S. 160, 173 (1949)).

162 Maryland v. Pringle, 540 U.S. 366, 371 (2003).

163 *See, e.g.*, Jason Iuliano, *Jury Voting Paradoxes*, 113 Mich. L. Rev. 405, 417 (2014) ("The preponderance-of-the-evidence standard requires the plaintiff to prove that the proposition is more likely true than not. In other words, the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be. Accordingly, scholars and judges alike place the threshold for belief between 50 and 51%." (internal quotations omitted)).

primarily by the police, there is another crucial difference between the application of the two standards: probable cause need not be established by evidence that is admissible in a courtroom. In fact, the Supreme Court has firmly established "the inappropriateness of applying the rules of evidence as a criterion to determine probable cause."[164] So what happens when dispositions that only require a finding of probable cause, like arrests or charges, are being used as a proxy for finding that allegations are proven by a preponderance of the evidence? Right now, nothing—but this Article posits nothing happens because of a lack of oversight, not for lack of a claim.

4. Other Evidentiary Standards

To fully explore the evidentiary issues of CFHO enforcement, it is worth considering two other common evidentiary standards in the American legal system: clear and convincing evidence and proof beyond a reasonable doubt.

Proof by clear and convincing evidence is an "intermediate standard"[165] used in some civil cases and is an evidentiary burden that lies in between proof by a preponderance of the evidence and the proof beyond a reasonable doubt required in criminal cases. The clear and convincing evidence standard is typically used "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant."[166] It is applied when the outcome of a civil proceeding may result in "drastic deprivations,"[167] where "particularly important individual interests… are at stake,"[168] and to "reduce the risk to the defendant of having [their] reputation tarnished erroneously."[169] The Supreme Court has found requiring proof by clear and convincing evidence to be appropriate in civil or administrative proceedings in a

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164 *Brinegar*, 338 U.S. at 174 n.12. The Court used the example of a police officer appearing in front of a magistrate to grant a warrant and explained that the application of the rules of evidence would be improper "partly because there is no opponent to invoke them, partly because the judge's determination is usually discretionary, partly because it is seldom final, but mainly because the system of Evidence rules was devised for the special control of trials by jury." *Id.* (quoting 1 Wigmore, Evidence (3d ed, 1940)).

165 Addington v. Texas, 441 U.S. 418, 424 (1979).

166 *Id.*

167 Woodby v. Immigr. & Naturalization Serv., 385 U.S. 276, 285 (1966).

168 Herman & MacLean v. Huddleston, 459 U.S. 375, 389 (1983).

169 *Addington*, 441 U.S. at 424.

variety of cases, including those where defendants risked deportation,[170] denaturalization,[171] infringement on First Amendment rights in defamation cases brought by a public figure,[172] or civil commitment.[173] In summary, the preponderance standard is the default in civil cases where there is not an important individual right implicated in the outcome of the hearing; the clear and convincing evidence standard applies when one side has important interests or rights potentially at risk in the hearing.[174] This standard is not currently used in eviction proceedings. As discussed in Section I.C, eviction proceedings, whether CFHO-based or not, require proof by a preponderance of the evidence.

Criminal cases are subject to the most stringent evidentiary requirement; in criminal cases, "proof of a criminal charge beyond a reasonable doubt is constitutionally required."[175] The Supreme Court has articulated a twofold need for this evidentiary standard in criminal cases: "both because of the possibility that [the accused] may lose [their] liberty upon conviction and because of the certainty that [they] would be stigmatized by the conviction."[176] This evidentiary standard is confined to criminal cases, but the strict evidentiary requirements of criminal court help to justify the existence of the clear and convincing evidence in quasi-criminal cases. Our legal system requires that criminal charges be proved by overwhelming evidence; the state should not be able to avoid a stringent burden of proof merely by shifting the proceedings out of criminal court and into civil ones.

B. Current Enforcement of CFHOs Improperly Applies Evidentiary Standards

There are many grounds on which the improper application of evidentiary standards in CFHO evictions might be effectively challenged, including that CFHOs, by relying so heavily on documentation obtained under a probable cause standard, seem to undermine the requirement that tenants may only be evicted under a preponderance of the evidence

170 *Woodby*, 385 U.S. 276.

171 Chaunt v. U.S., 364 U.S. 350 (1960).

172 Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989).

173 *Addington*, 441 U.S. 418.

174 Herman & MacLean v. Huddleston, 459 U.S. 375, 389–90 (1983) ("A preponderance-of-the-evidence standard allows both parties to "share the risk of error in roughly equal fashion."); *Addington*, 421 U.S. at 423 ("Any other standard expresses a preference f'r one side's interests.").

175 *In Re* Winship, 397 U.S. 358, 362 (1970).

176 *Id.* at 363.

standard. The lack of national housing data discussed briefly in Section I.B makes it difficult to determine how broadly CFHOs are being enforced without a final disposition in proceedings related to the underlying criminal conduct, but there is anecdotal evidence showing that CFHOs are enforced after arrests alone,[177] or even after 911 calls that do not result in arrest.[178] Whenever this occurs, practitioners have strong cases for challenging the validity not just of their client's eviction, but of CFHOs themselves. The remainder of this Part will outline the ways the current system appears to be constitutionally lacking and provide suggestions for routes via which practitioners might challenge CFHO enforcement on the individual, or, if sufficient cases emerge, class-action level.

