THEIR HOME IS NOT THEIR CASTLE: SUBSIDIZED HOUSING'S INTRUSION INTO FAMILY PRIVACY AND DECISIONAL AUTONOMY*

MICHELLE Y. EWERT**

The anti-Black racism that has permeated public benefits programs and federal housing policy for over a century persists in subsidized rental housing. Public housing authorities ("PHAs") impede the ability of tenants—who are disproportionately Black women—to change household composition as their family situations change. PHAs routinely take months or longer to approve requests to add or remove household members and often require tenants to produce inaccessible third-party verification of a former household member's new address before removing them from official records. In failing to grant these requests promptly, PHAs infringe on tenants' fundamental right to privacy and family autonomy, impose a financial burden on tenants who have limited resources, and put tenants at risk of eviction if former household members are arrested for criminal activity.

This Article proposes workable solutions to these problems. First, PHA failure to timely respond to a request to adjust household composition should be treated as a constructive denial, as is done in fair housing law and other areas of administrative law. This strategy would allow tenants to pursue administrative and judicial review rights that already exist in public housing and the housing choice voucher program. Second, the statutory or regulatory schemes governing subsidized housing should be amended to include subpoena powers such as those that exist in the Administrative Procedure Act to allow tenants to access needed third-party records. These changes would protect the substantive and due process rights of vulnerable tenants and help dismantle the systemic racism that continues to plague public benefits programs.

** Associate Professor of Law, Washburn University School of Law. J.D., University of Wisconsin. M.P.P., University of Minnesota. I would like to thank Karen Wabeke, Kathryn Ramsey, Merrill and Priscilla Ewert, Michele Gilman, Jaime Lee, David Ewert, Frédéric Sourgens, and David Rubenstein for reading early drafts; my working group at the 2020 Clinical Law Review Writers' Workshop for the helpful feedback and invigorating conversation; Shambria Dale and Emily Lauritsen for their excellent research assistance; the students of the *North Carolina Law Review* for superb edits; Cricket Elrod for the many socially-distant porch gatherings during COVID; and the tenacious attorneys of the Homeless Persons Representation Project and other legal aid programs around the country who fight every day to promote access to housing and public benefits.

INTRODUCTION

After living in public housing for more than seven years, Mary Harris asked the Housing Authority of Norwalk to remove two adult daughters from her lease.[1] One daughter, Kim, had recently married.[2] Another daughter, Mary

1. Hous. Auth. of Norwalk v. Harris, No. SPNO 9009-10295, 1991 WL 270285, at *1–2 (Conn. Super. Ct. Nov. 14, 1991), *rev'd sub nom.* 611 A.2d 934 (Conn. App. Ct. 1992), *aff'd*, 625 A.2d 816 (Conn. 1993).

2. *Id.* at *1.

Jr., had moved in with her boyfriend.[3] The housing authority removed Kim from the lease but did not remove Mary Jr. because Ms. Harris had no third-party verification of her new address.[4] Mary Jr. was subsequently arrested for drug possession.[5] The housing authority then filed an eviction case against Ms. Harris for "nuisance" violations based on her daughter's alleged criminal activity.[6] A lengthy legal battle ensued.

While Ms. Harris was ultimately able to keep her housing, it took the assistance of several lawyers and an appeal to the Connecticut Appellate Court to resolve the matter.[7] Further, the appellate decision did not address the issue of the housing authority's failure to remove Mary Jr. from household records or its requirement that tenants produce third-party proof of new residence before allowing a tenant to remove a household member from the lease.[8]

Unfortunately, Ms. Harris's story is not an isolated incident. Similar policies and practices requiring third-party verification of changes in household composition exist in public housing authorities ("PHAs") across the country and radically restrict the ability of tenants to shape their family life.[9] Indeed, tenants often wait many months for PHAs to process their requests to add or remove household members from official records and many are unable to obtain counsel to challenge PHA actions.[10]

Ms. Harris's experience, and other subsidized tenants' inability to decide their own familial dynamic, is deeply demeaning and tramples on recognized liberty interests. Ms. Harris was deemed guilty by association for actions that had nothing to do with her household.[11] She was deprived of a voice as her request to change the composition of her household was summarily ignored. And she was only able to continue living in her home because she had the good fortune to have access to counsel. Those less fortunate than Ms. Harris, suffering a similar fate, must bear the harmful consequences of a wrongful eviction they have no real means to prevent. PHA mishandling of requests to

3. *Id.* at *2.

4. *Id.*

5. *Id.* at *1.

6. *Id.*

7. *See* Hous. Auth. of Norwalk v. Harris, 611 A.2d 934, 938 (Conn. App. Ct. 1992), *aff'd*, 625 A.2d 816 (Conn. 1993).

8. *See id.* at 935 (noting that the issue on appeal was whether the housing authority was required to include a specific type of notice giving Ms. Harris twenty-one days to rectify the misuse of her public housing).

9. *See generally, e.g.*, TOPEKA HOUS. AUTH., CHANGE IN INCOME OR FAMILY MEMBERS (2018), https://www.tha.gov/wp-content/uploads/2018/11/Income-Packet-Change-Booklet-112018.pdf [https://perma.cc/9MJK-U5N5] (requiring residents to fill out nine pages of forms to receive approval for a change in household membership and supply numerous supporting documents).

10. *See infra* Section I.D (discussing the harms of PHA delays and long processing times).

11. *See Hous. Auth. of Norwalk*, 611 A.2d at 937–38.

add or remove household members literally brings home the weight of structural racism to those who suffer from it the most—poor Black women.[12]

This Article argues that PHA procedures to add or remove household members deprive subsidized tenants of fundamental privacy and family formation rights. These rights, which protect parenting, partnering, and choices related to household composition, have been repeatedly upheld by the U.S. Supreme Court as fundamental to human dignity.[13] PHA practices consciously, consistently, and conspicuously violate these very rights of subsidized tenants by interfering with their ability to parent, partner, and choose the family structure they want. Further, these PHA practices constitute procedural due process violations. Low-income tenants are effectively denied redress when PHAs fail to issue written, appealable decisions or require action the tenants cannot possibly take.

This Article argues a point that should be accepted without question: people who live in subsidized housing—disproportionately Black women—must be no less secure in their constitutional rights than other people. For this to be more than wishful thinking, the demeaning procedures imposed upon these tenants by PHAs must change. Tenants must be able to treat a PHA's failure to respond as a constructive denial, triggering formal administrative and judicial review rights. Further, the federal government must revise subsidized housing programs to include subpoena power to compel witness attendance and the production of third-party records at hearings. Adopting these approaches would create administrative and judicial avenues for low-income tenants in subsidized housing to exercise more control over the lives of their families, thus protecting their fundamental rights.

Addressing this gap in the enforcement of constitutional rights of subsidized tenants is urgent because housing is already a precarious resource for low-income individuals, and low-income Black women in particular.[14] Matthew Desmond's work studying renters in Milwaukee helps illuminate the challenges facing low-income renters around the country.[15] The Milwaukee Area Renters Study found that twenty percent of Black female renters had been evicted at some point during their adult lives, in contrast to just over eight percent of

12. *See* Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88, 104 (2012) [Desmond, *The Reproduction of Urban Poverty*] ("[B]lack women are 'marked' by eviction at higher rates—collecting evictions on their records— . . . [and] are exposed to the hardship of eviction at higher rates as well. Black women are more likely to be evicted on paper and in practice.").

13. *See infra* Section II.A.

14. *See, e.g.*, Desmond, *The Reproduction of Urban Poverty*, *supra* note 12, at 90, 120–21; Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOCIO. REV. 117, 137–38 (2012).

15. *See* Desmond, *The Reproduction of Urban Poverty*, *supra* note 12, at 120–21.

Latinx female renters and just under seven percent of White female renters.[16] Poverty alone cannot explain this disparate impact. The eviction rate in poor White neighborhoods is nowhere near as high as in poor Black neighborhoods.[17]

What does begin to explain the disparate impact is overpolicing. Police harassment of Black communities directly impacts the housing rights of Black women. It was the arrest (not the conviction) of Ms. Harris's daughter, Mary Jr., that put the eviction proceeding against Ms. Harris in motion.[18] Racial profiling by police and disparate prosecution for drug offenses put families of color in more frequent contact with the criminal justice system than their White counterparts.[19] The link between these arrests (not convictions) and housing security through breach of lease cases is shameful.[20] It is even more upsetting when the person arrested by the police no longer lives in the household later subject to eviction.

Arrests and evictions in the past make it harder to find stable housing in the future. In discussing the systemic barriers to stable housing, Matthew Desmond says, "Because [B]lack men [are] disproportionately incarcerated and [B]lack women disproportionately evicted, uniformly denying housing to applicants with recent criminal or eviction records [has] an incommensurate impact on African Americans."[21] Tragically, systemic racism built into subsidized rental housing programs often makes housing intended for the most

16. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 299 (2016) [hereinafter DESMOND, EVICTED].

17. *Id.* at 359 ("In Milwaukee's poorest [B]lack neighborhoods, 1 male renter in 33 was evicted through the court system each year, compared to 1 male renter in 134 and 1 female renter in 150 in the city's poorest [W]hite neighborhoods.").

18. *See* Hous. Auth. of Norwalk v. Harris, No. SPNO 9009-10295, 1991 WL 270285, at *1 (Conn. Super. Ct. Nov. 14, 1991), *rev'd sub nom.* 611 A.2d 934 (Conn. App. Ct. 1992), *aff'd*, 625 A.2d 816 (Conn. 1993).

19. For discussions of racial profiling and disparate arrest rates, see generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (discussing racial profiling, pretextual police stops, and disparities in arrest rates for drug crimes by race); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999) (analyzing racial profiling and pretextual stops in Ohio and other states through resident interviews, court statistics, and other studies); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001) (discussing data and law enforcement justifications for racial profiling); Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439 (2004) (reviewing case law and studies related to racial profiling of Black men).

20. For analysis of the link between incarceration and homelessness, see CATERINA GOUVIS ROMAN & JEREMY TRAVIS, THE URBAN INSTITUTE, TAKING STOCK: HOUSING HOMELESSNESS, AND PRISONER REENTRY, at iii–iv (2004); LEGAL ACTION CENTER, HELPING MOMS, DADS & KIDS TO COME HOME: ELIMINATING BARRIERS TO HOUSING FOR PEOPLE WITH CRIMINAL RECORDS 1–2 (2016); STEPHEN METRAUX, CATERINA G. ROMAN & RICHARD S. CHO, INCARCERATION AND HOMELESSNESS 9–8 (2007); Brianna Remster, *A Life Course Analysis of Homeless Shelter Use Among the Formerly Incarcerated*, 36 JUST. Q. 437, 437 (2019).

21. DESMOND, EVICTED, *supra* note 16, at 252.

vulnerable people unattainable, and even after admission to subsidized housing, tenants are subject to PHA procedures that threaten the stability of their living situation.[22]

Under federal regulations, subsidized housing tenants must receive permission from the PHA to add or remove a household member.[23] The rationale for this policy is reasonable. Because PHAs use total household income to determine the tenant's share of rent, they must know the composition of the household so they can include everyone in the income calculation.[24] Additionally, federal law prohibits admission of people with certain criminal backgrounds into subsidized housing.[25] PHAs must therefore screen potential household members to determine eligibility. This policy becomes problematic, however, when PHAs fail to respond in a timely way to requests to add or remove household members.[26]

Since federal law imposes no time limits by which PHAs must respond to household change requests, many PHAs wait months, if not longer, to approve or deny requests.[27] Further, requirements that tenants produce third-party verification of a former household member's new residence can prevent the processing of a removal request, since many subsidized tenants do not have access to the necessary third-party records.[28] These practices can—and do—lead to homelessness for some.

When PHAs fail to respond to requests to remove someone from the official records, there are serious consequences to the tenants. They pay higher than necessary rent because the income of the former household member is still included when calculating household income.[29] Similarly, if a former household member is arrested for criminal activity, that activity can be imputed to the household, as happened to Ms. Harris, putting the tenant at risk for eviction even though that former household member no longer lives in the unit. The financial costs and risk of eviction can be devastating to the family.

22. *See infra* Section II.C (discussing institutionalized racism as one barrier to accessing public benefits for families of color); *see also infra* Section III.B (discussing procedural due process deficits in subsidized housing).

23. *See* 24 C.F.R. §§ 960.257(b)(2), 982.551(h) (2020).

24. *See* 42 U.S.C. § 1437a(a)(1).

25. *See* 24 C.F.R. §§ 960.204(a), 982.553(a) (2020).

26. Many private landlords also conduct criminal background checks on applicants and new household members and screen for income; some of those private landlords are likely also slow in responding to tenant requests to adjust household composition. *See, e.g.*, David Thatcher, *The Rise of Criminal Background Screening in Rental Housing*, 33 J.L. & SOC. INQUIRY 5 (2008). However, this Article focuses on unreasonable delays by PHAs in screening new household members and approving household composition changes.

27. *See infra* note 90 and accompanying text (discussing how the Housing Authority of Baltimore City took four months to issue a decision about removal of a household member).

28. *See infra* note 269 (discussing the use of third-party records and third-party verification).

29. *See infra* note 347 and accompanying text (discussing the fact that PHAs often do not adjust rent after changes in the household).

PHA failure to respond to a request to add a household member is equally harmful because it means that the new family member cannot legally join the household. Tenants who allow the person to move in without PHA permission risk eviction for having an unauthorized occupant. If they wait for official permission, the partner or other family member might have to wait months before moving into the unit, destabilizing family life.

This Article proposes necessary solutions to these problems. It proceeds in three parts. Part I focuses on subsidized rental housing, describing the obligation of PHAs to screen applicants and calculate household income. Then, it examines the problems stemming from the failure of PHAs to approve requests to change household composition in a timely manner. Part II discusses case law establishing fundamental rights related to family privacy and autonomy. It then contrasts these rights with the long history of government regulation of low-income families of color through restrictions on family formation during and after slavery as well as discriminatory public benefits programs in the modern era. This Article shows how constitutional violations against Black women are inherent in the social safety net, including subsidized housing. Part III argues that the PHA requirement to produce often unattainable third-party verification and unreasonably long response times for requests to change household composition violate procedural due process. To address these due process problems, this part proposes that unreasonable delays be treated as constructive denials, triggering administrative and judicial review rights, just as unreasonable delays are addressed in fair housing law and other areas of administrative law. This part further proposes the creation of subpoena power such as the one existing under the Federal Administrative Procedure Act ("APA").[30]

I. PHA PROCEDURE FOR ADDING OR REMOVING HOUSEHOLD MEMBERS

The United States Housing Act of 1937[31] created a mechanism for the federal government to "provide financial assistance to the States and political subdivisions thereof for the elimination of unsafe and insanitary housing conditions, for the eradication of slums, [and] for the provision of decent, safe, and sanitary dwellings for families of low income."[32] Through the 1937 act, the government set up the framework for the public housing program, which it later expanded through the Housing Act of 1949.[33] Twenty-five years after that

30. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

31. Pub. L. No. 75-412, 50 Stat. 888 (codified as amended in scattered sections of 42 U.S.C.).

32. *Id.* at 888.

33. Pub. L. No. 81-171, 63 Stat. 413 (codified as amended at 12 U.S.C. § 1701h and in scattered sections of 42 U.S.C.). In the public housing program, local PHAs own and operate rental units, including scattered site single-family homes and multi-family complexes. *See HUD's Public Housing*

expansion, Congress further expanded federal subsidized rental housing to include the voucher program, first known as "Section 8" and now known as the Housing Choice Voucher Program ("HCVP").[34]

Subsidized housing is a critical part of the social safety net for low- and moderate-income households. According to the Department of Housing and Urban Development ("HUD"), over 800,000 households in the United States, encompassing nearly 1.7 million people, were assisted by public housing in the reporting period from March 1, 2019 through June 30, 2020.[35] During that same reporting period, over four million people, representing almost two million households, were assisted by tenant-based voucher programs.[36] People who live in subsidized housing are able to devote more of their income to health care, food, and transportation; whereas low-income renters on the private market have only a fraction of their income available to meet other basic needs after paying for rent.[37] Desmond's 2011 study showed that one-third of the tenants in Milwaukee eviction court spent at least eighty percent of their income on rent, and a majority spent at least half of their income on rent.[38] Unfortunately, the COVID-19 pandemic and the attendant economic crisis exacerbated housing instability, particularly for households of color.[39]

Given the incredible rent burden on low-income renters in the private market, demand for subsidized rental housing far exceeds supply.[40] One report estimates that the number of existing subsidized housing units could meet the need of only one quarter of households that were financially eligible for

Program, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/topics/rental_assistance/phprog [https://perma.cc/3W6X-VEM5]. For a description of the program, see *id.*

34. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended in scattered sections of 12 U.S.C., 20 U.S.C., and 42 U.S.C.). In the HCVP, PHAs issue vouchers that allow tenants to rent units on the private rental market at a reduced rate. *See Housing Choice Vouchers Fact Sheet*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet [https://perma.cc/2UEA-JKWG]. For a description of the voucher program, see *id.*

35. *See Resident Characteristics Report*, U.S. DEP'T HOUS. & URB. DEV., https://pic.hud.gov/pic/RCRPublic/rcrmain.asp [https://perma.cc/6Y4X-R59B].