1. CFHOs Should Necessitate Proof by Clear and Compelling Evidence

Although municipalities have often explicitly mandated a preponderance standard in CFHO evictions,[179] and the default standard for ordinances silent on burden of proof is preponderance, there is a strong argument that this is not a constitutionally appropriate evidentiary burden. Under the frameworks the Supreme Court has articulated for determining whether a civil proceeding ought to require proof by a preponderance of the evidence or by clear and convincing evidence, eviction under a CFHO may require the heightened evidentiary standard of clear and convincing evidence.

CFHOs create quasi-criminal proceedings; their entire justification is predicated on removing so-called criminal elements from neighborhoods, and their enforcement is typically supported—and often mandated—by police officers and other government officials.[180] *Any* eviction comes with substantial reputational damage and can make it exponentially harder to find housing,[181] particularly for individuals in

177 *See, e.g.*, *supra* Section I.D.1 (discussing the Barron family).

178 *See, e.g.*, *id.* (discussing evictions based on overdose calls in Granite City, which could not have been based on arrests, as arresting individuals who are overdosing or who called 911 to prevent an overdose death has been prohibited in Illinois since 2012).

179 *See, e.g.*, *Rantoul Addendum*, *supra* note 2; *Granite City Addendum*, *supra* note 53; *Oak Forest Addendum*, *supra* note 53; *Country Club Hills Addendum*, *supra* note 53.

180 *See, e.g.*, Hansen, *supra* note 3 ("Brown, the Rantoul police chief, defends the crime-free rule. He said the department wants landlords to use the court process, and that's why they talk about it in the mandatory, crime-free housing seminars each landlord is required to attend.").

181 *See* Matthew Goldstein, *The Stigma of a Scarlet E*, N.Y. Times (Aug. 9, 2021), https://

public housing,[182] but the reputational damage of eviction under a CFHO is even greater due to the idea that such an eviction is based on a tenant's criminality. The tenant stands to lose important property interests in the form of their leasehold interest in a CFHO eviction proceeding,[183] and they *also* risk having "[their] reputation tarnished erroneously"[184] by being evicted for an alleged crime that may or may not have ever resulted in a conviction (or even arrest).

In *Oriel v. Russell*,[185] the Supreme Court considered the appropriate standard for proving a turnover order in bankruptcy. Although the ins and outs of corporate law are a far cry from eviction courts in most contexts, the Court ultimately made the determination that the appropriate evidentiary burden in this case was clear and convincing evidence,[186] and made that determination based on dynamics that track CFHO-based evictions almost exactly. The Court's main concern was that this was a civil court proceeding that was equivalent to a criminal one in many ways; the underlying conduct that would allow the order to be issued "is a charge equivalent to one of fraud," foreshadowing potential criminal charges and thus not appropriately

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www.nytimes.com/2021/08/09/business/eviction-stigma-scarlet-e.html ("Companies that quickly generate automated background checks work with an estimated nine out of 10 landlords across the country. These firms scour public documents like court records for information, but the reports can conflate people with similar names and cause other headaches. An eviction, even an old one, can be enough for a landlord to move on to the next application.").

182 Housing voucher eligibility is governed by local public housing agencies, which may bar tenants from voucher eligibility at all if they have been evicted from public housing in the recent past. *See, e.g.*, U.S. Dep't of Hous. & Urb. Dev., Housing Choice Vouchers Fact Sheet, https://www.hud.gov/topics/housing_choice_voucher_program_section_8 (last visited Nov. 5, 2023) ("Eligibility for a housing voucher is determined by the PHA[.]"); *Qualifying for the HCV Program*, Chi. Hous. Auth., https://cha-assets.s3.us-east-2.amazonaws.com/s3fs-public/Eligibility%20Criteria-2019_0.pdf (last visited Aug. 4, 2023) ("CHA will also deny a family assistance if . . . Any family member has been evicted from federally assisted housing in the last three years . . . [or a]ny public housing authority (PHA) has previously terminated assistance for any family member under any federal assisted housing program within the last 3 years.").

183 Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 135–36 (2002) ("The Court of Appeals sought to bolster its discussion of constitutional doubt by pointing to the fact that respondents have a property interest in their leasehold interest . . . The is undoubtedly true[.]"); *see also* Laura Flint, *Criminalizing Property Rights: How Crime-Free Housing Ordinances Violate the Fifth Amendment*, 70 Emory L.J. 1369 (2021).

184 Addington v. Texas , 441 U.S. 418, 424 (1979).

185 Oriel v. Russell, 278 U.S. 358, 363–64 (1929).

186 *Id.* at 362.

proved by "[a] mere preponderance of [the]evidence."[187] Historically, courts have required proof by clear and convincing evidence where civil charges and potential criminal charges are closely linked.[188] In a proceeding like CFHO-based evictions, it ought not be sufficient to punish someone based on criminal charges proved only by a "mere preponderance of [the]evidence."[189] Rather, the correct evidentiary requirement in CFHO-based eviction proceedings should be clear and convincing evidence.

2. Plaintiff-Landlords Often Do Not Meet Their Burden

If courts determine that, despite the quasi-criminal dynamics and potential reputational harm from improperly decided CFHO proceedings, preponderance remains the proper evidentiary standard for evictions under CFHOs, the current reality of their enforcement provides an additional basis on which practitioners might challenge CFHOs. Landlords, and by extension, the municipalities and police departments that are conscripting them, are not meeting their burden, even if they only need to prove their case by a preponderance of the evidence. Although CFHOs may be facially valid, their enforcement must be halted until such enforcement is substantially altered.

As a threshold issue, the landlord, as the plaintiff, bears the burden of proving grounds for eviction by a preponderance of the evidence.[190] Private evictions are civil lawsuits litigated in state courts, as opposed to administrative hearings,[191] which means they are subject to the same evidentiary rules as other state court proceedings. Landlords are legally required to ensure that there is sufficient evidence to meet their burdens of production and persuasion, and that their evidence

187 *Id.*

188 *See, e.g.*, *id.*; *Addington*, 441 U.S. at 424 (applying clear and convincing evidence to "reduce the risk to the defendant of having [their] reputation tarnished erroneously" where defendant was ordered civilly committed); Herman & MacLean v. Huddleston, 459 U.S. 375, 389 (1983) (requiring clear and convincing evidence where "particularly important individual interests are at stake").

189 *Oriel*, 278 U.S. at 362.

190 *See, e.g.*, Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment when Resolving § 1983 Qualified Immunity Disputes*, 52 Vill. L. Rev. 135, 173–74 (2007) ("As a general rule, the burden of proof 'follows' the burden of pleading. Accordingly, the party who bears the burden of pleading a particular issue traditionally bears the burden of proving that issue.").

191 *Supplementary Information: Estimating Eviction Prevalence Across the United States*, Eviction Lab (2022), https://evictionlab.org/docs/Eviction_Lab_Methodology_Report_2022.pdf.

is legally admissible, and when they fail to do so, judges ought to be ruling against them. This is only possible when practitioners (or *pro se* tenants) object to inadmissible evidence and appeal when judges rule for landlords that have not met their burden.

a. Municipalities Relying on Arrest Records

Across the country, municipalities are pressuring or requiring landlords to initiate eviction proceedings based on 911 calls, arrests, or the filing of criminal charges, and often use records of said 911 calls, arrests, or charges as proxies for meeting their burden.[192] Of course, an arrest record or charges filed against a tenant or someone in their household is not prima facie proof that the underlying conduct has been proved by a preponderance of the evidence because arresting or charging an individual does not require proof by a preponderance of the evidence. But the incredibly brief length of eviction hearings[193] and the consistent favorable findings for landlords[194] strongly implies that the arrests, charges, and/or police reports are being *treated* as sufficient evidence of the underlying alleged criminal conduct. CFHO trainings for landlords acknowledge this reality—one featured a slide titled "Burden of Proof: Not as Hard as You Think," and the trainer acknowledged "the purpose of the whole program . . . . [is to] get people off your property for what would ordinarily be considered criminal offenses without

192 *See supra* Section I.D.

193 *See* Texas House Staff, *"Case Dismissed!" What does this mean for tenants in eviction hearings?*, Tex. Housers, (June 14, 2022), https://texashousers.org/2022/06/14/tenant-eviction-hearing-case-dismissal/ ("HESN observers estimate that the majority of eviction hearings are over in less than two minutes."); Andrew Dougherty, *Fast Food Justice: The Denial of Tenants' Due Process Rights in Chicago's Eviction Courts*, Pub. Int. L. Rep., Spring 2004 art. 2, at 1, 2 (2004) ("A typical fast-food restaurant can serve a meal in 3 minutes and 9 seconds. Not to be outdone by the fast food chains, the average time of a trial in Chicago's eviction courts is 1 minute and 44 seconds.").

194 Lucia Walinchus, *Tenants on Trial: Investigation Shows Landlords Win 95 percent of Eviction Cases*, J. Rec. (Dec. 31, 2015), https://journalrecord.com/2015/12/31/tenants-on-trial-investigation-shows-landlords-win-95-percent-of-cases-law/ (detailing investigations of landlord win rates in Baltimore); Heidi Schultheis & Caitlin Rooney, *A Right to Counsel Is a Right to a Fighting Chance*, Ctr. for Am. Progress (Oct. 2, 2019), https://www.americanprogress.org/article/right-counsel-right-fighting-chance/ ("In eviction lawsuits nationwide, an estimated 90 percent of landlords have legal representation, while only 10 percent of tenants do. Without representation, the majority of tenants lose their cases and are ultimately evicted.").

necessarily proving they committed a crime."[195] There is simply not time in the average eviction proceeding for landlords to be calling witnesses, or for judges to be thoroughly considering evidence.