36. *Id.*

37. DESMOND, EVICTED, *supra* note 16, at 302.

38. *Id.* at 97.

39. Yung Chun, Stephen Roll, Selina Miller, Hedwig Lee, Savannah Larimore & Michal Grinstein-Weiss, *Racial and Ethnic Disparities in Housing Instability During the COVID-19 Pandemic* 4 (Soc. Pol'y Inst. Wash. Univ. St. Louis, Working Paper No. 38, 2020); Yung Chun & Michal Grinstein-Weiss, *Housing Inequality Gets Worse as the COVID-19 Pandemic Is Prolonged*, BROOKINGS: BLOG (Dec. 18, 2020), https://www.brookings.edu/blog/up-front/2020/12/18/housing-inequality-gets-worse-as-the-covid-19-pandemic-is-prolonged/ [https://perma.cc/4CKT-AABC]; BRADLEY L. HARDY & TREVON D. LOGAN, HAMILTON PROJECT, ESSAY 2020-17, RACIAL ECONOMIC INEQUALITY AMID THE COVID-19 CRISIS 6 (2020), https://www.hamiltonproject.org/assets/files/EA_HardyLogan_LO_8.12.pdf [https://perma.cc/A97L-SF2B].

40. DESMOND, EVICTED, *supra* note 16, at 59, 302–03; EDWARD G. GOETZ, NEW DEAL RUINS: RACE, ECONOMIC JUSTICE, & PUBLIC HOUSING POLICY 45 (2013).

federally subsidized rental housing.[41] In 2015, around six million households qualified for HCVP vouchers but did not receive one.[42] Many PHAs have closed their waiting lists so people in need of subsidized housing cannot even submit new applications.[43]

Limited resources devoted to subsidized rental housing is not the only reason households have difficulty accessing federally subsidized housing. Over the years, racial discrimination has played a significant role in shaping these programs. Early public housing projects were racially segregated.[44] Later public housing developments were concentrated in low-income neighborhoods of color rather than dispersed throughout metro areas, which further entrenched segregation and limited residents' economic opportunities.[45] Additionally, the Federal Housing Administration and Veterans Administration initially refused to insure mortgages for Black applicants or for applicants of any color in Black neighborhoods, making it harder for renters of color to become homeowners.[46]

The enactment of the Fair Housing Act ("FHA")[47] in 1968 prohibited housing discrimination based on race, color, religion, and national origin.[48] Subsequent amendments to the FHA added sex, disability, and familial status as protected classes.[49] Further, fair housing law has evolved to recognize

41. Douglas Rice & Barbara Sard, *Decade of Neglect Has Weakened Federal Low-Income Housing Programs*, CTR. ON BUDGET & POL'Y PRIORITIES 9 (Feb. 24, 2009), https://www.cbpp.org/sites/default/files/atoms/files/2-24-09hous.pdf [https://perma.cc/VM9G-4YCS].

42. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 209 (2017).

43. For example, the Housing Authority of Baltimore City's waiting lists for public housing and both HCVP tenant-based and project-based vouchers are currently closed. *Public Housing and RAD*, HOUS. AUTH. OF BALT. CITY, https://www.habc.org/habc-information/programs-departments/public-housing/ [https://perma.cc/LV2J-7Q8E]; *HCVP*, HOUS. AUTH. OF BALT. CITY, https://www.habc.org/habc-information/programs-departments/hcvp/ [https://perma.cc/9NNZ-H2GM]. The Chicago Housing Authority's HCVP waiting list is also closed. *Housing Choice Voucher (HCV) Program*, CHI. HOUS. AUTH., https://www.thecha.org/residents/housing-choice-voucher-hcv-program [https://perma.cc/6CFU-JA7P]. The New York City Housing Authority's HCVP waiting list has been closed since December 10, 2009. *Applying for Section 8*, N.Y.C. HOUS. AUTH., https://www1.nyc.gov/site/nycha/section-8/applicants.page [https://perma.cc/6HRR-PRN7]; *see also* DESMOND, EVICTED *supra* note 16, at 59 (noting that "the list" to apply for housing voucher assistance in Milwaukee had not accepted new applicants for more than four years).

44. GOETZ, *supra* note 40, at 36–37; ROTHSTEIN, *supra* note 42, at 19.

45. GOETZ, *supra* note 40, at 31; DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 55–57 (1993).

46. MASSEY & DENTON, *supra* note 45, at 51–64; ROTHSTEIN, *supra* note 42, at 13.

47. Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended in scattered sections of 42 U.S.C.).

48. § 804, 82 Stat. at 83.

49. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808, 88 Stat. 633, 728 (1974) (codified as amended at 12 U.S.C. § 1735f-5); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620 (1988) (codified as amended at 42 U.S.C. § 3604).

disparate impact as a cause of action under federal fair housing law, in addition to disparate treatment.[50]

Despite these growing protections, however, federal housing policies that produce discriminatory effects still persist. All public housing policies have a disparate impact on women of color, who are disproportionately represented in subsidized rental housing.[51] While less than 13% of the U.S. population in 2019 identified as Black (non-Hispanic), 43% percent of public housing residents for the 2020 reporting period were Black (non-Hispanic).[52] Furthermore, nationwide in 2019 only 12.3% of households in the United States were female-headed family households, but 74% of public housing households in the 2020 reporting period were female headed and 33% were female headed with children.[53] This means that policies that harm subsidized tenants have a disproportionately negative impact on Black women.[54] One such policy involves lengthy delays in PHA approval of changes to household composition.

The rights of subsidized tenants to change household composition exist in tension with PHAs' interest in efficiently administering subsidized housing programs. PHAs have a clear interest in knowing and approving who lives in subsidized rental units. They want to make sure people who live in subsidized housing meet federal eligibility requirements and are not a threat to other tenants or community members.[55] Additionally, they want their tenants to pay the proper amount of rent.[56]

50. After decades of the circuit courts recognizing disparate impact as a cause of action under federal fair housing law, HUD issued a regulation in 2013 officially recognizing disparate impact as a theory of liability. 24 C.F.R. § 100.500 (2020). In 2015 the Supreme Court upheld disparate impact as a cause of action under the FHA. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015).

51. Michelle Y. Ewert, *One Strike and You're Out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violates Due Process and Fair Housing Principles*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 57, 97–101 (2016).

52. *Hispanic or Latino Origin by Race*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=race&d=ACS%201-Year%20Estimates%20Detailed%20Tables&tid=ACSDT1Y2019.B03002&hidePreview=false [https://perma.cc/M3ZP-G942]; *Picture of Subsidized Households*, U.S. DEP'T. OF HOUS. & URB. DEV., https://www.huduser.gov/portal/datasets/assthsg.html#2009-2020_data [https://perma.cc/CJ7D-QVHX].

53. *Households and Families*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=S11&d=ACS%201-Year%20Estimates%20Subject%20Tables&tid=ACSST1Y2019.S1101&hidePreview=false [https://perma.cc/7HCF-Q667]; *Picture of Subsidized Households*, *supra* note 52.

54. Ewert, *supra* note 51, at 97–101.

55. U.S. DEP'T OF HOUS. & URB. DEV., OFF. OF PUB. & INDIAN HOUS., OFF. OF PUB. HOUS. & VOUCHER PROGRAMS, PUB. HOUS. MGMT. & OCCUPANCY DIV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 53 (2003), https://www.hud.gov/sites/documents/DOC_10760.PDF [https://perma.cc/2Z5Y-4MTA].

56. *See Housing Choice Vouchers Fact Sheet*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet [https://perma.cc/2UEA-JKWG].

Federal law creates the framework for how PHAs screen applicants and determine rent. However, as the rest of this part shows, the implementation of these policies makes it difficult for tenants to easily change household composition and interferes with their ability to exercise family autonomy. Because tenants' fundamental rights are at stake,[57] PHAs must utilize procedures that protect procedural due process when dealing with requests to change household composition. The current regulations are inadequate.

A. *Criminal Background Screening*

Before admission into subsidized housing, applicants undergo criminal background checks.[58] The federal regulations governing subsidized rental housing impose very few requirements for criminal background screening of applicants and new household members. Indeed, there are only two types of criminal records that create lifetime ineligibility for subsidized housing under federal law. First, a person is ineligible for subsidized rental housing for life if they are subject to a lifetime sex offender registration requirement.[59] Second, a person is ineligible for life if they have been convicted of manufacturing methamphetamine on federally subsidized housing property.[60] Other criminal activity can lead to temporary ineligibility. For example, PHAs must deny admission to people who are currently engaged in illegal drug use or whose pattern of illegal drug use "may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents."[61] PHAs must also deny admission to people whose current alcohol abuse "may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents."[62]

Other than these few specific prohibitions, the federal rules governing subsidized rental housing give PHAs substantial discretion to determine their own eligibility criteria based on criminal records.[63] Indeed, it is up to local PHAs to determine what sorts of drug-related criminal activity, violent criminal activity, or other criminal activity make applicants ineligible to receive a HCVP voucher.[64] Further, it is up to individual PHAs to determine how far back into a person's criminal history they look when determining eligibility for the voucher program; all the federal regulations require is that the lookback period

57. See *infra* Part II.

58. 24 C.F.R. § 982.553(a)(2)(i) (2020).

59. *Id.* §§ 960.204(a)(4), 982.553(a)(2)(i).

60. *Id.* §§ 960.204(a)(3), 982.553(a)(1)(ii)(C).

61. *Id.* §§ 960.204(a)(2), 982.553(a)(1)(ii)(B).

62. *Id.* §§ 960.204(b), 982.553(a)(2)(ii)(C)(3).

63. *Id.* § 982.553(a)(2)(ii)(A) ("The PHA *may* prohibit admission . . . ."); *id.* § 960.202(a)(1) ("The PHA shall establish and adopt written policies for admission of tenants."); *id.* § 960.203(c) ("[T]he PHA is responsible for screening family behavior and suitability for tenancy. The PHA *may* consider . . . .") (emphasis added).

64. *Id.* § 982.553(a)(2)(ii)(A).

is a "reasonable time before the admission."[65] The federal regulations similarly give PHAs broad discretion when determining criminal background screening policies for admission to public housing. The regulations say PHAs may consider "all relevant information, which may include, but is not limited to . . . [a] history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety or welfare of other tenants."[66]

Because of the substantial discretion afforded PHAs, rules vary greatly by jurisdiction regarding the length of the lookback period and what activity or criminal case disposition trigger ineligibility. Some PHAs do not distinguish between misdemeanor or felony charges, and some have lengthy lookback periods that can be ten years or longer.[67] Other PHAs have relatively short lookback periods and distinguish between misdemeanors and felonies.[68] These inconsistencies in screening procedures and the broad discretion afforded to PHAs lead to unequal access to subsidized housing between jurisdictions, especially in communities with aggressive racial profiling by law enforcement.

B. *Rent Determinations*

PHAs also examine applicants' household income to determine eligibility and calculate the tenants' share of rent.[69] Subsidized rental housing, including both public housing and the HCVP, is reserved for low-income families.[70] To

65. *Id.*

66. *Id.* § 960.203(c)(3).

67. The Lawrence-Douglas County Housing Authority in Kansas looks back five years for both misdemeanor and felony convictions and also considers arrest without conviction if there is "other evidence that establishes that the person engaged in disqualifying criminal activity." LAWRENCE-DOUGLAS CNTY. HOUS. AUTH., ADMINISTRATIVE / ACOP PLAN: COMBINED ADMINISTRATIVE PLAN AND ADMISSION & CONTINUED OCCUPANCY POLICIES AND METHODS OF ADMINISTRATION FOR ALL LDCHA PROGRAMS 21 (2020), https://storage.googleapis.com/wzukusers/user-31752601/documents/969aae83f0b34d599f5e30057de77d06/ADMIN-ACOP%20Master%20Copy%20Amended%2010-26-2020.pdf [https://perma.cc/D2DJ-EL7P]. Still other PHAs have even longer lookback periods. Until as recently as 2016, the Little Rock Housing Authority, also known as the Metropolitan Housing Alliance, looked back seven years for felony convictions, and a study by the Sargent Shriver Center on Poverty Law identified many PHAs with lookback periods of ten years or more. MARIE CLAIRE TRAN-LEUNG, WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 12–13 (2015), https://www.povertylaw.org/article/when-discretion-means-denial/ [https://perma.cc/2CEK-9C4J]; METRO. HOUS. ALL., METROPOLITAN HOUSING ALLIANCE: ADMISSIONS AND CONTINUED OCCUPANCY POLICY 18 (2016), http://lrhousing.org/wp-content/uploads/2016/04/ACOP-2016_HUD-Approved.pdf [https://perma.cc/9SUS-GXU2].

68. For example, the Housing Authority of Baltimore City looks back eighteen months for misdemeanor convictions and three years for felony convictions. HOUS. AUTH. OF BALT. CITY, PUBLIC HOUSING ADMISSIONS & CONTINUED OCCUPANCY POLICIES 4–15 (2019), https://www.habc.org/media/2449/the-fy-2021-public-housing-acop_r2.pdf [https://perma.cc/ZKE9-S2QQ].

69. 24 C.F.R § 5.628(a) (2020).

70. 42 U.S.C. § 1437a(a)(1).

make housing affordable for these low-income tenants, income-based rent is capped at thirty percent of household adjusted income.[71] The federal government gives PHAs great discretion in determining what documentation participants must provide to prove household income under the HCVP.[72] The regulations governing public housing tenancies are a bit more specific. They require PHAs to either obtain third-party verification of the household's income and assets or to include documentation for why third-party verification is not available.[73] For both programs, however, PHAs must consider all sources of income for all household members when calculating household income.[74] Consequently, PHAs must know the identity of everyone in the household to correctly determine the appropriate amount of rent.

In addition to the threshold income screening that occurs at the time of admission, PHAs conduct periodic income screenings to make sure rent is still correct. Generally, these screenings occur on an annual basis.[75] However, tenants can request interim reexaminations if their household income changes.[76] PHAs have the discretion to determine when and how tenants report income changes.[77] PHAs might require tenants to provide notification of income changes in writing or within a certain period of time following the change. For example, the Lawrence-Douglas County Housing Authority in Kansas requires tenants to report income changes within ten calendar days of the change.[78] Other PHAs have slightly longer reporting periods, which allow tenants more time to gather needed documentation to support the request.[79]

C. *Proving Household Composition Changes*

Because rent is based on total household income and there are restrictions on who can live in subsidized rental housing, federal regulations require HCVP participants to notify PHAs of the birth, adoption, or court-ordered custody of

71. *Id.* The "Brooke Amendment" to the housing program originally capped the tenant's share of rent at twenty-five percent of household income. *See* Housing and Urban Development Act of 1969, Pub. L. No. 91-152, § 213(a), 83 Stat. 379, 389 (codified as amended at 42 U.S.C. § 1437a(a)).

72. 24 C.F.R. § 982.516(f) (2020).

73. *Id.* § 960.259(c)(1).

74. 42 U.S.C. § 1437a(b)(4).

75. 24 C.F.R. §§ 960.257(a)(1), 982.516(a)(1).

76. *Id.* §§ 960.257(b)(1), 982.516(c)(2).

77. *Id.* §§ 960.257(d), 982.516(d).