Where eviction courts rely solely on arrest records to determine that criminal conduct has been proven by a preponderance of the evidence, they are, quite simply, legally wrong. Arrest records alone cannot prove underlying alleged criminal conduct by a preponderance of the evidence, nor can charges being filed, because making an arrest or filing charges does not require that allegations be proven by a preponderance of the evidence. "[A]dopting a standard of proof is more than an empty semantic exercise";[196] an eviction judge cannot infer that one evidentiary standard being met is sufficient for a plaintiff to meet another, entirely different evidentiary standard. Courts cannot permit arrests to automatically meet a preponderance burden, or even to create a rebuttable presumption that the preponderance burden is met, because, as discussed in Section II.A.1, probable cause for an arrest need not—and often *cannot*, due to the nature of policing—be based on evidence that is admissible in court. Practitioners must interrogate the underlying evidence behind the arrest to determine what portions, if any, are admissible in court, and then again to determine if the admissible portions prove conduct by a preponderance of the evidence.

b. Municipalities Relying on Police Reports

If eviction judges grant evictions under CFHOs by examining the police reports written in conjunction with tenants' or their household members' arrests (as opposed to improperly taking their existence as sufficient for the plaintiff to meet their burden), this approach again results in evidentiary issues that are unaddressed. Large portions of police reports are often inadmissible in civil court, for a variety of reasons, chief among them hearsay rules.[197] These are perhaps the rules of evidence most deeply ingrained in our court system:

> Out-of-court statements are traditionally excluded because

195 Leora Smith, *When the Police Call Your Landlord*, Atlantic (Mar. 13, 2020), https://www.theatlantic.com/politics/archive/2020/03/crime-free-housing-lets-police-influence-landlords/605728/.

196 Addington v. Texas, 441 U.S. 418, 425 (1979) (internal citation omitted).

197 Michael H. Graham, *Rule 803(8) Public Records*, *in* Handbook of Federal Evidence § 803:8 (9th ed. 2023), (While police reports themselves are generally admissible under this exception, their contents remain subject to hearsay rules as opposed to being automatically admissible due to their inclusion in a police report).

> they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of [their] statements; the declarant's word is not subject to cross-examination; and [they are] not available in order that [their] demeanor and credibility may be assessed by the jury.[198]

Federally, police reports are generally admissible in civil court under the public records hearsay exception.[199] However, where police officers depend upon the testimony of others in compiling their reports, such testimony is not admissible under the public records exception, because the exception applies to reports based on "matters *observed* by law enforcement personnel."[200] Facts based on testimony from others are still hearsay and must fall under a hearsay exception or exemption, or are inadmissible in court.[201] These requirements present another opportunity for practitioners to challenge the evidence relied upon to evict under CFHOs.

There are also concerns about using civil court hearsay exceptions in quasi-criminal proceedings in which private individuals are being functionally deputized by the state. In criminal cases, police reports are inadmissible when offered by the prosecution, under the Federal Rules of Evidence[202] and the Confrontation Clause, which overrides a certain subset of hearsay exceptions in criminal proceedings[203] to ensure that individuals who are accused of a crime have the right to confront their accusers. Although tenants being evicted under CFHOs are not in criminal proceedings, the ultimate question is whether they have committed a crime (typically as defined by criminal statutes), a question that is addressed by a judge in a hearing that is often instigated by the state forcing a landlord to evict. An adverse finding causes eviction, a loss of a property interest. It is difficult to imagine another non-criminal proceeding that tracks criminal proceedings so closely. In limited instances, the Supreme Court has found that the nature of particular quasi-criminal proceedings requires due process protections.[204] Applying stricter evidentiary standards that more closely track those in criminal proceedings is a potential remedy to the due process issues discussed in detail below. If practitioners gather sufficient cases to pursue a class

198 Chambers v. Mississippi, 410 U.S. 284, 298 (1973).
199 Fed. R. Evid. 803(8).
200 *Id.* (emphasis added).
201 *Chambers*, 410 U.S. at 298.
202 Graham, *supra* note 197.
203 *See generally* Crawford v. Washington, 541 U.S. 36 (2004).
204 *See supra* Section II.A.4.

action lawsuit, practitioners might argue for the implementation of criminal court evidentiary standards in CFHO proceedings.

Even if courts are not persuaded that the quasi-criminal nature of CFHO eviction proceedings merits a new approach to the admissibility of police reports, some states already have additional restrictions on police reports being entered into evidence at all, including in civil proceedings. Our old friend Illinois, the home of dozens of CFHOs,[205] has a general prohibition on the admissibility of police reports in *any* court proceeding, "because they contain conclusions or are hearsay."[206] Illinois may allow police reports into evidence as past recollections recorded, but this is only possible after "a proper foundation has been laid," and in instances where the witness (i.e., the police officer) is appearing and testifying to the contents of the document.[207] Practitioners representing tenants in eviction court must make sure to object when appropriate, and appeal when decisions are made based on improperly admitted evidence or evidence that does not rise to the appropriate standard.

Unfortunately, most tenants appearing in eviction court are not represented by a practitioner able and ready to object to hearsay; depending on the locality, tenant representation rates in eviction proceedings range from less than 1% to 12%.[208] This means that *pro se* tenants may not know to object to issues of hearsay, thus forfeiting them. However, there is substantial caselaw at the federal appellate level[209] suggesting that *pro se* litigants in civil cases may be entitled to pursue arguments on appeal that would be waived had the client been represented by counsel.

In *Chapman v. Kleindienst*,[210] the Seventh Circuit found that a man who was incarcerated did not waive his right to a jury by failing to object to a bench trial because he was not represented by counsel and was unlikely to fully understand his right to object.[211] The Tenth Circuit has

205 Hansen, *supra* note 3.

206 Kociscak v. Kelly, 962 N.E.2d 1062, 1068 (Ill. App. Ct. 2011).

207 *Id.*

208 *Eviction Representation Statistics for Landlords and Tenants Absent Special Intervention*, Nat'l Coalition for a Civ. Right to Couns. (July 2022), http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats__NCCRC_.pdf [hereinafter *Eviction Representation Statistics*].

209 *See, e.g.*, Chapman v. Kleindienst, 507 F.2d 1246 (7th Cir. 1974); Morales-Fernandez v. Immigr. & Naturalization Serv., 418 F.3d 1116 (10th Cir. 2005); Yates v. Mobile Cnty. Pers. Bd., 658 F.2d 298, 299 (5th Cir. 1981). Given that private evictions happen in state courts, this case law is persuasive, as opposed to binding authority; practitioners are encouraged to find state-by-state case law.

210 *Chapman*, 507 F.2d at 1246.

211 *Id.* at 1253.

established a carve-out for waiver rules "when (1) a *pro se* litigant has not been informed of the time period for objecting and the consequences of failing to object, or when (2) the 'interests of justice' require review."[212] The Fifth Circuit has granted latitude to *pro se* litigants because they are "generally ignorant of procedural rules,"[213] language the Sixth Circuit has cited.[214] In cases that carry such serious consequences, where the hearsay evidence being improperly admitted may be the *only* evidence supporting a tenant's loss of property, courts ought to grant tenants substantial leeway, particularly given the complexity of hearsay law. Advocates may appeal on behalf of *pro se* tenants evicted under CFHOs even if the *pro se* tenants failed to properly preserve objections.

Even without the substantial leeway to which *pro se* tenants are entitled when evaluating whether they have forfeited objections, many of these cases would likely be successful on appeal under the plain error standard, which allows courts to address unobjected-to errors when the errors "are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."[215] Making this determination is guided by the relevant rules of evidence in the proceeding; the Supreme Court has articulated that under the Federal Rules of Evidence, correction is proper despite an objection being waived when "a plain forfeited error affecting substantial rights"[216] is seriously affecting the reputation of the court system.

Advocates can similarly rely upon the plain error standard on appeal to challenge evictions based on CFHOs. Tenants being evicted across the country are having property taken from them, on such a scale that undermines the fairness and reputation of eviction court itself. Tenants who appeal these decisions ought to win even on plain error review, as opposed to the more relaxed standards to which they should be held if they are *pro se*. Practitioners have an opportunity to represent tenants on appeal and not only overturn their eviction, but also build powerful caselaw that might eventually lead to injunctions barring enforcement of CFHOs until these errors are remedied.

212 *Morales-Fernandez*, 418 F.3d at 1119.

213 *Yates*, 658 F.2d at 299.

214 United States v. Willis, 804 F.2d 961, 963 (6th Cir. 1986).

215 United States v. Atkinson, 297 U.S. 157, 159 (1936); *see also* Fed. R. Civ. P. 51(d)(2).

216 United States v. Olano, 507 U.S. 725, 736 (1993).

III. The Status Quo Points to Deeper Due Process Issues with CFHO Enforcement

Conflating probable cause and preponderance under CFHOs is demonstrably improper, to a degree that one might wonder how it has gone on for several decades. The abuse of these evidentiary standards is only possible due to another constitutional flaw of CFHOs: the due process violations inherent in asking individuals to litigate criminal conduct in civil court, in front of civil judges, without an attorney. CFHOs do not provide a constitutionally required "meaningful opportunity to be heard."[217] Although tenants do have their day in court, the protections afforded to them in eviction court are simply not sufficient. Some commenters have argued that all eviction proceedings need substantially more judicial protections for defendant-tenants;[218] that argument is outside the scope of an article focused specifically on the failings of CFHOs, though it is compelling. But whether one believes that the eviction system needs reform across the board or not, the quasi-criminal nature of CFHO-based evictions demands additional due process protections for tenants.

A. Tenants in CFHO Eviction Proceedings Do Not Have Access to Meaningful Hearings

Defendants in civil trials have access to substantial protections, particularly when life, liberty, or property interests are at stake; the Supreme Court has said that "at a minimum [the Due Process Clauses] require that deprivation of life, liberty **or property** by adjudication be preceded by notice and opportunity for hearing **appropriate to the nature of the case**."[219]

In limited instances, the Supreme Court has found that the nature of particular quasi-criminal proceedings requires due process protections. In *Morrissey v. Brewer*, the Court acknowledged substantial due process rights in parole revocation hearings, despite

217 Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

218 *See, e.g.*, Vamsi A. Damerla, *The Right to Counsel in Eviction Proceedings: A Fundamental Rights Approach*, 6 Colum. Hum. Rts. L. Rev. F., May 2022, at 355; Rachel Kleinman, *Housing* Gideon*: The Right to Counsel in Eviction Cases*, 31 Fordham Urb. L.J. 1507, 1529 (2004); 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, 563 (1988).

219 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (emphasis added).

parole revocations being distinct from criminal proceedings.[220] These rights were extended to probation revocations in *Gagnon v. Scarpelli*, with the Court again making this decision while acknowledging that the proceedings were not criminal prosecutions.[221] In *Morrissey*, the Court indicated that determining "[w]hether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss . . .[t]he question is not merely the weight of the individual's interest, but whether the nature of the interest is one within the contemplation of the liberty **or property** language of the Fourteenth Amendment."[222]

While the interests at stake in *Morrissey* and *Gagnon* were liberty interests, the analysis applies to proceedings in which property interests are at stake as well. The due process protections required in CFHO eviction proceedings likely do not rise to the level of the protections mandated under *Morrissey* and *Gagnon*, but these cases "recogni[ze] that not all situations calling for procedural safeguards call for the same kind of procedure."[223] The appropriate due process protections in CFHO proceedings are different than the appropriate due process protections in a parole or probation revocation hearing, but they are certainly higher than those currently in place.