78. LAWRENCE-DOUGLAS CNTY. HOUS. AUTH., *supra* note 67, at 79.

79. The Housing Authority of Baltimore City requires tenants to report income changes in writing within ten working days. HOUS. AUTH. OF BALT. CITY, PUBLIC HOUSING ADMISSIONS & CONTINUED OCCUPANCY POLICIES 14-9 (2019), https://www.habc.org/media/2449/the-fy-2021-public-housing-acop_r2.pdf [https://perma.cc/J55G-PQ4Z]. The Topeka Housing Authority is more lenient, allowing subsidized tenants to report changes in income in writing within thirty days of the change. *Tenant Declaration*, TOPEKA HOUS. AUTH. (Aug. 29, 2018), https://www.tha.gov/wp-content/uploads/2018/11/Income-Packet-Change-Booklet-112018.pdf [https://perma.cc/R2MG-M4ZY].

minor children and obtain approval before adding other people to the household.[80] For similar reasons, HCVP tenants must "promptly notify" the PHA if a family member no longer lives in the unit.[81] Federal regulations also require PHAs to create policies for the reporting of household composition changes by public housing tenants[82] and require public housing tenants to provide the requested information related to household composition.[83]

The regulations are silent, however, as to what documentation the PHAs should require to prove a change in household composition. Some, like the Housing Authority of Norwalk referenced in the Introduction,[84] require third-party verification that a former household member has a new residence before officially removing them from the household records.[85] As another example, the Topeka Housing Authority requires that a head of household provide a copy of the former household member's new lease, a copy of a utility bill showing their new address, or a statement from the former household member's new landlord before it will remove the former household member from the household's official records.[86]

It might be easy for subsidized tenants to comply with this requirement if they maintain a good relationship with the former household member and that person is able to produce documentation of their new residence. If the former household member will not cooperate with requests for information, however, there is little the tenant can do to obtain third-party verification of the former household member's new address. Housing providers generally refuse to release their tenants' personal information without the tenants' consent or a court order.[87] The requirement for third-party verification punishes tenants who no longer have a good relationship with a former household member, whether due

80. 24 C.F.R. § 982.551(h)(2).

81. *Id.* § 982.551(h)(3).

82. *Id.* § 960.257(b)(2).

83. *Id.* § 960.259(a)(2).

84. *See supra* notes 1–9 and accompanying text.

85. Hous. Auth. of Norwalk v. Harris, No. SPNO 9009-10295, 1991 WL 270285, at *2 (Conn. Super. Ct. Nov. 14, 1991), *rev'd sub nom.* Hous. Auth. of Norwalk v. Harris, 611 A.2d 934 (Conn. App. Ct. 1992), *aff'd*, 625 A.2d 816 (Conn. 1993).

86. TOPEKA HOUS. AUTH., CHANGE IN INCOME OR FAMILY MEMBERS (2018), https://www.tha.gov/wp-content/uploads/2018/11/Income-Packet-Change-Booklet-112018.pdf [https://perma.cc/R2MG-M4ZY].

87. Such prohibitions might be codified in a state's residential landlord-tenant act. *See, e.g.*, VA. CODE ANN. § 55.1-1209(A) (LEXIS through the 2020 Special Sess. I of the Gen. Assemb.) (requiring that without the tenant's prior written consent, a subpoena, or some other lawful basis, "[n]o landlord or managing agent shall release information about a tenant or prospective tenant in the possession of the landlord or managing agent to a third party"). Additionally, landlord policies related to industry best practices might prohibit disclosure. *See, e.g.*, *Code of Ethics and Standards of Professionalism, art. 1-5*, NAT'L ASS'N RESIDENTIAL PROP. MANAGERS, https://www.narpm.org/code-of-ethics/ [https://perma.cc/Z3UH-FCYK] ("The Property Manager shall not reveal confidential information of Clients, Tenants or others . . . [and] shall take all reasonable precautions to protect confidential information.").

to familial strife or more serious circumstances involving domestic violence or sexual violence.

Additionally, the third-party verification requirements can cause problems if the former household member lacks stable housing. Many low-income people who are evicted by landlords or move out of the family home end up bouncing around between emergency shelters, cheap hotels, the homes of other family or friends, or squatting in vacant units, sometimes staying only a night at a particular place; other times, they may remain there for weeks or months before having to find somewhere else to stay.[88] These individuals who are squatting, couch surfing, or moving between emergency shelters cannot provide proof of new permanent residence because they simply do not have a permanent residence. In that instance, the subsidized tenant might be unable to update their household composition if the PHA insists on waiting to remove the former household member from the public housing lease or HCVP records until there is third-party verification.

D. *Harms Caused by PHA Delays in Issuing a Decision*

In addition to a lack of clarity as to *how* tenants should prove household composition changes, neither the HCVP nor the public housing regulations impose a deadline by which PHAs must approve household composition changes. The regulations governing both programs merely state that PHAs must conduct an interim reexamination "within a reasonable time after the family request."[89] The regulations do not specify what amount of time is reasonable. Thus, it is up to PHAs to determine the speed with which they respond to these requests. Some PHAs make determinations promptly, while others take months to process requests.[90]

PHA response time to requests to add or remove household members from official records can effectuate tenants' exercise of family privacy and family autonomy rights (by helping create the household that tenants desire) or interfere with those fundamental rights (by preventing the household that

88. *See generally* DESMOND, EVICTED, *supra* note 16 (following eight families in the poorest neighborhoods of Milwaukee as they struggle with eviction).

89. 24 C.F.R. §§ 960.257(b)(2), 982.516(c)(2) (2020).

90. For example, in a case involving the Housing Authority of Baltimore City, the PHA took almost four months to issue a decision on a request to remove one household member and add another. *See* Matthews v. Hous. Auth. of Balt. City, 88 A.3d 852, 854 (Md. Ct. Spec. App. 2014). Similarly, the Housing Authority of the City of Annapolis repeatedly took more than four months to process income recertification requests following reports of income reductions. *See* Danielle Ohl, Talia Buford & Beena Raghavendran, *An Annapolis Woman Was Sued Over Rent She Didn't Owe. It Took Seven Court Dates To Prove She Was Right*, CAP. GAZETTE (Aug. 25, 2020), https://www.capitalgazette.com/news/ac-cn-annapolis-housing-authority-rent-longform-20200825-32vp7wne4ra4beqbbi2kmfjb3i-htmlstory.html [https://perma.cc/42Q7-ZHAA]. Based off author's experience, advocates report lengthy delays around the country, sometimes even longer than four months.

tenants desire). The harms that tenants experience when PHAs fail to respond in a timely way to such requests are immediate and significant. PHA failure to approve the addition of a family member disrupts family life. If the family member waiting to be added is the tenant's spouse or partner, the tenant is deprived of their companionship and support if they wait for PHA approval to have them move in. Moreover, the spouse or partner is unable to help with childcare and participate in the daily life of the family. If the family member waiting to be added is the tenant's adult child, grandchild, or other family member with no other place to stay, the tenant must bear the strain of seeing their loved one unstably housed. This is particularly true during times of economic stress such as the Great Recession and COVID-19 pandemic, when some people were forced to move back to live with their parents or grandparents because of job loss.[91] In sum, while waiting for PHA approval, a person cannot be integrated into the life of the family in the same way as if they lived in the unit.

On the other hand, the tenant could always choose to have the family member move in before the PHA grants approval. However, the consequences of having an unauthorized occupant could be disastrous for the family. Federal regulations allow PHAs to terminate HCVP assistance to a family if they violate their family obligations under the program.[92] One significant obligation is to ensure that only allowed household members live in the subsidized unit.[93] HCVP participants who allow unauthorized occupants risk termination from the voucher program.[94] Similarly, public housing tenants who allow unauthorized occupants risk eviction for failure to cooperate with PHA requirements related to family composition.[95] The tenants can even face criminal prosecution for larceny and filing a false instrument.[96]

PHA delays in removing a former household member from the official records can be equally harmful. Until the PHA removes that person, their

91. *See generally* ZHENCHAO QIAN, U.S. 2010 PROJECT, DURING THE GREAT RECESSION, MORE YOUNG ADULTS LIVE WITH PARENTS (2012), https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report08012012.pdf [https://perma.cc/3MU7-X7DH] (describing how the Great Recession was a large factor in young people living with their parents); Richard Fry, Jeffrey S. Passel & D'vera Cohn, *A Majority of Young Adults in the U.S. Live with Their Parents for the First Time Since the Great Depression*, PEW RSCH. CTR. (Sept. 4, 2020), https://www.pewresearch.org/fact-tank/2020/09/04/a-majority-of-young-adults-in-the-u-s-live-with-their-parents-for-the-first-time-since-the-great-depression/ [https://perma.cc/3SHW-8GTG] (noting that the coronavirus outbreak has pushed millions of Americans, especially young adults, to move in with family members).

92. 24 C.F.R. § 982.552(c)(1)(i) (2020).

93. *Id.* § 982.551(h)(2).

94. *Id.* § 982.552(c)(1)(i); *see, e.g.*, Basco v. Machin, 514 F.3d 1177, 1179 (11th Cir. 2008), *overruled on unrelated grounds by* Yarbrough v. Decatur Hous. Auth., 931 F.3d 1322 (11th Cir. 2019).

95. 24 C.F.R. § 960.259(a)(2) (2020).

96. *See* McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, 37 CLEARINGHOUSE REV. J. POVERTY & POL'Y 56, 56 (2003).

income is still counted as part of household income, which can set the household's rent higher than it should be. By overpaying rent, the tenant has less money available to meet other household needs. Worse, if the tenant is unable to pay the inflated amount, they are at risk for eviction due to failure to pay rent. Any amount of money the tenant overpays each month until the PHA corrects its records might seem small to the PHA but could be consequential for a household dependent on means-tested benefits or low-wage work.

PHA delays in removing former household members from official records and third-party verification requirements also put survivors of domestic violence at risk of future abuse. Scholars and advocates have long noted that domestic violence is a leading cause of homelessness among women and that access to affordable housing is critical in helping women leave abusive relationships.[97] The third-party verification requirement is especially dangerous for survivors of domestic violence, who risk being newly victimized if they are forced to interact with a former, abusive household member to obtain records relating to their new housing.[98] Making a tenant's housing stability dependent on the cooperation of a former abusive household member gives that abuser ongoing control over the survivor.

Additionally, PHA failure to remove a former household member from the official records in a timely way puts the tenant at risk for eviction under the one-strike eviction policy if that former household member is charged with

97. *See generally* U.S. CONF. OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES (2013), https://mazon.org/assets/Uploads/Hunger-and-Homelessness-Survey.pdf [https://perma.cc/D3UB-P392] (identifying lack of affordable housing and domestic violence as two of the main causes of homelessness among families with children); Margaret E. Johnson, *A Home with Dignity: Domestic Violence and Property Rights*, 2014 B.Y.U. L. REV. 1, 1–2 (2014) (arguing for the creation of a comprehensive theory that expands existing laws to promote dignity, end domestic violence, and ensure greater home access); Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237, 244–54 (1994) (discussing the government's role in preventing battered women from becoming homeless when escaping their abusive partners); Chiquita Rollins, Nancy E. Glass, Nancy A. Perrin, Kris A. Billhardt, Amber Clough, Jamie Barnes, Ginger C. Hanson & Tina L. Bloom, *Housing Instability Is as Strong a Predictor of Poor Health Outcomes as Level of Danger in an Abusive Relationship: Findings from the SHARE Study*, 27 J. INTERPERSONAL VIOLENCE 623, 623–24 (2012) (finding that the greater the number of housing instability risk factors, the more likely abused women reported symptoms consistent with post-traumatic stress disorder, depression, and reduced quality of life, even when controlling for the amount of danger in the abusive relationship); Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421, 429 (1991) (arguing that legal service programs should allocate more resources to cases that prevent domestic violence in order to reduce the number of situations that deteriorate into evictions and homelessness).

98. Prior scholarship has noted the absurdity of requiring a survivor to gain the cooperation of their abuser in order to access public benefits, describing the plight of an applicant for emergency shelter who left their apartment due to sexual harassment by her landlord. Susan D. Bennett, *"No Relief but Upon the Terms of Coming into the House"—Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System*, 104 YALE L.J. 2157, 2170 (1995). The intake worker at the shelter insisted she provide a written statement from the landlord corroborating her claims. *Id.*

criminal activity.[99] The one-strike eviction policy allows PHAs to evict innocent tenants if a household member, guest, or "other person under the tenant's control" engages in drug-related criminal activity on or off the public housing property.[100] Tenants who themselves do not engage in criminal activity can face eviction because of the criminal activity of other people—even if the tenants did not know about or endorse the criminal activity.[101] Indeed, this is precisely what happened to Ms. Harris. She herself was never accused of engaging in criminal activity; rather, the daughter she had previously requested be removed from her lease was arrested and charged.[102] The risk of eviction to households of color whose family members are subject to overpolicing is especially great.[103]

Prior scholarship shows how the one-strike eviction policy imposes a strict liability standard on subsidized tenants, contrary to the framework courts have developed for justifying strict liability policies in other contexts.[104] Despite this inconsistency, the U.S. Supreme Court has upheld the one-strike eviction policy.[105] The effects of this policy on subsidized tenants are dire. Unreasonable PHA delays in responding to requests to remove household members increase the possibility of eviction, in addition to interfering with tenants' family autonomy.

The harms that low-income families experience following eviction are long lasting. The Milwaukee Area Renters Study showed that of the tenants who appeared at their eviction hearings and were subsequently evicted, only one out of six had a place lined up to stay.[106] Public housing tenants or HCVP participants who lose their subsidies through eviction or termination are at high risk for homelessness because their low incomes make it difficult for them to afford housing on the private market.[107] Further, many landlords still discriminate against applicants with children, despite the FHA outlawing discrimination based on familial status.[108] Finding a safe, stable place to stay can

99. 42 U.S.C. § 1437d(l)(6).

100. *Id.*; 24 C.F.R. §§ 966.4(f)(12)(i)(A)(2), (f)(12)(ii)(A)(2) (2020).

101. Regina Austin, *"Step on a Crack, Break Your Mother's Back": Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 YALE J.L. & FEMINISM 273, 275–76 (2002).

102. Hous. Auth. of Norwalk v. Harris, No. SPNO 9009-10295, 1991 WL 270285, at *1 (Conn. Super. Ct. Nov. 14, 1991), *rev'd sub nom.* Hous. Auth. of City of Norwalk v. Harris, 611 A.2d 934 (Conn. App. Ct. 1992), *aff'd*, 625 A.2d 816 (Conn. 1993).

103. *See supra* notes 18–21 and accompanying text.

104. *See generally* Ewert, *supra* note 51 (applying the four-pronged test used to critique public welfare offenses to show that there is insufficient justification for imposing strict liability on innocent tenants in public housing).

105. Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 136 (2002).

106. DESMOND, EVICTED *supra* note 16, at 97.

107. Ewert, *supra* note 51, at 86.

108. Discriminatory conduct against applicants with children includes telling applicants units are unavailable, refusing to rent to families with children, advertising that children are not allowed, or imposing strict occupancy limits. *See* DESMOND, EVICTED, *supra* note 16, at 229; *see also* White v. U.S.

be virtually impossible following eviction. Equally disruptive, eviction jeopardizes employment. Attending hearings and searching for new housing causes some tenants to be late for shifts or miss work, and the stress of eviction can lead to poor job performance, resulting in termination.[109] Moving unexpectedly can also lead to missing mail, including notices from government agencies with information necessary for recertifying public benefits. On top of the significant material hardship that evictions inflict on vulnerable tenants, evictions can also lead to significant psychological strain, including depression or even suicide.[110]

Unreasonable PHA delays in approving household composition changes create a host of problems. In particular, PHA control over the ability of subsidized housing tenants—who are disproportionately Black women—to determine household composition implicates fundamental rights related to parenting and intimate partner relationships. As will be discussed further in Part III, it is critical that PHAs follow procedural due process when responding to requests to add or remove household members given this serious adverse impact on constitutionally protected rights.

II. HISTORIC REGULATION OF LOW-INCOME FAMILIES AND HOUSEHOLDS OF COLOR DESPITE DUE PROCESS PROTECTIONS

Throughout the twentieth and early twenty-first centuries, the U.S. Supreme Court established family privacy, parenting, and the ability to form family relationships free from unnecessary government intrusion as fundamental rights. However, people of color have not historically enjoyed the benefits of these fundamental rights. Indeed, from this country's inception until the present day, families of color in general—and Black families in particular—have faced significant intrusion into family autonomy and decision-making.

Dep't of Hous. & Dev., 475 F.3d 898, 907 (7th Cir. 2007) (finding that an owner's statements indicating they did not want to rent to families with children violated the FHA); United States v. Badgett, 976 F.2d 1176, 1179–80 (8th Cir. 1992) (holding that a one-person-per-bedroom rule had a disparate impact on families with children and was impermissible); S. Cal. Hous. Rts. Ctr. v. Krug, 564 F. Supp. 2d 1138, 1151 (C.D. Cal. 2007) (finding that statements discouraging potential renters with children from applying violated the FHA); Title VIII Conciliation Agreement at 6, Fair Hous. Ctr. of Cent. Ind. v. Pierce Educ. Props., L.P., No. 05-20-7919-8 (HUD Aug. 18, 2020) (requiring as part of a settlement that the respondent revise their policies regarding children); Complaint and Jury Demand at 2, Maya Moss v. Asset Campus Hous., Inc., No. 18-cv-00487 (W.D. Ky. July 24, 2018) (asserting that a one-bedroom-per-person policy discriminates against families); Lauren Brasil, *Legal Aid of NC Settlement Involving Familial Status Discrimination and Online Housing Advertisements*, FAIR HOUS. PROJECT (Nov. 5, 2020), https://www.fairhousingnc.org/newsletter/legal-aid-of-north-carolina-settlement-involving-familial-status-discrimination-and-online-housing-advertisements/ [https://perma.cc/R82j-GT8U] (noting that language on a property's website indicating that it was only available to those above the age of twenty-one "violate[d] the Fair Housing Act").

109. DESMOND, EVICTED, *supra* note 16, at 227.

110. *Id.* at 296–98.

A. *Family Formation and Decision-Making as Fundamental Rights*

1. Cases Related to Childrearing

The Court's cases involving parenting and family decision-making started in the early twentieth century. When reviewing a state law that restricted foreign language education, the Supreme Court in *Meyer v. Nebraska* [111] interpreted the idea of "liberty" in the Fourteenth Amendment's Due Process Clause to include a wide range of activities relating to everyday life and family relationships.[112] In holding the Nebraska law unconstitutional, the Court said that liberty does not simply mean "freedom from bodily restraint" but also includes the right of the individual "to marry, establish a home and bring up children."[113]

Two years later in 1925, the Court similarly found unconstitutional an Oregon law that mandated compulsory public school education, as opposed to allowing private school education. In its decision in *Pierce v. Society of the Sister of the Holy Names of Jesus & Mary*,[114] the Court said, "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[115] With these cases, the Court articulated the protected right of parents to determine how to best raise their children and meet their needs.

In the early 1970s, the Court again expressed the idea of parental rights in *Stanley v. Illinois*.[116] There, the Court addressed an Illinois law that made the children of an unwed father wards of the state when the children's mother died, regardless of the father's fitness to parent.[117] Yet again, the Court emphasized the constitutional importance of the family, explaining, "The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights'" and that the "integrity of the family unit" has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.[118] The Court further noted that these protections did not apply only to relationships formalized by a marriage

111. 262 U.S. 390 (1923).
112. *Id.* at 399.
113. *Id.*
114. 268 U.S. 510 (1925).
115. *Id.* at 535.
116. 405 U.S. 645 (1972).
117. *Id.* at 646–47.
118. *Id.* at 651 (citations omitted) (first quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); then quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and then quoting *May v. Anderson*, 345 U.S. 528, 533 (1953)).

ceremony.[119] The ability to form relationships with family members—whether through marriage or not—was a constitutionally protected right.

A few years later, in 1977, the Court considered what constituted a family. In *Smith v. Organization of Foster Families for Equality & Reform*,[120] in which the Court considered the due process rights of foster parents, the Court noted in dicta that a blood relation was not required to make a family and that "the emotional attachments that derive from the intimacy of daily association" are what make family life important.[121] That same year, the Court in *Moore v. City of East Cleveland*, [122] considered whether a local ordinance impermissibly discriminated against families living in residential units. In that case, the city cited a grandmother for allowing her son and his son (her grandchild) and another grandchild (not born to her son) to live with her.[123]

The Court in *Moore* wrote that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[124] The Court rejected the rational basis review used in *Village of Belle Terre v. Boraas*,[125] which involved an ordinance impacting households of unrelated individuals.[126] Instead, the Court said, "When a city undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate."[127] The Court stated that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[128]

The Court went on to discuss the importance of extended family in American life, saying,

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family[.] The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. *Even if conditions of modern society have brought about a decline in*

119. The Court said, "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony." *Id.*

120. 431 U.S. 816 (1977).

121. *Id.* at 844.

122. 431 U.S. 494 (1977).

123. *Id.* at 496.

124. *Id.* at 499.

125. 416 U.S. 1 (1974).

126. *See Moore*, 431 U.S. at 498.

127. *Id.* at 499.

128. *Id.* (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974)).

> *extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family[.] Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home*.[129]

In finding the city's ordinance unconstitutional, the Supreme Court expanded its understanding of what constituted a protected family to more than just a married couple or parent and child. Later, though, the Supreme Court reaffirmed the special rights of parents, describing parenting as "perhaps the oldest of the fundamental liberty interests recognized by this Court."[130]

2. Cases Related to Marriage and Sexuality

In addition to examining the right to parenting, the Court has also considered the right to marriage. In 1967, in *Loving v. Virginia*,[131] the Court found a Virginia statute prohibiting interracial marriage to be unconstitutional.[132] The Court relied on an earlier decision striking down sterilization of certain people based on criminal history, explaining, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[133] The Court recognized the importance of people being able to choose their spouses free from government intrusion based on race.

The Court affirmed the constitutionally protected right to marry in 1987, even for people whose other liberties were severely curtailed. In *Turner v. Safley*,[134] the Court held that while prisons could impose restrictions that were reasonably related to penological interests, inmates still had a constitutionally protected right to marry.[135] The Court described the important attributes of marriage, including the public expression of commitment and support, the exercise of religious faith, a hope for future intimacy, and qualification for property rights and public benefits.[136] The Court found these to be significant to inmates, despite other liberties having been taken away.

The Court also determined freedom and privacy related to sexual activity and contraception to be constitutionally protected. In 1965, in *Griswold v. Connecticut*,[137] the Court considered the "zone of privacy" in marriage and how

129. *Id.* at 504–05 (emphasis added).
130. Troxel v. Granville, 530 U.S. 57, 65 (2000).
131. 388 U.S. 1 (1967).
132. *Id.* at 12.
133. *Id.* (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
134. 482 U.S. 78 (1987).
135. *Id.* at 99.
136. *Id.* at 95–96.
137. 381 U.S. 479 (1965).

it related to a state law that criminalized the use of birth control, including by married people.[138] The Court found the law unconstitutional because it interfered with privacy and decision-making in marriage.[139]

Seven years later, the Court extended the right to access birth control to unmarried people, as well as married people,[140] and the following year, in *Roe v. Wade*,[141] the Court reaffirmed the right to privacy in marriage, procreation, contraception, family relationships, and child rearing.[142] The Court then interpreted privacy rights to include the right to abortion.[143] In his concurrence, Justice Stewart discussed how Supreme Court decisions "make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[144]

In 2003, the Court continued its development of privacy and family autonomy as a fundamental right by turning its attention to same-sex couples. In *Lawrence v. Texas*,[145] the Court struck down a state law criminalizing same-sex sodomy.[146] Citing its earlier decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[147] in which the Court found a requirement that a woman obtain her husband's consent before an abortion to be unconstitutional, the Court reiterated that "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" are constitutionally protected.[148] It then quoted *Casey*'s language about the importance of dignity and autonomy, saying

> These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment*. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[149]

The Court went on to explain the limits that this liberty imposes on government action, saying, "Liberty protects the person from unwarranted government

138. *Id.* at 485.

139. *See id.* at 484–86 ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." (citation omitted)).

140. Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972).

141. 410 U.S. 113 (1973).

142. *Id.* at 152–53.

143. *Id.* at 153.

144. *Id.* at 169 (Potter, J., concurring).

145. 539 U.S. 558 (2003).

146. *Id.* at 578–79.

147. 505 U.S. 833 (1992).

148. *Lawrence*, 539 U.S. at 574.

149. *Id.* (emphasis added).

intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."[150]

Over the past century, the Supreme Court has developed a robust case law establishing a clear vision of the fundamental right to privacy and autonomy in people's personal and home lives, whether with intimate partners, children, or other family members. That liberty applies to people in same-sex relationships and different-sex relationships, to parents and other people providing care for children, and those living both inside and outside prison walls.

Those fundamental rights exist—and are constitutionally protected—even if the person wishing to exercise those rights is not politically powerful or socially popular. In *Obergefell v. Hodges*,[151] the Supreme Court held that laws restricting same-sex marriage were unconstitutional.[152] The Court explained that the issue was one appropriate not only for legislative action but also judicial consideration, asserting that "[a]n individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act."[153]

Courts apply strict scrutiny when considering the constitutionality of government action that infringes on fundamental rights.[154] This includes both enumerated rights, such as the freedom of religion, and nonenumerated rights, such as the right to privacy.[155] One scholar described the fundamental right to privacy as having a "decisional" aspect related to intimacy decisions (the relationships one chooses) and a "spatial" aspect related to home decisions (how one uses or what happens in one's home space).[156] Unreasonable PHA delays in approving household composition directly conflict with both the decisional and spatial aspects of the fundamental right to privacy because the delays make it difficult for tenants to form and change family units, build marriages, and engage in intimate acts with partners. Thus, the PHA practices should be subject to strict scrutiny.

150. *Id.* at 562.

151. 135 S. Ct. 2584 (2015).

152. *Id.* at 2608.

153. *Id.* at 2605.

154. *See* Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (citations omitted) (quoting *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969))); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("Where fundamental claims . . . are at stake . . . we must searchingly examine the interests that the State seeks to promote . . . ."); Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").

155. *See Roe*, 410 U.S. at 155–56; Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

156. G. Sidney Buchanan, *A Very Rational Court*, 30 HOUS. L. REV. 1509, 1586–87 (1993).

The persistence of this interference is unfortunately not surprising. As discussed above, tenants in subsidized rental housing are exclusively low-income and disproportionately women of color, a group historically and currently underrepresented in positions of political power.[157] Despite the clear precedent that the ability to marry, engage in consensual sexual acts with partners, care for children according to parents' best judgment, and create the family and home life that people desire are constitutionally protected fundamental rights, not all Americans have been able to exercise these rights. As the next section describes, Black Americans, and especially Black women of low income, have often been subject to legal restraints and governmental intrusion into their family life.

B. *Restraints on the Ability of Enslaved People and Their Descendants To Marry and Exercise Reproductive Autonomy*

The regulation of Black families by the government permeates American history. Indeed, the economic system that built the United States was premised on the idea that Black people were less than human and lacking in meaningful rights.[158] In turn, this perspective justified the buying and selling of enslaved people with no regard for familial relationships.[159]

Early colonies imposed significant restraints on marriage based on race. Some colonies outlawed mixed-race marriages.[160] Other marriage restraints during colonial times had consequences both for enslaved people themselves and their partners. Entering into mixed-race marriages during colonial times could change people's legal status.[161] For example, in the colony of Maryland, White people who married Black or mixed-race people were forced into servitude, and free Black or mixed-race people who married White people became enslaved.[162] Some laws even prohibited enslaved people from marrying at all.[163]

157. For a detailed analysis of the underrepresentation of Black women in state and federal office, see ANDRE M. PERRY, ANALYSIS OF BLACK WOMEN'S ELECTORAL STRENGTH IN AN ERA OF FRACTURED POLITICS (2018), https://www.brookings.edu/wp-content/uploads/2018/09/2018.09.10_metro_black-women-office_Perry_Final-version-sep10.pdf [https://perma.cc/6CGV-96MB].

158. *See* Jeremy Hobson, *Without Slavery, Would the U.S. Be the Leading Economic Power?*, NHPR, https://www.nhpr.org/post/without-slavery-would-us-be-leading-economic-power#stream/0 [https://perma.cc/MU7V-HHLQ].

159. The U.S. Constitution codified the idea that enslaved people were not fully human, counting them as three-fifths of a person for the purposes of representation and the apportionment of taxes. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

160. MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 98 (rev. ed. 1996).

161. ABRAMOVITZ, *supra* note 160, at 98.

162. Dred Scott v. Sandford, 60 U.S. 393, 408 (1857), *superseded*, (1868); *see also* ABRAMOVITZ, *supra* note 160, at 98; Ta-Nehisi Coates, *The Case for Reparations*, ATL. MONTHLY, June 2014, at 54, 63.

163. ABRAMOVITZ, *supra* note 160, at 83.

Following colonialism, antebellum slavery continued its devastation of Black families. Because they could not legally contract, enslaved people generally could not marry without the enslavers' consent (even then, the marriages lacked the legal significance and rights afforded White marriages).[164] Similarly, enslaved parents had no parental rights to their children.[165] Enslavers could sell off family members, and enslaved people had no recourse.[166] Estimates of the rate of family separation are staggering. Roughly one-sixth of marriages of enslaved people ended in forced separation.[167] In fact, half of interstate sales of enslaved people in the South separated nuclear families and one quarter of those sales destroyed a first marriage.[168] "In a time when telecommunications were primitive and blacks lacked freedom of movement, the parting of black families was a kind of murder. Here we find the roots of American wealth and democracy—in the for-profit destruction of the most important asset available to any people, the family."[169]

Regulation of families of color generally—and Black families in particular—continued following emancipation. States adopted different strategies for legalizing the marriages of formerly enslaved people, sometimes even without their knowledge or by using coercive means to enforce marriage.[170] "Black Codes" throughout the South mandated involuntary "apprenticeships" for children in poor Black families and rapes against Black women were not criminalized.[171] States enacted anti-miscegenation laws targeting Black people, like the one in Virginia that gave rise to the *Loving* case.[172] And in the West, states prohibited interracial marriage between White people and people of Asian descent.[173] Despite free people having the legal right to contract, postbellum governments still

164. Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 307 (2006) ("Slave couples joined together in quasi-marital unions that were sanctioned by the plantation owners.").

165. *See id.* at 311; Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1329 (1998).

166. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 35 (2d. ed. 2017) [hereinafter ROBERTS, KILLING THE BLACK BODY]; Goring, *supra* note 164, at 311; Hasday, *supra* note 165, at 1329–30; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1439 (1991) [hereinafter Roberts, *Punishing Drug Addicts Who Have Babies*].

167. Hasday, *supra* note 165, at 1330.

168. *See* Coates, *supra* note 162, at 63.

169. *Id.*

170. Goring, *supra* note 164, at 314–33; Hasday, *supra* note 165, at 1339; R.A. Lenhardt, *Marriage as Black Citizenship*?, 66 HASTINGS L.J. 1317, 1327–28 (2015).

171. Hasday, *supra* note 165, at 1339.

172. *Loving v. Virginia*, 388 U.S. 1, 4–7 (1967).

173. Lenhardt, *supra* note 170, at 1332.

imposed limits on the ability of people of color to create legal family attachments.

In addition to marriage restraints, control over Black women's fertility was prevalent during slavery and afterwards. Many enslaved women were subjected to rape and forced "breeding."[174] Enslaved women often had little control over the choice to become pregnant and who would father their children.

In the early to mid-twentieth century, governmental and private actors intervened to limit the fertility of women of color. Black women in particular were more likely to undergo forced sterilization.[175] But in 1942, the U.S. Supreme Court found that an Oklahoma law allowing the forced sterilization of people determined to be "habitual criminals" was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment.[176] In its opinion, the Court addressed the harm of racially discriminatory sterilization, saying, "In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."[177] Despite this caution, however, control of the fertility and family choice of low-income Black women continues. Indeed, such control over these highly personal decisions is built into our country's social safety net.