For a plethora of reasons, tenants subject to CFHO-based evictions do not have access to hearings that are appropriate to the nature of the case, which is, as discussed extensively in Section I.B-D and II.A.4, a quasi-criminal case in which individuals are being stripped of property rights based on evidence that they or a household member have committed a crime. Tenants are being evicted based on alleged criminality without access to counsel, typically without a jury, in trials that are shorter than most radio edits.[224] These proceedings violate tenants' due process rights. This Section will look at each of these named failings in turn—though it by no means intends to imply that there are not myriad other constitutional failings in CFHO and general eviction proceedings—and provide recommendations.

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220 Morrissey v. Brewer, 408 U.S. 471, 482–84 (1972).

221 Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973).

222 *Morrissey*, 408 U.S. at 481 (internal citations and quotation marks omitted, emphasis added).

223 *Id.*

224 Rhett Allain, *Why Are Songs on the Radio About the Same Length?*, Wired (July 11, 2014), https://www.wired.com/2014/07/why-are-songs-on-the-radio-about-the-same-length/; *see also infra* Section I.B.

1. Ensure Right to Counsel in CFHO Evictions

As discussed briefly in Section II.B, representation rates for tenants in eviction court are abysmally low. Representation rates are so often in the single digits[225] that the 11% tenant representation rate documented in a decade-long study of Chicago eviction courts almost seems high; across the same time frame, landlords were represented in eviction court 81% of the time.[226] Even if one believes that the property interests in non-CFHO-based eviction proceedings do not necessitate that indigent tenants be provided with an attorney free of charge, CFHO-based evictions are different. CFHOs create lease violations that are defined by state statute,[227] often incorporating the entirety of the criminal code as terms of the lease.[228] They are often proceedings instigated by the state, and take place in courts where the private landlord doing the state's bidding is many times more likely to be represented than the tenant facing eviction due to alleged criminal activity.[229] When the Supreme Court considered the necessity of the right to counsel in criminal trials, it declared:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . [They are] unfamiliar with the rules of evidence. Left without the aid of counsel [they] may be . . . convicted upon incompetent evidence, or evidence

225 *See No Eviction Without Representation*, *supra* note 16.

226 *Explore the Data*, L. Ctr. for Better Hous., https://eviction.lcbh.org/data (last visited Dec. 5, 2023). In 2022, the city of Chicago announced a three year Right to Counsel Pilot Program to address the abysmal representation rates for tenants in eviction court and the difference representation can make in outcomes. *The Chicago Department of Housing Announces Right to Counsel Pilot Program*, Chicago.gov (Apr. 4, 2022), https://www.chicago.gov/city/en/depts/doh/provdrs/renters/news/2022/april/the-chicago-department-of-housing-announces-right-to-counsel-pil.html. There is not yet data available on the outcomes of this pilot program, but results from similar efforts in New York City shows "significant declines" in evictions in zip codes that provide universal eviction representation as compared to those that do not. Jack Newton et. al, *Civil Gideon and NYC's Universal Access: Why Comprehensive Public Benefits Advocacy is Essential to Preventing Evictions and Creating Stability*, 23 CUNY L. Rev. 200, 228 (2020).

227 *Rantoul Addendum*, *supra* note 2, at § 1.

228 *See, e.g.*, *id.* at § 1 ("For purposes of this Addendum, criminal activity means . . .the commission of two (2) or more of any other offenses under the Illinois Criminal Code of 2012 not specifically listed above[.]").

229 *Eviction Representation Statistics*, *supra* note 208.

irrelevant to the issue or otherwise inadmissible.[230]

As discussed in Section I.C, the current reality of CFHOs is such that tenants without counsel are in a closely analogous situation to the worst-case scenario outlined by the Court. CFHO-based eviction proceedings are rampant with evidentiary issues that tenants do not know exist, and the tenants are losing property interests as well as suffering reputational harm on the basis of incompetent evidence. That CFHO-based evictions rest on whether a crime took place means that they are both factually and procedurally far more complicated than the average eviction proceeding, and more similar in many ways to a criminal proceeding than a civil one. One argument practitioners might make if seeking an injunction to halt the enforcement of CFHOs more broadly as opposed to challenging individual ordinances is that indigent tenants ought to have counsel provided to them in CFHO-based eviction proceedings; to do otherwise is a violation of their due process rights.

1. Require Jury Trials in CFHO Evictions

Tenants have a right to a jury trial in eviction proceedings,[231] but practitioners and reporters familiar with the topic indicate that the vast majority of eviction proceedings are decided by a judge.[232] Given the quasi-criminal nature of CFHO-based evictions, however, the default for these proceedings ought to be empaneling a jury and forcing the landlord (and the state interests they represent) to prove their case in front of them.