C. *Institutionalized Racism and Sexism as Barriers to Public Benefits for Households of Color*

Government regulation of economic activity to protect low-income Americans is deeply rooted in race, class, and sex-based discrimination, which

174. ABRAMOVITZ, *supra* note 160, at 98 (discussing sexual violence and forced "breeding" during colonialism); ROBERTS, KILLING THE BLACK BODY, *supra* note 166, at 27–29 (discussing rape by White men, forced "breeding" with enslaved men, and maternity prizes); Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L.J. 89, 119–20 (2005) (discussing rape and forced "breeding"); Goring, *supra* note 164, at 311; Camille A. Nelson, *American Husbandry: Legal Norms Impacting the Production of (Re)productivity*, 19 YALE J.L. & FEMINISM 1, 3–4, 14–15 (2007) (discussing rape, the practice of performing experimental reproductive surgeries on enslaved women, and forced "breeding"); Carla M. Newman, *Essay: Bartering from the Bench: A Tennessee Judge Prevents Reproduction of Social Undesirables; Historic Analysis of Involuntary Sterilization of African American Women*, 10 GEO. J.L. & MOD. CRITICAL RACE PERSP. 53, 53–55 (2018) (discussing rape and "maternity prizes" to promote fertility and control women).

175. ROBERTS, KILLING THE BLACK BODY, *supra* note 166, at 89–98 (discussing the sterilization of institutionalized Black women and those seeking abortion, as well as the practice that came to be known as "Mississippi appendectomies," in which teaching hospitals in the South performed sterilizations on Black women without their knowledge or consent while under anesthesia for other procedures); Nelson, *supra* note 174, at 38–39; Roberts, *Punishing Drug Addicts Who Have Babies*, *supra* note 166, at 1442–43; Ariel S. Tazkargy, *From Coercion to Coercion: Voluntary Sterilization Policies in the United States*, 32 L. & INEQ. 135, 150–52 (2014) (discussing the practice of "Mississippi appendectomies").

176. Skinner v. Oklahoma, 316 U.S. 535, 537–38 (1942).

177. *Id.* at 541.

led to the idea of the deserving and undeserving poor. In colonial times, the "poor laws" mostly reserved public assistance for White people and distinguished between "deserving" women (widows, women who were sick or disabled or whose husbands were sick or disabled, and mothers of young children) and "undeserving" women (women who had been divorced, abandoned, or were never married).[178] Deserving women received financial assistance and supplies to enable them to continue living in their own homes or a neighbor's home ("indoor relief"); undeserving women were forced to work outside their homes and often made to live in poorhouses ("outdoor relief").[179] While the deserving beneficiaries could retain much of their decision-making autonomy, the undeserving beneficiaries were subject to public control over decisions as basic as where they lived and worked.

During the 1800s, economic pressures and an increasing contempt for poor people reduced available publicly funded outdoor relief and many programs explicitly excluded Black people.[180] Private charities developed to meet people's needs, but these charities also distinguished between the deserving and undeserving poor.[181] Like prior public aid programs, many private charities excluded Black women.[182] In response, Black middle- and upper-class community members formed private charities to serve low-income Black people.[183] The 1800s also saw a proliferation of mental institutions and orphanages, which served children from poor families in addition to children whose parents had died.[184] These institutions severely restricted the rights of the institutionalized people's family members—including parents—to maintain contact with them.[185] The disruption to family relationships through government control was significant.

178. ABRAMOVITZ, *supra* note 160, at 84–85; Judith E. Koons, *Motherhood, Marriage, and Morality: The Pro-Marriage Moral Discourse of American Welfare Policy*, 19 WIS. WOMEN'S L.J. 1, 29–31 (2004) (explaining the difference between the deserving poor, who were viewed as "subjects of 'misfortune, sickness, and adversity,'" and the undeserving poor, who were viewed as "idle and vicious" (quoting NANCY E. ROSE, WORKFARE OR FAIR WORK 20 (1995))); Nantiya Ruan, *Corporate Masters & Low-Wage Servants: The Social Control of Workers in Poverty*, 24 WASH. & LEE J. C.R. & SOC. JUST. 103, 110–11 (2017).

179. ABRAMOVITZ, *supra* note 160, at 84–86.

180. *See generally* William P. Quigley, *The Quicksands of the Poor Law: Poor Relief Legislation in a Growing Nation, 1790-1820*, 18 N. ILL. UNIV. L. REV. 1 (1997) (providing a summary of individual states' poor laws and restrictions from 1790 to 1820); *see also* ABRAMOVITZ, *supra* note 160, at 146–50.

181. ABRAMOVITZ, *supra* note 160, at 150–55.

182. *Id.* at 154–55.

183. *Id.*

184. *Id.* at 155–71; Kay Schriner & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 OHIO ST. L.J. 481, 511–13 (2001); Sidney D. Watson, *From Almshouses to Nursing Homes and Community Care: Lessons from Medicaid's History*, 26 GA. ST. UNIV. L. REV. 937, 941 (2010).

185. ABRAMOVITZ, *supra* note 160, at 165–66.

The Mothers' Pensions created during the "Progressive" era of the late 1800s and early 1900s incorporated much of the race- and sex-based discrimination of prior programs. The Mothers' Pensions became a way to encourage "deserving" low-income women to stay home and care for their children instead of entering the labor market.[186] States structured their Mothers' Pensions to serve almost exclusively White women, whether because Black women and other women of color were explicitly excluded based on race or because individual applicants were determined not to be deserving.[187] These public benefits cemented castes of women based on race.

Contemporary public benefits programs, born from the New Deal, continued that caste system. President Roosevelt depended on the support of Southern Democrats to implement his New Deal agenda and provide relief during the Depression.[188] To appease the lawmakers who embraced White supremacy, many important New Deal programs deliberately excluded Black people.[189] The Fair Labor Standards Act of 1938[190] ("FLSA"), which established a federal minimum wage,[191] did not cover industries like agriculture and domestic work, which at the time were dominated by Black workers.[192]

This same animus was infused into cash aid and workforce development programs under the New Deal. Racism permeated the Social Security Act of 1935,[193] which established cash assistance programs for retired and unemployed workers and other people who were poor.[194] Like FLSA, the Old Age Insurance Program and Unemployment Insurance Program excluded government employees and domestic and agricultural workers from coverage, denying access

186. *Id.* at 184–85; KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 18–19 (2011); Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER, SOC. POL'Y & L. 247, 258 (2014) [hereinafter Gilman, *The Return of the Welfare Queen*]; Koons, *supra* note 178, at 33–34.

187. ABRAMOVITZ, *supra* note 160, at 200–02; GUSTAFSON, *supra* note 186, at 19; ELISA MINOFF, CTR. FOR THE STUDY OF SOC. POL'Y, THE RACIST ROOTS OF WORK REQUIREMENTS 12 (2020), https://cssp.org/wp-content/uploads/2020/02/Racist-Roots-of-Work-Requirements-CSSP-1.pdf [https://perma.cc/9S45-RMNB].

188. ROTHSTEIN, *supra* note 42, at 155; Michele E. Gilman, *En-Gendering Economic Inequality*, 32 COLUM. J. GENDER & L. 1, 51 (2016) [hereinafter Gilman, *En-Gendering Economic Inequality*]; Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1559 (2012).

189. ROTHSTEIN, *supra* note 42, at 155–56; Gilman, *En-Gendering Economic Inequality*, *supra* note 188, at 51.

190. Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended in scattered sections of 29 U.S.C.).

191. *Id.* § 13, 52 Stat. at 1067–68 (codified as amended at 29 U.S.C. § 213).

192. ABRAMOVITZ, *supra* note 160, at 234; ROTHSTEIN, *supra* note 42, at 154; Gilman, *En-Gendering Economic Inequality*, *supra* note 188, at 51.

193. Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

194. ABRAMOVITZ, *supra* note 160, at 215.

to almost all Black women and men.[195] Indeed, in 1937, two years after the program's inception, less than ten percent of employed Black men and less than five percent of employed Black women worked in jobs covered by Old Age Insurance.[196] Similarly, the Works Progress Administration programs routinely refused to place Black and Latinx workers in jobs because they were supposedly used to lower living standards and so less in need of assistance.[197] These critical programs were deliberately inaccessible to most Black workers.

The Social Security Act of 1935 also established Aid to Dependent Children ("ADC"), later known as Aid to Families with Dependent Children ("AFDC"), which provided cash aid to mothers without male breadwinners.[198] ADC continued the distinction between deserving and undeserving women previously drawn by the Mothers' Pensions.[199] However, due to programmatic and economic changes, by the 1960s ADC recipients were disproportionately Black and Latinx women.[200]

The shift in the demographic composition of beneficiaries corresponded with increasingly invasive controls by the government in means-tested wealth transfer programs.[201] In the 1950s, many states adopted "substitute father" or "man in the house" rules that disqualified a family from benefits if an able-bodied man was living there.[202] ADC workers conducted midnight raids to check for the presence of men in assisted homes.[203] Today, some states require mothers to establish paternity of their children and pursue child support to continue receipt of welfare benefits.[204] Also, some means-tested benefits programs collect biometric data through fingerprints and photographs, linking

195. ABRAMOVITZ, *supra* note 160, at 287–89; Gilman, *En-Gendering Economic Inequality*, *supra* note 188, at 51. In 1930, 62.6% of Black women were domestic workers, and 40.7% of employed Black men worked in the agricultural sector. ABRAMOVITZ, *supra* note 160, at 250.

196. In 1937, only 8% of Black men and 4.2% of Black women worked in jobs covered by the Social Security Act. ABRAMOVITZ, *supra* note 160, at 250.

197. *Id.* at 283.

198. *Id.* at 313; GUSTAFSON, *supra* note 186, at 19–20.

199. ABRAMOVITZ, *supra* note 160, at 318–19; ROBERTS, KILLING THE BLACK BODY, *supra* note 166, at 205–07; Gilman, *The Return of the Welfare Queen*, *supra* note 186, at 258; Ocen, *supra* note 188, at 1559.

200. ABRAMOVITZ, *supra* note 160, at 320–21.

201. Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 330–31 (2014) [hereinafter Bach, *The Hyperregulatory State*]; Ocen, *supra* note 188, at 1562; Gilman, *The Return of the Welfare Queen*, *supra* note 186, at 258–62.

202. ABRAMOVITZ, *supra* note 160, at 324; GUSTAFSON, *supra* note 186, at 21.

203. ABRAMOVITZ, *supra* note 160, at 324–25; GUSTAFSON, *supra* note 186, at 21; Gilman, *The Return of the Welfare Queen*, *supra* note 186, at 258.

204. ABRAMOVITZ, *supra* note 160, at 325; ROBERTS, KILLING THE BLACK BODY, *supra* note 163, at 228; Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1399 (2012) [hereinafter Gilman, *The Class Differential*]; Ocen, *supra* note 188, at 1562–63.

indigency to criminality.[205] On a regular basis, states pass laws to condition receipt of means-tested benefits on passing a drug test.[206] Further, access to public benefits has often been linked to regulation of fertility, whether through sterilization or birth control campaigns.[207] Women applying for prenatal health benefits are subjected to a barrage of invasive, often painful questions unrelated to the benefits themselves.[208] In using language relating to slavery to describe the way the government administers means-tested benefits, one scholar called government the "overseer of family life" of vulnerable women.[209]

The consequences of these programmatic structures are dire. Discriminatory intrusion into the privacy of low-income individuals, particularly low-income women of color, promotes stigma, engenders distrust in our democracy, and perpetuates existing inequalities.[210] Scholars have noted the way regulatory mechanisms for means-tested benefits pass information to other programs controlling the lives of poor people.[211] One scholar described this phenomenon as "regulatory intersectionality," explaining how subsidized housing providers and other benefits programs pass information to and from

205. Wendy A. Bach, *Poor Support / Rich Support: (Re)viewing the American Social Welfare State*, 20 FLA. TAX REV. 495, 537 (2017) [hereinafter Bach, *Poor Support / Rich Support*]; Gilman, *The Class Differential*, *supra* note 204, at 1404; Ocen, *supra* note 188, at 1565.

206. GUSTAFSON, *supra* note 186, at 59–60; Bach, *The Hyperregulatory State*, *supra* note 201, at 357–60; Ocen, *supra* note 188, at 1565.

207. ROBERTS, KILLING THE BLACK BODY, *supra* note 166, at 209–11; Gilman, *The Class Differential*, *supra* note 204, at 1399–1400.

208. *See* Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 124–30 (2011) (listing the required disclosures of private information that women must share when seeking prenatal coverage through Medicaid).

209. ABRAMOVITZ, *supra* note 160, at 206.

210. ROBERTS, KILLING THE BLACK BODY, *supra* note 166, at 294–99 (showing in the context of procreative privacy that "[o]nce liberty is set up to protect only the interests of the most privileged, it then excludes the equality claims of the dispossessed"); Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539, 1556–57 (2014) (explaining that low-income people of color affected by the war on crime "logically conclude that the state does not respect them nor does it view their identities and viewpoints as equal to those of white and wealthier citizens"); Gilman, *The Class Differential*, *supra* note 204, at 1441–43 (discussing how welfare surveillance and negative interactions with public institutions stigmatize low-income individuals and lead to decreased participation in the political process); Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L.F. 1, 7–9 (2008) [hereinafter Gilman, *Welfare, Privacy, and Feminism*] (describing the psychological, material, and physical harms that poor women experience as a result of government intrusion into their privacy).

211. *See generally* GUSTAFSON, *supra* note 186, at 54 (explaining how the information exchange results in low-income citizens being arrested); Bach, *Poor Support / Rich Support*, *supra* note 205, at 531 (describing how regulatory functions result in individuals being targeted, stigmatized, and excluded); Gilman, *The Class Differential*, *supra* note 204, at 1397–99 ("[I]nformation is electronically shared and compared with numerous federal and state databases, as well as commercial databases, to verify eligibility . . . ."); Ocen, *supra* note 188, at 1565 ("As a consequence of the deviant welfare queen imagery that policymakers activate in discussions of the welfare system, sets of monitoring systems have been embedded within subsidy eligibility determinations.").

law enforcement, child protective services, and other programs.[212] This regulatory intersectionality takes away privacy and destabilizes families.[213] Notably, this invasive regulation is not present in wealth transfer programs that serve middle- and upper-income households.

D. *Critiques of Hyperregulation in Means-Tested Benefits Programs*

Many scholars have noted the disparities in regulation between means-tested public expenditures that give money and resources to low-income households (including AFDC, Supplemental Nutrition Assistance Program benefits, and subsidized rental housing) and public expenditures that give money and resources to predominantly middle- and upper-income households (such as the mortgage interest tax deduction and other tax breaks, farm subsidies, and in-state tuition at public colleges and universities).[214] One scholar illustrated this disparity using a familiar hypothetical:

> Imagine that tax returns demanded detail about substance use and criminal records for everyone who lives in your home, and then the IRS sent inspectors to high-income homes to verify occupancy. Imagine further that, if it appeared that there was an unauthorized person, that high-income taxpayers would lose the [home mortgage interest deduction]. Imagine police sweeps and task forces targeting deduction recipients. I would argue that all of this is nothing short of unimaginable.[215]

212. Bach, *The Hyperregulatory State*, *supra* note 201, at 322; Bach, *Poor Support / Rich Support*, *supra* note 205, at 529–30.

213. For a detailed discussion of the intersectionality of the criminal law system, foster care system, and services for low-income parents and the effects of that intersectionality on Black mothers, see generally Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012).

214. *See generally* KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 65–66 (2017) [hereinafter BRIDGES, THE POVERTY OF PRIVACY RIGHTS] (putting forward that poor women's families are treated much differently than their nonpoor counterparts); ROBERTS, KILLING THE BLACK BODY, *supra* note 166, at 226 ("Middle-class Americans avoid these impositions because they receive their benefits in the form of entitlements and tax breaks that are not subject to the discretion of caseworkers, supervisors, or administrators. While poor single mothers must endure government surveillance for their paltry benefits, 'self-sufficient' traditional families receive huge public subsidies — Social Security, tax breaks, and government-backed mortgages, for example — without any loss of privacy."); Bach, *The Hyperregulatory State*, *supra* note 201, at 366 (concluding that punitive policies are targeted disproportionately); Bach, *Poor Support / Rich Support*, *supra* note 205, at 539–43 (distinguishing the benefits available for those higher on the income scale compared to those available for individuals at the bottom); Gilman, *The Class Differential*, *supra* note 204 (describing the differences in privacy between low-income Americans and middle-class Americans that results from complex interactions between class, race, and gender); Ocen, *supra* note 188 (arguing that the denial of subsidized rental housing opportunities and the surveillance and regulation of Black female-headed households in three California cities is functionally analogous to the repudiated racially restrictive covenant).

215. Bach, *Poor Support / Rich Support*, *supra* note 205, at 534.

Thus, "[a]s one moves from benefits for the poor towards benefits for the rich, the administrative structures become less and less punitive and risky and more and more like invisible entitlements."[216] At the higher end of the income spectrum, aid recipients experience the state as an enabling, helpful force and have the resources needed to hire counsel to protect their rights when government oversteps.[217] At the lower end of the spectrum, aid recipients with fewer resources and more limited access to counsel experience the "hyperregulatory state," one whose "mechanisms are targeted by race, class, gender, and place to exert punitive social control over poor, African-American women, their families, and their communities."[218]

Scholars have discussed at length how constitutional law protections granting privacy and liberty are applied for the wealthy but not the poor.[219] In particular, some have critiqued the invasive programmatic requirements of means-tested benefits through the lens of the unconstitutional conditions doctrine, noting the Supreme Court's tendency to uphold conditions affecting low-income recipients of means-tested benefits while striking down conditions on benefits that favor middle- and upper-income recipients.[220] One scholar explained this problem, saying "Poverty Law in the United States subsists within a constitutional framework that constructs a separate and unequal rule of law for poor people. Across constitutional doctrines, poor people suffer diminished protection, with their claims for liberty and equality formally

216. *Id.* at 498.

217. Bach, *The Hyperregulatory State*, *supra* note 201, at 318–19.

218. *Id.*

219. For a discussion of constitutional law protections granted to the wealthy but not the poor, see generally BRIDGES, THE POVERTY OF PRIVACY RIGHTS, *supra* note 214; ROBERTS, KILLING THE BLACK BODY, *supra* note 166, at 294–312; Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. 1061, 1071 (2015); Bailey, *supra* note 210; Gilman, *The Class Differential*, *supra* note 204; Gilman, *Welfare, Privacy, and Feminism*, *supra* note 210, at 9–10.

220. *See generally* BRIDGES, THE POVERTY OF PRIVACY RIGHTS, *supra* note 214, at 65–100 (discussing the Court's inconsistent interpretation of privacy rights that results in "poor mothers' privacy rights seem[ing] to function differently than the privacy rights that wealthier mothers enjoy"); Julie A. Nice, *Making Conditions Constitutional by Attaching Them to Welfare: The Dangers of Selective Contextual Ignorance of the Unconstitutional Conditions Doctrine*, 72 DENV. U. L. REV. 971, 972 (1995) (criticizing the result that "seems nearly preordained for welfare recipients: when courts encounter arguably unconstitutional conditions attached to welfare, they tend to uphold those conditions (regardless of the strength of the constitutional guarantee at issue), although they would apply full review to a non-welfare condition"); Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629 (2008) [hereinafter Nice, *No Scrutiny Whatsoever*] (tracing how the Supreme Court has deconstitutionalized poverty law); Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L.J. 1051 (1995) (discussing that the Supreme Court has offered no explanation why governmental pressure on property rights requires more exacting review than similar pressure on liberty rights).

receiving the least judicial consideration and functionally being routinely denied."[221]

This discriminatory constitutional framework is apparent in the Supreme Court's decision in *Wyman v. James*.[222] In 1971, the Court heard a case challenging mandatory home visits for New York's AFDC program.[223] Ms. James, an AFDC recipient, consented to allowing the program access to records to confirm her ongoing eligibility and agreed to meet with the caseworker outside her home.[224] However, she objected on constitutional grounds to a mandatory in-home visit.[225] In ruling against her, the Court stated many reasons why it found the mandatory home visits to be reasonable. It claimed that the visits were necessary to protect children and to ensure that public funds were being used responsibly,[226] that they were not a burden to the recipients because they received advance notice,[227] that Fourth Amendment protections did not apply because a benefits eligibility determination was not a criminal investigation,[228] and that the recipients had accepted the governmental intrusion when they accepted the benefits.[229] The Court even compared mandatory in-home visits to taxpayers being required to produce records during a tax audit.[230]

This reasoning mischaracterized the nature of the regulation. Admittedly, in 1971 the Supreme Court was only partway into its development of family privacy and autonomy as fundamental, constitutionally protected rights. However, requiring the AFDC recipient to allow government workers into her home was not at all like taxpayers producing records in an audit meeting. Indeed, Ms. James demonstrated a willingness to produce all records reasonably related to the eligibility determination; she just did not want unnecessary intrusion into her physical space.[231] Given the protections afforded the home in Fourth Amendment jurisprudence and American law's view of the home as "sacred" space,[232] Ms. James's refusal to conduct the recertification appointment in her home seems reasonable.

221. Nice, *No Scrutiny Whatsoever*, *supra* note 220, at 629.
222. 400 U.S. 309 (1971).
223. *Id.* at 310.
224. *Id.* at 313.
225. *Id.* at 314.
226. *Id.* at 318–19.
227. *Id.* at 320–21.
228. *Id.* at 321–23.
229. *Id.* at 324.
230. *Id.*
231. *Id.* at 313.
232. *See, e.g.*, United States v. Karo, 468 U.S. 705, 714 (1984) (noting that "private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable"); Payton v. New York, 445 U.S. 573, 589–90 (1980) ("[A]t the very core [of the Fourth Amendment]

The dissents in *Wyman v. James* rightfully raised the issue of family privacy and autonomy and saw the mandatory home visits for AFDC recipients as constitutional violations. Justice Marshall attacked the idea that the home visits were necessary to protect children, noting that child abuse did not occur solely in poor households, yet the government had not instituted home visits for all people.[233]

Justice Douglas noted that the government's invasive intrusions to allegedly prevent fraud only extended to expenditures for low-income families.[234] He said,

> If the welfare recipient was not Barbara James but a prominent, affluent cotton or wheat farmer receiving benefit payments for not growing crops, would not the approach be different? *Welfare in aid of dependent children, like social security and unemployment benefits, has an aura of suspicion.* There doubtless are frauds in every sector of public welfare whether the recipient be a Barbara James or someone who is prominent or influential.[235]

The dissenting Justices viewed the Court as applying a different constitutional standard for family privacy to AFDC recipients than other people.[236] The dissents reflect the concern for family privacy and autonomy developed through Supreme Court case law during the twentieth and twenty-first centuries. Unfortunately, the majority view in *Wyman* has not yet been overturned and pervades policy discussion today regarding what protections means-tested public benefits recipients—including subsidized housing tenants—are due.[237]

Family privacy matters. The Supreme Court developed a line of case law protecting family privacy and autonomy because it saw the right to parent, pick

stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." (quoting Silverman v. United States, 365 U.S. 505, 511 (1961))); *see also* Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. MEM. L. REV. 907, 957 (1997) ("The most sacred of all areas protected by the Fourth Amendment is the home."); Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 203 (1995) ("The rhetoric of the inviolability and privacy of the home repeatedly employs images of sanctuary . . . This language of sanctuary signals that the home is a refuge for persons and their intimate relationships against invasion and intrusion, either by government or by others."); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1215 (2004) (describing the home as "the primary defense" in American privacy law).

233. *See James*, 400 U.S. at 340–42 (Marshall, J., dissenting) (describing the home visits as a "severe intrusion upon privacy and family dignity").

234. *Id.* at 332 (Douglas, J., dissenting).

235. *Id.* (emphasis added).

236. *Id.* at 347.

237. *See, e.g.*, Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 356, 357–58 (2010).

intimate partners, and establish home lives as integral to a well-ordered society. Unfortunately, like the administration of many other means-tested benefits programs, the procedure by which PHAs approve the addition or removal of household members interferes with the family autonomy and privacy of low-income women with harmful results. The requirements PHAs impose to add or remove household members from official records make it difficult for subsidized housing tenants to exercise their constitutionally protected right to parent, partner, and form family units. Procedural due process protections are necessary to protect these fundamental rights.

III. PROCEDURAL DUE PROCESS PROBLEMS AND SOLUTIONS

Given the critical role housing plays in people's lives and the harm that low-income families experience when they lose their subsidized housing, it is fitting that courts around the country have found that people have a protected property interest in subsidized rental housing.[238] In *Goldberg v. Kelly*,[239] the Supreme Court laid out due process protections required for certain public benefits.[240] Other courts then extended those protections to subsidized housing.[241] The Fourth Circuit held that "[t]he 'privilege' or the 'right' to occupy publicly subsidized low-rent housing seems to us to be no less entitled to due process protection than entitlement to welfare benefits which were the subject of decision in *Goldberg* or the other rights and privileges referred to in *Goldberg*."[242] A federal district court similarly held that "[o]nce an applicant for public housing is accepted and becomes a tenant, there can be no doubt that a 'property interest' is created, entitling the tenant to protections of the due process clause."[243] Even the U.S. Supreme Court found it "undoubtedly true" that public housing residents have a protected property interest in their subsidized housing.[244] This property interest supplements fundamental constitutional rights relating to family privacy and autonomy. Unfortunately, how PHAs implement due process in the context of adding and removing household members substantially weakens the constitutional protections proclaimed by the Court.

238. Ewert, *supra* note 51, at 63–65.

239. 397 U.S. 254 (1970).

240. *Id.* at 255–57.

241. *See* Escalera v. N.Y.C. Hous. Auth., 425 F.2d 853, 862–63 (2d Cir. 1970); Caulder v. Durham Hous. Auth., 433 F.2d 998, 1002–04 (4th Cir. 1970); *see also* Jaime Alison Lee, *Poverty, Dignity, and Public Housing*, 47 COLUM. HUM. RTS. L. REV. 97, 119 (2016).

242. *Caulder*, 433 F.2d at 1003.

243. Singleton v. Drew, 485 F. Supp. 1020, 1023 (E.D. Wis. 1980) (citing *Caulder*, F.2d at 998).

244. U.S. DEP'T OF HOUS. & URB. DEV. v. Rucker, 535 U.S. 125, 135 (2002).

A. *Procedural Due Process Requirements Under* Goldberg

In *Goldberg*, the Supreme Court examined New York's termination procedures for recipients of AFDC and state cash aid benefits.[245] Specifically, the Court considered "whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits."[246] When the case was filed, the state did not require either notice or a hearing before terminating cash aid.[247]

The Court found New York's pretermination procedures unconstitutional and explicitly stated what due process required.[248] First, the public benefits recipient was entitled to "timely and adequate notice detailing the reasons for a proposed termination."[249] The recipient needed to know why the agency was planning to take adverse action. Second, the agency had to provide the recipient "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."[250] A written challenge was not enough; the participants had to have the opportunity to present their case in person and cross-examine witnesses used against them. Third, the recipient must have the right to be represented by counsel at the hearing.[251] Although the agency was not required to provide representation to the participants, it could not deny participants the right to retain and use their own attorneys when presenting their case.[252] Finally, the Court held that the decisionmaker had to be impartial and base their decision "solely on the legal rules and evidence adduced at the hearing."[253] Further, the decision had to state both the reasoning behind the decision and the evidence on which it was based.[254]

In explaining why these due process protections were necessary, Justice Brennan used soaring language to describe the critical role that public benefits play in American society. He wrote,

> *From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders.* We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence,

245. *Goldberg*, 397 U.S. at 255–56.
246. *Id.* at 260.
247. *Id.* at 257.
248. *Id.* at 268–71.
249. *Id.* at 267–68.
250. *Id.* at 268.
251. *Id.* at 270–71.
252. *Id.*
253. *Id.* at 271.
254. *Id.*

> can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. *Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."*[255]

Justice Brennan understood that people's inherent dignity necessitated a government-sponsored social safety net, and that the safety net had to be administered fairly in order to accomplish its goals. Indeed, Justice Brennan went on to say, "The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end."[256]

The Court later narrowed the scope of its due process protections for certain public benefits recipients, finding in *Mathews v. Eldridge*[257] that a pretermination hearing was not necessary for recipients of Social Security disability benefits.[258] The Court distinguished between means-tested benefits programs like welfare, reserved for the most indigent, and disability programs, where eligibility was not based on financial need.[259] In *Mathews*, the Court concluded that "the disabled worker's need is likely to be less than that of a welfare recipient"[260] because they might have access to private resources or could apply for other public benefits if they lost their disability benefits, while the welfare recipients likely have access to fewer alternative resources. As such, less rigorous due process protections were necessary for Social Security disability benefits than for means-tested benefits programs.

Like welfare, public housing and the HCVP are means-tested benefits reserved for people of very low income. Under the *Goldberg* and *Mathews* analyses, they should have stricter due process requirements for adverse government actions than non-means-tested benefits programs. Indeed, the statutes and regulations governing these subsidized housing programs include significant procedural due process protections. However, they are still insufficient to fully protect participants' dignity and autonomy.

B. *Procedural Due Process in Subsidized Rental Housing*

Many regulatory protections for subsidized rental housing address the due process issues raised in *Goldberg*. The PHA must provide written notice that

255. *Id.* at 264–65 (emphasis added (quoting U.S. CONST. pmbl.)).
256. *Id.*
257. 424 U.S. 319 (1976).
258. *Id.* at 349.
259. *Id.* at 340–41.
260. *Id.* at 342.

explains the reasons for an adverse decision and the participant's right to request a hearing.[261] Prior to the hearing, the participant may conduct discovery by reviewing the PHA records.[262] If the PHA does not make documents available to the participant, it cannot use them at the hearing.[263] The participant may have counsel present at the hearing.[264] The hearing officer must not be the person who made the adverse decision or a subordinate of that person.[265] The participant may present evidence at the hearing and may cross-examine the PHA witnesses.[266] Finally, the hearing officer must issue a written decision explaining the reason for the decision.[267] If the hearing officer issues a decision upholding the adverse decision, the subsidized tenant may then pursue review of the decision in state court.[268]

Despite these protections, however, there are some serious due process deficiencies in subsidized rental housing. These deficiencies are especially problematic for people requesting to add or remove household members. First, the federal regulations provide no mechanism for participants to access third-party records. Many PHAs require tenants to provide proof of a former household member's new residence through a lease, utility bill, landlord certification, or some other verification before they will formally remove the household member from the records and redetermine rent.[269] However, the

261. 42 U.S.C. § 1437d(k)(1)–(2) (applying due process protections to "any proposed adverse public housing agency action," not just actions to terminate participation); 24 C.F.R. §§ 966.4(k)(1)(i), 966.51(a)(1), 966.53(a), 982.555(c) (2020).

262. 42 U.S.C. § 1437d(k)(3); 24 C.F.R. §§ 966.56(b)(1), 982.555(e)(2)(i) (2020).

263. 24 C.F.R. §§ 966.56(b)(1), 982.555(e)(2)(i).

264. 42 U.S.C. § 1437d(k)(4); 24 C.F.R. §§ 966.56(b)(2), 982.555(e)(3).

265. 24 C.F.R. §§ 966.53(e), 982.555(e)(4)(i).

266. 42 U.S.C. § 1437d(k)(5); 24 C.F.R. §§ 966.56(b)(4), 982.555(e)(5).

267. 42 U.S.C. § 1437d(k)(6); 24 C.F.R. §§ 966.57(a), 982.555(e)(6).

268. The mechanism for reviewing a PHA decision varies based on state law. In some jurisdictions, it would be through a mandamus action; in others, it would be through judicial review. *See, e.g.*, Montgomery v. Hous. Auth. of Balt. City, 731 F. Supp. 439, 442 (D. Md. 2010).