When the Supreme Court determined that individuals have a right to a jury trial in eviction cases, they found that either party in the proceeding has a right to affirmatively *demand* a jury.[233] But to ensure

230 Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

231 Pernell v. Southall Realty, 416 U.S. 363 (1974).

232 *See, e.g.*, Kori Suzuki, *Taking an Eviction Case to Court is Risky. But this Mom Decided to Try It*, KQED (July 29, 2022), https://www.kqed.org/news/11920788/taking-an-eviction-case-to-court-is-risky-but-this-mom-decided-to-try-it; Hon. Magaret Cammer, *How to Prepare for a Landlord-Tenant Trial*, Civ. Ct. of the City of N.Y. (May 2006), https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/L%26TPamphlet.pdf ("Trials in Housing Court are usually heard by a Judge without a jury."); Michael DeSantis, *How to Take an Eviction Case in Chicago to Trial*, Gardi, Haught, Fischer & Bhosale Ltd. (Oct. 5, 2017), https://www.gardilaw.com/take-eviction-case-chicago-trial/ ("Most likely the case will proceed to a bench trial as they are far more common and much easier to schedule.").

233 *Pernell*, 416 U.S. at 373.

a hearing that is "appropriate to the nature of the case,"[234] defendant-tenants ought to have to affirmatively waive their jury right, as they must in criminal cases. These evictions require that criminality be alleged and proved, and the state should not "presume a waiver of these . . . important federal rights from a silent record,"[235] as it cannot in criminal proceedings. Of course, tenants ought to be able to waive their right to a jury trial, and many of them surely will. However, to require that *pro se* tenants both know that they must demand a jury in order to have access to one and that they defend themselves in front of a jury if they cannot afford a lawyer is not meaningful access to an appropriate hearing in a quasi-criminal proceeding.

2. Reduce the Speed of Hearings in Eviction Court

Where data exists on the length of time of the average eviction hearing, it is shocking. In one of the only studies to exist on the topic, a group of law students at Chicago Kent observed Cook County, Illinois eviction court for an eleven-week period in 2003, updating a study from 1996. In the 1996 study, the students found the average length of an eviction hearing was three minutes.[236] In 2003, the average length of an eviction hearing had somehow *decreased* since 1996; the average length of the hearings they observed was one minute and forty-four seconds.[237] Unfortunately, these studies did not break out the underlying grounds for the eviction, nor has any study on the length of eviction hearings.

Due process is a nebulous concept, but it "requires, at a minimum . . . persons forced to settle their claims of right and duty through the judicial process must be given a **meaningful** opportunity to be heard."[238] What this meaningful opportunity looks like will vary depending on circumstances; "due process is flexible and calls for such procedural protections as the particular situation demands."[239] While there is not data showing the length of CFHO-based evictions as opposed to evictions based on other grounds, there is no reason to believe that these CFHO-based evictions are receiving additional care, particularly when coupled with the abysmal representation statistics in

234 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

235 Boykin v. Alabama, 395 U.S. 238, 243 (1969).

236 Karen Doran et al., *No Time for Justice: A Study of Chicago's Eviction Court* 4, Laws.' Comm. for Better Hous. (Dec. 2003), https://www.lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf.

237 *Id.*

238 Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

239 Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

housing court, which imply a lack of advocates who know to push on evidentiary admissibility and burdens at all.[240]

Assuming CFHO-based evictions are similarly brief, advocates must question if these proceedings offer sufficient time and opportunity to determine whether or not a criminal act was proved by a preponderance of the evidence. The speed of these hearings once again indicates that most eviction judges are taking landlords, and, by extension, the state and its police officers, at their word when a CFHO-based eviction proceeding takes place in their courtrooms. To properly litigate facts, to raise the myriad of evidentiary issues present in these cases, and to ultimately decide whether it has been proved that the tenant or a household member did, in fact, commit a criminal act, that it does not fall outside of the types of criminal acts that are barred as grounds for eviction, and that this determination is based entirely on admissible evidence, requires more. In contrast, the length of a criminal jury trial, where the same facts might be litigated as in a CFHO-based eviction, is measured in days—an average of five, as of 2009.[241] Tenants being evicted under CFHOs are once again having their right to due process violated.

B. *Rucker Explicitly Did Not Address These Challenges*

Before closing, this Article must acknowledge the bedrock upon which most CFHOs are founded: the Supreme Court's decision in *Rucker*, discussed in Section I.A. *Rucker* has been used as a kind of trump card in CFHO passage and enforcement,[242] used to claim that the Court has found these types of policies constitutional. However, the situation *Rucker* addressed was not analogous to local CFHOs, because it dealt specifically with federal public housing and its administration. Moreover, it explicitly stated that the decision was not generalizable to the kinds of challenges outlined herein.

Rucker was argued and decided based on statutory interpretation, with the ultimate issue being whether the statute allowing eviction based upon alleged criminal conduct was ambiguous.[243] The Court stated that

240 *See supra* Section III.A.1.

241 *See* Hon. Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 Geo. Wash. L. Rev. 99, 156 (2018) ("[A]s of 2009, the average length of a criminal jury trial was five days.").

242 *See generally* Robert Hornstein, *Litigating Around the Long Shadow of* Department of Housing and Urban Development v. Rucker: *The Availability of Abuse of Discretion and Implied Duty of Good Faith Affirmative Defenses in Public Housing Criminal Evictions*, 43 U. Toledo L. Rev. 1 (2011); Ramsey, *supra* note 3.