269. For example, the Topeka Housing Authority requires tenants to provide a copy of the former household member's new lease, utility bill showing their new address, or a statement from their new landlord in order to remove a former household member from the tenant's official records. TOPEKA HOUS. AUTH., CHANGE IN INCOME OR FAMILY MEMBERS 2 (2018), https://www.tha.gov/wp-content/uploads/2018/11/Income-Packet-Change-Booklet-112018.pdf [https://perma.cc/9MJK-U5N5]. The Lawrence-Douglas County Housing Authority is less specific, requiring "documentation that [the former household member] obtained replacement housing." LAWRENCE-DOUGLAS CNTY. HOUS. AUTH., COMBINED ADMINISTRATIVE PLAN AND ADMISSION & CONTINUED OCCUPANCY POLICIES AND METHODS OF ADMINISTRATION FOR ALL LDCHA PROGRAMS 80 (2020), https://storage.googleapis.com/wzukusers/user-31752601/documents/969aae83f0b34d599f5e30057de77d06/ADMIN-ACOP%20Master%20Copy%20Amended%2010-26-2020.pdf [https://perma.cc/3DTC-74SN]. The Housing Authority of Baltimore City requires the tenant complete a "certification of removal" and provide "verification of removal," such as the former household member's new address. HOUS. AUTH. OF BALT. CITY, PUBLIC HOUSING ADMISSIONS & CONTINUED OCCUPANCY POLICIES 14-12 (2019), https://www.habc.org/media/2449/the-fy-2021-public-housing-acop_r2.pdf [https://perma.cc/UL3H-5Y8F].

federal regulations provide no mechanism for issuing subpoenas.[270] The participants have a right to review PHA records[271] and bring their own evidence to hearings and cross-examine any witnesses the PHA calls.[272] They have no right to review third-party records or compel the attendance of third parties at PHA events. Thus, PHA policies requiring tenants to produce a former household member's new lease, a utility bill, or landlord certification of new residence require them to produce evidence to which they are not legally entitled and often have no way to access. It is inconsistent with procedural due process protections that tenants be required to produce third-party verification they cannot legally obtain.

Additionally, although subsidized housing rules give participants significant administrative rights to challenge adverse PHA decisions, those rights do not go into effect until the PHA actually issues a decision. When PHAs fail to respond promptly to a request to add or remove a household member, there is no decision—neither a favorable one to enforce nor an adverse one to appeal. The participant is unable to utilize the due process protections in place to compel the PHA to adjust their household composition records. Instead, they must continue in limbo, perhaps paying too much in rent or being at risk for eviction if the person who used to live in the household is arrested for criminal activity, as demonstrated by Ms. Harris's case in the Introduction.

These procedural due process deficiencies are extremely problematic because they interfere with subsidized tenants' fundamental right to form the family units they want, as detailed in Part II. In striking down a law that interfered with parental rights, the Supreme Court explained that due process rights "were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."[273] PHAs might say that requiring them to address these deficiencies would create an administrative burden. However, given that family privacy and autonomy are protected, fundamental rights guaranteed by the U.S. Constitution, it is critical that PHAs and HUD implement changes to their practices and regulations to address these deficiencies. Indeed, other areas of administrative law show reasonable solutions.

C. *Solution 1: Treating Lack of PHA Response as a Denial*

Imposing time limits on PHAs to respond to requests to add or remove household members would be a convenient solution for subsidized tenants.

270. Edgecomb v. Hous. Auth. of Town of Vernon, 824 F. Supp. 312, 316 (D. Conn. 1993).
271. 24 C.F.R. §§ 966.56(b)(1), 982.555(e)(2)(i).
272. *Id.* §§ 966.56(b)(4), 982.555(e)(5).
273. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

Indeed, other means-tested benefits programs include federally imposed time limits for agency action.[274] Further, the HUD Multifamily Occupancy Handbook, which lays out procedures for subsidized housing programs like Project-Based Section 8 and Section 202 housing for the elderly, provides that "[g]enerally, [interim recertifications based on family income and composition changes] should not exceed 4 weeks."[275] HUD expects private housing providers receiving federal subsidies for low-income tenants to process household change requests quickly. However, it is unlikely that Congress will soon amend the authorizing statutes or that HUD will implement regulatory changes to impose a time limit on PHAs administering public housing or HCVP programs, given the many housing issues stemming from the pandemic that require immediate attention.[276]

274. Federal law requires that states process Medicaid applications and provide benefits to eligible individuals "with reasonable promptness." 42 U.S.C. § 1396a(a)(8). The regulations implementing the Medicaid program require states to process Medicaid applications within forty-five days, unless the application requires a disability determination; in that case, the state must process the application within ninety days. 42 C.F.R. § 435.911(a)(1)–(2) (2020). Similarly, the federal authorizing statute requires that states process Supplemental Nutrition Assistance Program ("SNAP") applications and start benefits for eligible households within thirty days from the date of application, unless they are entitled to expedited service. 7 U.S.C. § 2020(e)(3); 7.C.F.R. § 273.2(g)(1) (2020).

275. U.S. DEP'T OF HOUS. & URB. DEV., HUD MULTIFAMILY OCCUPANCY HANDBOOK CHAPTER 7: RECERTIFICATION, UNIT TRANSFERS, AND GROSS RENT CHANGES 7–24 (2013), https://www.hud.gov/sites/documents/43503C7HSGH.PDF [https://perma.cc/Y98R-ZEDL].

276. This author is not optimistic that there would be bipartisan support for a proposal to amend the statutory subsidized housing scheme in favor of tenants. Further, even with Democratic control of Congress and the White House, elected officials will likely focus their attention on the myriad of challenges facing the country as a result of the coronavirus pandemic. Addressing the issue of household change requests will likely be low priority for Congress. A regulatory fix might be more feasible. It is already clear that under the Biden-Harris Administration, HUD will follow practices like those of the Obama Administration, which worked to expand access to housing by reducing criminal record screening in subsidized housing, expanding protections for transgender individuals in emergency shelter, and clarifying the FHA mandate that cities and towns receiving federal funding examine their policies to determine whether they contain barriers to fair housing. *See* U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF PUB. & INDIAN HOUS., HUD Notice PIH 2015-9, Guidance for Public Housing Authorities (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions (Nov. 2, 2015); Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763 (Sept. 21, 2016) (codified at 24 C.F.R. § 5.106); Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R pt. 5, 91, 92, 570, 574, 576, 903). Already, President Biden has issued a memorandum to the HUD Secretary about the need to redress the federal government's role in perpetuating discriminatory housing practices. In it, he said,

> It is the policy of my Administration that the Federal Government shall work with communities to end housing discrimination, to provide redress to those who have experienced housing discrimination, to eliminate racial bias and other forms of discrimination in all stages of home-buying and renting, to lift barriers that restrict housing and neighborhood choice, to promote diverse and inclusive communities, to ensure sufficient physically accessible housing, and to secure equal access to housing opportunity for all.

An alternative to imposing time limits that would allow participants to exercise administrative and judicial review rights would be to treat PHA failure to respond to a request within a reasonable amount of time as a constructive denial. The "denial" would then trigger review rights under existing federal and state law. This approach already exists in federal statutory law. The Federal Tort Claims Act[277] specifically states that "[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim," after which the complainant can file a case in court without going through the administrative process.[278] However, Congress and HUD are unlikely to implement this legislative or regulatory fix anytime soon, given current priorities and the political climate.[279]

A judicial remedy, however, is possible if courts apply the doctrine of constructive denial.

1. Constructive Denials in Fair Housing Law

Trial and appellate courts already treat unreasonable delays as denials in the fair housing context. The FHA requires that housing providers make reasonable accommodations to policies or procedures or allow reasonable modifications to units to allow people with disabilities to use the housing.[280] Although the statute does not identify what is a reasonable time for a decision, courts have consistently found that unreasonable delays by housing providers constitute a denial.

President Joseph R. Biden Jr., *Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies*, WHITE HOUSE (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/ [https://perma.cc/F83G-2XEM]. Shortly thereafter, the Acting Assistant Secretary for Fair Housing & Equal Opportunity at HUD issued a memorandum directing the enforcement of the FHA to prohibit discrimination based on sexual orientation and gender identity. JEANINE M. WORDEN, MEMORANDUM ON THE IMPLEMENTATION OF EXECUTIVE ORDER 13988 ON THE ENFORCEMENT OF THE FAIR HOUSING ACT 1 (2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf [https://perma.cc/4XMK-CZTJ]. This approach to fair housing protections is vastly different from that of the Trump Administration, which rescinded the Affirmatively Furthering Fair Housing Rule and began steps to rescind the Equal Access Rule. *See* Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Aug. 7, 2020) (to be codified at 24 C.F.R. pt. 5, 91, 92, 570, 574, 576, 903); Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44,811 (Proposed July 24, 2020) (to be codified at 24 C.F.R. pt. 5, 576). It remains to be seen, though, what other issues HUD will tackle under the Biden-Harris Administration, given the many challenges facing renters and homeowners as a result of the pandemic.

277. Pub. L. No. 79-601, 60 Stat. 842 (1946), *repealed, revised, and reenacted by* Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869.

278. 28 U.S.C. § 2675(a).

279. *See supra* note 276 and accompanying text.

280. 42 U.S.C. § 3604(f)(3)(A)–(B).

In a decision issued shortly after disability was added to the FHA as a protected class, a HUD administrative law judge ("ALJ") found a condominium association in violation of the FHA because it engaged in "delaying tactics" and "stalling and dilatory conduct" that had the effect of a denial; it "just never ruled upon the [reasonable modification] request."[281] The condominium association failed to take action on the homeowner's modification request to install a wheelchair lift and wooden walkways and failed to made accommodations to association policies from November 1989 until the homeowner's death in March 1992.[282] The ALJ found the delays to be "for all practical purposes" a denial.[283]

Multiple district and circuit courts have since found that unreasonable delays in responding to requests for reasonable accommodation or modification constitute constructive denial in violation of the FHA.[284] Focusing on the effects of failure to timely respond to a request, the Fifth Circuit stated that "an indeterminate delay has the same effect as an outright denial."[285] In *Groome Resources Ltd. v. Parish of Jefferson*,[286] a group home applied for a zoning variance to operate a dwelling for five unrelated individuals in a single family zone.[287] Three months later, when the parish still had not issued a decision on the reasonable accommodation request, the group home filed suit in federal district court, alleging monetary damages related to the rescheduling of closing on the property.[288] When the parish challenged the suit for lack of ripeness, both the district court and Fifth Circuit found the three-month delay with no timeline for resolution to be a denial under fair housing law.[289]

The Eleventh Circuit referred back to *Groome Resources* in a subsequent case, similarly explaining that "the denial of an accommodation 'can be both actual or constructive, as an indeterminate delay has the same effect as an outright denial.'"[290] In *United States v. Hialeah Housing Authority*,[291] a tenant

281. Sec'y U.S. Dep't of Hous. & Urb. Dev. *ex rel.* Guard v. Ocean Sands, Inc., HUDALJ 04-90-0231-1, 12, 26, 32 (Sept. 3, 1993).

282. *Id.* at 27.

283. *Id.*

284. Astralis Condo. Ass'n v. Sec'y, U.S. Dep't of Hous. & Urb. Dev., 620 F.3d 62, 69 (1st Cir. 2010); Scoggins v. Lee's Crossing Homeowners Ass'n, 718 F.3d 262, 272–75 (4th Cir. 2013); Groome Res. Ltd., L.L.C. v. Par. of Jefferson, 234 F.3d 192, 199–200 (5th Cir. 2000); United States v. Hialeah Hous. Auth., 418 F. App'x 872, 878 (11th Cir. 2011); United States v. Town of Garner, 720 F. Supp. 2d 721, 729 (E.D.N.C. 2010).

285. *Groome Res.*, 234 F.3d at 199.

286. 234 F.3d 192 (5th Cir. 2000).

287. *Id.* at 196.

288. *Id.* at 197.

289. The court said that "[w]hile never formally denying the request, the Parish's unjustified and indeterminate delay had the same effect of undermining the anti-discriminatory purpose of the FHAA." *Id.* at 199–200.

290. United States v. Hialeah Hous. Auth., 418 F. App'x 872, 878 (11th Cir. 2011) (quoting *Groome Res.*, 234 F.3d at 199).

291. 418 F. App'x 872 (11th Cir. 2011).

with mobility issues requested transfer to an accessible unit without stairs.[292] However, the PHA only offered the household inaccessible units with stairs without indicating when it would offer an accessible unit.[293] Between when the tenant explicitly made the reasonable accommodation request and when he filed his HUD complaint, almost a year had passed with no accommodation from the PHA.[294] On review, the Eleventh Circuit found that failure to grant the accommodation for an accessible unit "for an indefinite period of time constitute[d] at least a constructive refusal to provide the accommodations."[295]

The Fourth Circuit reaffirmed that "[a] denial of a request need not be explicit, but rather may be treated as a 'constructive' denial based on the decision maker's conduct."[296] In *Scroggins v. Lee's Crossing Homeowners Ass'n*,[297] the Fourth Circuit considered a family's reasonable accommodation request to allow their son to use an all-terrain vehicle on community paths because it was difficult for his manual or electric wheelchair to navigate the unpaved paths.[298] The homeowners association waited sixteen months before responding to the request or requesting additional information.[299] While the case was ultimately dismissed on the merits, the court found the delay of sixteen months to constitute a constructive denial, reiterating the principle that unreasonable delays in responding to a reasonable accommodation request are denials under law.

Other courts have similarly found unreasonably long delays in responding to reasonable accommodation requests to violate the Fair Housing Act. In *Astralis Condominium Ass'n v. Secretary, U.S. Department of Housing and Urban Development*,[300] the complainants had requested designated parking spaces close to the building entrance to accommodate their physical disabilities, but the condominium association issued no final decision for over a year.[301] The First Circuit affirmed the agency finding of discrimination due to the delay.[302] In *United States v. Town of Garner*,[303] a group home operator requested a reasonable accommodation to allow a group home in an area zoned for families.[304] The trial court denied the town's motion to dismiss, stating that it "may have

292. *Id.* at 874.
293. *Id.* at 878.
294. *Id.* at 874–75.
295. *Id.* at 878.
296. Scoggins v. Lee's Crossing Homeowners Ass'n, 718 F.3d 262, 271 (4th Cir. 2013).
297. 718 F.3d 262 (4th Cir. 2013).
298. *Id.* at 267.
299. *Id.* at 268.
300. 620 F.3d 62 (1st Cir. 2010).
301. Astralis Condo. Ass'n v. Sec'y, U.S. Dep't of Hous. & Urb. Dev., 620 F.3d 62, 68 (1st Cir. 2010).
302. *Id.* at 69–70.
303. 720 F. Supp. 2d 721 (E.D.N.C 2010).
304. *Id.* at 722–23.

constructively denied the reasonable accommodation request . . . [by] failing to act" for over a year and a half after the group home submitted its reasonable accommodation requests.[305]

Because fair housing law already views a housing provider's unreasonable delay in responding to a reasonable accommodation or modification request to be a constructive denial, it is logical to suggest that PHA failure to timely respond to a request to add or remove a household member from household records could similarly be treated as a denial. Federal fair housing law was enacted to promote fair housing for people who historically had difficulty securing housing due to discrimination.[306] Women and people of color, historic targets of housing discrimination and some of the first protected classes under the FHA, are disproportionately likely to be poor, disproportionately likely to be eligible for subsidized housing, and are in fact overrepresented in subsidized rental housing.[307] It therefore makes sense to apply strategies from fair housing law to subsidized housing.

2. Constructive Denials in Other Areas of Law

Much like constructive denials in fair housing law, it is well established in other areas of law that the requirement to exhaust administrative or legislative remedies before seeking judicial review is not an impediment to judicial review if the entity reviewing a request delays an unreasonable length of time.[308] Under the doctrine of administrative exhaustion, someone wishing to challenge an agency decision must generally complete the agency review process before filing a case in court.[309] Reasons for the doctrine of administrative exhaustion include judicial economy and recognition that agencies have expertise in their areas of law that is important to the administration of justice.[310] However, there are exceptions to the doctrine.[311] Relevant to the instant issue, courts have

305. *Id.* at 729.

306. *See* 42 U.S.C. § 3601.

307. Ewert, *supra* note 51, at 97–101.

308. Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp., 489 U.S. 561, 587 (1989); Smith v. Illinois Bell Tel. Co., 270 U.S. 587, 590–92 (1926); Taylor v. Barnett, 105 F. Supp. 2d 483, 486 (E.D. Va. 2000).

309. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938); *see* Kenneth Culp Davis, *Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Primary Jurisdiction: 1*, 28 TEX. L. REV. 168, 168 (1949); Robert C. Power, *Help Is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. ILL. L. REV. 547, 547–48 (1987).