243 Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 130–32 (2002).

these evictions, overseen by the government, were constitutionally valid in part because "[t]he government is not attempting to criminally punish or civilly regulate respondents as members of the general populace. It is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required."[244] At its core, the constitutionality of the government's actions in *Rucker* were rooted in the fact that the Court was evaluating the government's actions towards *its own tenants*, as opposed to forcing evictions in privately owned homes "to criminally punish or civilly regulate."[245] Evictions under CFHOs are the antithesis of the Court's succinct summary of *why* the evictions at issue were legal in *Rucker*. It does not matter that the structure of CFHOs and the provisions in their mandatory addenda are often modeled on HUD's policies. The model was not what made these evictions permissible. Instead, they were permissible because the government was acting as a landlord, as opposed to a sovereign attempting to deprive tenants "of their property interest without any relationship to individual wrongdoing."[246]

CFHOs are exactly what the *Rucker* Court heavily implied are *illegal*: they are laws under which municipal governments act as sovereign to evict people without any relationship to individual wrongdoing. That CFHOs deputize the private landlords does not shield municipalities from litigation; in fact, it exacerbates their constitutional problems—the government is not the landlord of the property at issue. It is acting as sovereign to punish tenants for alleged, often unproven criminal activity by evicting them from properties the government does not even own.

The underlying Court of Appeals decision also raised concerns about due process violations in evictions based on unproven criminal activity. The Supreme Court addressed these concerns directly, holding that protecting due process fell to the state courts hearing the eviction proceedings, and that "individual factual disputes about whether the lease provision [in which tenants agree that criminal activity is a violation of their lease] was actually violated can, of course, be resolved in [eviction] proceedings."[247] The Court essentially held that underlying eviction proceedings must provide appropriate due process protections, and must ensure that the facts at issue are actually proved. State eviction courts are doing neither. Thus, those challenging CFHOs might actually wish to cite to *Rucker* directly. Rather than see Rucker as a defense

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244 *Id.* at 135.
245 *Id.*
246 *Id.*
247 *Id.* at 136.

of CFHOs, practitioners should instead rely on it as a challenge to them—a powerful inversion of the way *Rucker* has been interpreted by municipalities.

Conclusion: Evidentiary Arguments in Practice

Challenging CFHOs is incredibly difficult because they are piecemeal across municipalities in a country that does not reliably collect data on evictions. Challenges tend to focus on the underlying racism of CFHO enactment and enforcement[248]—aspects of CFHOs that must be centered when criticizing them from a systemic level. The FHA permits claims challenging practices "that have a disproportionately adverse effect on minorities: disparate impact and segregative effects."[249] In a country with well-documented racism ingrained at every[250] level[251] of the criminal legal system,[252] laws and policies that use arrest records as determinative of anything but racism have disparate racial impact.[253] But challenging CFHOs based on disparate impact of course requires proof of disparate impact in the specific municipality in which the CFHO is being challenged, and that proof requires substantial information gathering from an eviction court system that keeps very bad records and

248 *See generally* Archer, *supra* note 26; Werth, *supra* note 29; *see also* Sarah L. Swan, *Exclusion Diffusion*, 70 Emory L.J. 847, 874–78.

249 Archer, *supra* note 26, at 217.

250 *See, e.g.*, The Sent'g Project, *supra* note 26 ("African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely.").

251 *See, e.g.*, Sunghoon Roh & Matthew Robinson, *A Geographic Approach to Racial Profiling: The Microanalysis and Macroanalysis of Racial Disparities in Traffic Stops*, Police Q. 137, 157 (2009) ("In our study, [B]lack drivers were stopped more often than any other racial/ethnic groups.").

252 *See, e.g.*, U.S. Sent'g Comm'n, Demographic Differences in Sentencing: An Update to the 2012 Booker Report 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf ("Black male offenders received sentences on average 19.1 percent longer than similarly situated White male offenders during the Post-Report period (fiscal years 2012-2016), as they had for the prior four periods studied.").

253 *See, e.g.*, U.S. Equal Emp. Opportunity Comm'n, No. 915.002, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act (Apr. 25, 2012), https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions ("An employer's neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity (disparate impact liability).").

a police department that may have lobbied for the CFHO's enactment in the first place.

Moreover, it is, unfortunately, a reality that in the United States, the fastest way to undo a racist law is to challenge it in a way that does not acknowledge its racism, lest the Supreme Court once again be determine that the racism present does not rise to a "constitutionally significant"[254] level. The evidentiary problems pervasive throughout CFHO addenda allow practitioners to do so. Challenging CFHOs based on evidentiary issues arising from boilerplate language in the CFHO addenda allows CFHOs to be challenged using boilerplate arguments. It potentially allows for class action lawsuits. The Department of Justice has signaled that the time is ripe for challenging CFHOs nationwide.[255] Adding evidentiary arguments to an already robust toolkit of potential grounds to bring when challenging CFHOs could allow these challenges to be brought more rapidly and more broadly to accelerate the inevitable and necessary demise of CFHOs across the United States. This Article hopes to provide a helpful starting point for practitioners doing this important work.

254 McCleskey v. Kemp, 481 U.S. 279, 313 (1987).
255 KCAL News Staff, *supra* note 93.