310. McKart v. United States, 395 U.S. 185, 193–94 (1969); Davis, *supra* note 309, at 169; Power, *supra* note 309, at 554–56.

311. Exceptions include if the administrative remedy is plainly inadequate, *see* U.S. Alkali Exp. Ass'n v. United States, 325 U.S. 196, 210 (1945), if there are issues of constitutionality of legislation that the agency action cannot address, *see* Pub. Utils. Comm'n of Cal. v. United States, 355 U.S. 534, 540 (1958), and if complying with the agency procedures would be futile, *see* Mont. Nat. Bank of Billings v. Yellowstone Cty., 276 U.S. 499, 505 (1928). *See generally* Davis, *supra* note 309, at 174–87 (noting exceptions to the exhaustion doctrine); Power, *supra* note 309, at 557–66 (same).

repeatedly found that unreasonable delays by the agency or legislative body warrant relaxing of the exhaustion doctrine.[312]

The banking context presents one such example. In a case involving the Federal Savings and Loan Insurance Corporation ("FSLIC"), which administered deposit insurance for savings and loan institutions until replaced by the Federal Deposit Insurance Corporation, [313] the Supreme Court determined that the indeterminate response period precluded the need for administrative exhaustion before seeking relief in court.[314] The relevant statute required the FSLIC to respond to creditor claims within six months and to issue a decision allowing the claim in full or in part, disallowing the claim in full or in part, or retaining the claim for further review.[315] However, the regulations set no time limit for how long the FSLIC had to make a final decision after it retained a claim for further review.[316] In *Coit v. Federal S&L Corp.*,[317] a creditor's claim had been pending in the "further review" stage before the FSLIC for thirteen months with no final decision.[318] The Supreme Court found that "lack of a reasonable time limit in the current administrative claims procedure render[ed] it inadequate" since the FSLIC could delay claims indefinitely, thus denying creditors "their day in court."[319] The Court held that the creditor did not need to show administrative exhaustion before filing a claim in court.[320]

Another area of law in which courts have found exhaustion unnecessary in the face of unreasonable delays is telecommunications law. In *Smith v. Illinois Bell Telephone Co.*, [321] a telephone company had requested that the state commerce commission implement a new rate schedule, alleging that the prior rate schedule did not allow it to cover its operating expenses.[322] The commission did nothing about the request for two years. [323] The U.S. Supreme Court addressed the phone company's claim that the failure to respond to its request was an unconstitutional taking, saying that "[p]roperty may be as effectively taken by long-continued and unreasonable delay" and that the injured party "is not required indefinitely to await a decision . . . before applying to a federal

312. *Coit Indep. Joint Venture*, 489 U.S. at 587; *Smith*, 270 U.S. 591–92; *Taylor*, 105 F. Supp. 2d at 486.

313. Julia Kagan, *Federal Savings and Loan Insurance Corporation (FSLIC)*, INVESTOPEDIA, https://www.investopedia.com/terms/f/federal-savings-and-loan-insurance-corporation-fslic.asp [https://perma.cc/3VNM-KZZ3] (last updated Jan. 30, 2021).

314. *Coit Indep. Joint Venture*, 489 U.S. at 587.

315. *Id.* at 586.

316. *Id.*

317. 489 U.S. 561 (1989).

318. *Id.* at 586.

319. *Id.* at 587.

320. *Id.*

321. 270 U.S. 587 (1926).

322. *Id.* at 590.

323. *Id.* at 591.

court for equitable relief."[324] The Supreme Court then determined that the phone company did not have to show legislative exhaustion before seeking relief in court.[325]

A third area of law in which courts have found the administrative exhaustion doctrine to not bar judicial review because of administrative delay is prisoners' rights. The Prison Litigation Reform Act ("PLRA")[326] states that "[n]o action shall be brought with respect to prison conditions under [section 1983 of this title], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies *as are available* are exhausted."[327] In *Taylor v. Barnett*,[328] the Eastern District of Virginia heard a case in which an inmate who was diagnosed with AIDS challenged a change in his medication that led to serious physical and mental side effects, including "rashes, drowsiness, discolored urine, numbness in his feet, loss of appetite and mental stress."[329] The Virginia Department of Corrections never processed his administrative grievances so he was unable to proceed with administrative review and instead filed a complaint in federal court.[330] The court refused to dismiss the claim for failure to exhaust administrative remedies because, if true, the inmate's allegations about the prison's failure to respond to his grievances showed that he had "exhausted his '*available*' administrative remedies as required by the PLRA."[331] If the prison would not respond to the inmate's attempts to participate in the appropriate administrative process, then there was nothing else he could do administratively, and he could proceed with court action to challenge the treatment per the federal statute.

This review of fair housing and administrative exhaustion case law shows that courts recognize the harm people experience when an entity fails to provide a timely response to requests for action. Further, courts understand that it is unfair to punish claimants for not using an administrative process if the entity administering the process is the reason for the delay. Even when statutes or regulations are silent as to how long a reasonable response period is, courts are capable of doing case-specific analysis to determine when a delay becomes a constructive denial. The cases discussed above often involved complex requests—determining reasonable rates for telecommunications services that affected a large community, appropriate treatment for a serious illness, and zoning variances that would potentially affect many neighbors. Despite the

324. *Id.* at 591–92.
325. *Id.*
326. Pub. L. No. 104-134, 110 Stat. 1366 (1996) (codified as amended at 42 U.S.C. 1997e).
327. *Id.* § 7, 110 Stat. at 1371 (emphasis added); *see also* 42 U.S.C. § 1997e(a).
328. 105 F. Supp. 2d 483 (E.D. Va. 2000).
329. *Id.* at 485.
330. *Id.* at 485–86.
331. *Id.* at 486 (emphasis added).

complexity of these issues, courts were able to review the facts and determine whether delays were reasonable. These cases had far reaching impacts yet were well within the ability of the courts to decide.

The instant issue—whether to allow a particular subsidized tenant to add or remove a particular household member—is far simpler and affects only a fraction of the subsidized households.[332] When determining whether to allow the addition of a new person, the PHA merely needs to conduct a criminal background check and screen their finances. These can be accomplished quickly using various credit reporting and background check programs. Already, PHAs conduct these screenings on a daily basis. When responding to a request to remove a former household member from the records, the PHA only needs to redetermine household income without the former member's income included. Given the limited issues involved and ease with which the PHAs can obtain the necessary information, it is reasonable for courts to treat an unreasonable delay as a constructive denial and allow the tenants to challenge the constructive denial using existing due process procedures.

In *Groome Resources*, the Fifth Circuit found a three-month delay in responding to a reasonable accommodation request for a zoning variance to be a constructive denial. Surely, it is reasonable to expect PHAs to respond to simple requests to add or remove household members from PHA records faster than that. While this Article does not necessarily advocate for a one-size-fits-all approach to what is a reasonable time for a PHA response,[333] it seems entirely reasonable for courts to find PHA delays of more than two months (and possibly even less given HUD's expectations for private housing providers receiving subsidies) to be constructive denials, triggering administrative and judicial review rights.

332. The number of households PHAs subsidize varies by community. Some programs are small. For example, the Housing Authority of Tulare County in California administers about 700 public housing units and 2,950 HCVP units. *See Housing Authority of the County of Tulare*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/ph/mtw/tulare [https://perma.cc/P2NE-M8R6] (last updated Sept. 8, 2020). Larger PHAs provide assistance to tens of thousands of households. The Housing Authority of Baltimore City administers about 7,200 public housing units and 20,200 HCVP vouchers. *See Housing Authority of Baltimore City*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/ph/mtw/baltimore [https://perma.cc/9M74-UG5J]. The Chicago Housing Authority is even larger, providing public housing and voucher assistance to over 63,000 households. *See Chicago Housing Authority*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/ph/mtw/chicago [https://perma.cc/WM5L-GAX8]. Regardless of whether the PHA is small or large, the percentage of households requesting to add or remove household members is likely a small percentage of the overall consumer base, so processing these change requests constitutes a small proportion of a PHA's overall work.

333. For example, this author recognizes that many PHAs experienced delays in processing all sorts of requests during the unprecedented COVID-19 shutdown of 2020 or that requests submitted during the winter holidays might take longer to process because of staff vacations and office closures.

D. *Solution 2: Self-Certification Combined with Subpoena Power*

A second procedural problem that PHAs must address is the requirement that a tenant produce third-party verification of a former household member's new address before removing the former household member from PHA records. It should be sufficient for tenants to submit a statement certifying that their household composition has changed. Then they would not need to obtain often inaccessible third-party records. Indeed, during the late 1960s and early 1970s, the Department of Health, Education, and Welfare instituted a "declaration method" of establishing eligibility for public benefits, relying on the applicant's or recipient's declaration and seeking external corroboration only when the declaration was "incomplete, unclear, or inconsistent."[334] Further, the Department of Health, Education, and Welfare was required to assist the applicant or recipient in obtaining third-party verification records if such records were necessary and was responsible for obtaining those records if the applicant or recipient could not do so.[335] Unfortunately, the Nixon Administration rolled back the simplified verification program as part of its campaign to root out alleged fraud in means-tested benefits programs.[336]

Welfare recipients came under increased scrutiny in the 1970s and 1980s, when concern over welfare fraud became frenzied.[337] While there were three high profile instances of individual women engaging in welfare fraud by collecting benefits under multiple aliases, a government report from 1979 found that medical providers overcharging Medicaid and Medicare were a much bigger problem than fraud in welfare.[338] Further, a recent study of welfare recipients found that the interviewees "considered it a welfare 'violation' to spend welfare money wastefully or to spend it on oneself rather than on one's children."[339] The idea that most means-tested public benefits recipients are successfully gaming the system for personal gain is not supported by evidence.[340] However, by the 1990s, governmental concern over welfare fraud

334. Bennett, *supra* note 98, at 2186; *see also* Determination of Eligibility for Public Assistance Programs, 33 Fed. Reg. 17,189 (1968) (proposed Nov. 8, 1968); Part 206—Application, Determination of Eligibility and Furnishing Assistance—Public Assistance Programs, 35 Fed. Reg. 8784, 8785 (1970) ("Applicants and recipients will be relied upon as the primary source of information in making the decision about their eligibility.").

335. 35 Fed. Reg. 8785 ("The agency will help applicants and recipients provide needed information, as necessary, or will obtain the information for them if, because of physical, mental, or other difficulties, they themselves are unable to provide it.").

336. 38 Fed. Reg. 22,005, 22,006–07 (1973); Bennett, *supra* note 98, at 2186.

337. GUSTAFSON, *supra* note 186, at 32–35.

338. *Id.* at 33–34.

339. *Id.* at 151.

340. Examining benefits for people in economic crisis reveals that the incidence of recipient fraud is low. The federal government has determined that less than 1% of households receiving SNAP benefits are, in fact, ineligible, and the payment accuracy rate for SNAP benefits was over 96% in 2011. *What Is FNS Doing to Fight SNAP Fraud?*, U.S. DEP'T. OF AGRIC. FOOD & NUTRITION SERV. (June

had reached a fevered pitch. When Congress passed welfare reform in 1996, it required states to implement some sort of fraud control policy.[341]

The response to concerns about fraud was "verification extremism," in which agencies administering public benefits demand stricter documentation of eligibility than the authorizing statutes or regulations require.[342] Examples of verification extremism include requiring the production of Social Security cards when program regulations require only that applicants list a valid Social Security number, requiring birth certificates or photo identification cards when the regulations do not require them, or requiring that applicants have statements notarized when the regulation only requires an applicant make a written statement.[343] These requirements impose real burdens on low-income individuals or people experiencing homelessness, who have little money for paying replacement fees and often limited transportation options for getting to agency offices if they lose documents. PHAs requiring third-party records like a former household member's new lease or utility bill is another example of verification extremism that poses challenges to program participants.

Given the ongoing hysteria about fraud in means-tested benefits programs and the entrenchment of verification extremism,[344] it is unlikely that PHAs will

27, 2019), https://www.fns.usda.gov/snap/integrity/fraud-FNS-fighting [https://perma.cc/38VE-MTZ2]. Further, in the case of SNAP overpayments, only about 11% of the overpayments in the 2016 fiscal year were due to recipient fraud; the overwhelming majority of overpayments stemmed from agency error or recipient error. RANDY ALISON AUSSENBERG, CONG. RSCH. SERV., R45147, ERRORS AND FRAUD IN THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) 11–13 (2018), https://fas.org/sgp/crs/misc/R45147.pdf [https://perma.cc/3E8H-NY2S]. With Medicaid, most fraudulent activity is committed by health care providers in their billing, not by low-income individuals submitting fraudulent applications. Clifford J. Levy & Michael Luo, *New York Medicaid Fraud May Reach into Billions*, N.Y. TIMES (July 18, 2005), https://www.nytimes.com/2005/07/18/nyregion/new-york-medicaid-fraud-may-reach-into-billions.html [https://perma.cc/6UPP-HHQU (dark archive)]. In the unemployment insurance program (which is not a means-tested benefit), the national improper payment rate for the 2020 reporting year was 9.17%. *Unemployment Insurance Payment Accuracy by State*, U.S. DEPT. LAB., https://www.dol.gov/agencies/eta/unemployment-insurance-payment-accuracy [https://perma.cc/9SY6-GKVG]. However, the rate of improper payments due to applicant fraud was much lower at 3.23% from 2019 to 2020. U.S. DEP'T LAB. EMP. & TRAINING ADMIN., CHART – UNEMPLOYMENT INSURANCE IMPROPER PAYMENT RATES, 1 (2020), https://oui.doleta.gov/unemploy/pdf/UI_Improper_PaymentRates.pdf [https://perma.cc/7YCP-AB7P].

341. GUSTAFSON, *supra* note 186, at 56–57, 63–65.

342. Bennett, *supra* note 98, at 2159; *see also* Timothy J. Casey & Mary R. Mannix, *Quality Control in Public Assistance: Victimizing the Poor Through One-Sided Accountability*, 22 CLEARINGHOUSE REV. 1381, 1385–86 (1989).

343. Bennett, *supra* note 98, at 2166–67.

344. A recent study of IRS data shows that the federal government audits low-income taxpayers applying for the Earned Income Tax Credit ("EITC") at a higher rate than wealthy taxpayers and that over the past thirty years audit rates for low-income taxpayers increased by one-third while audit rates for the wealthiest taxpayers decreased by ninety percent. The hyper focus on low-income taxpayers seems driven by the fear that EITC recipients are more likely to commit fraud than other taxpayers. David Cay Johnston, *I.R.S. More Likely To Audit the Poor and Not the Rich*, N.Y. TIMES (Apr. 16, 2000), https://www.nytimes.com/2000/04/16/business/irs-more-likely-to-audit-the-poor-and-not-the-rich.html [https://perma.cc/CA4J-3QWG (dark archive)].

do away with the third-party record requirement. The requirement likely stems from a fear that subsidized tenants will lie about household composition, saying that a household member has left when they in fact have not. Still, adopting an approach based on self-certification would be consistent with other housing assistance programs. For example, the home mortgage interest deduction and similar tax breaks are based on taxpayer self-reporting unless the household is audited due to suspected fraud, when the government might then request corroborating records.[345] The federal government and PHAs should take a similar approach to subsidized housing tenants adjusting their household composition records—relying on the tenants' self-certification unless there is some legitimate, household-specific reason for suspecting a particular individual engaged in fraud. If evidence suggested fraud, a more in-depth examination of household composition might then be warranted.

This solution would be better for tenants but still allow PHAs recourse if they determined that participants engaged in fraud. A PHA could terminate the participant from the program and could pursue an overpayment recovery, either through the agency (increasing the rent owed for future months if the tenant stays in the public housing or HCVP program) or the courts (a money judgment if the tenant is no longer in the program). As noted earlier, the difference in rental assistance between when a former household member's income is included or not included is small from the PHA's perspective but significant for the household.[346] Given that the tenants bear a great burden if the rent is set incorrectly high and are likely ill-equipped to represent themselves in legal challenges to correct government agency action,[347] PHAs should take steps to make the process to update records easier. Self-certification is a reasonable approach.

However, if PHAs insist on third-party documentation before updating household composition records, the federal government must authorize subpoena power to enable the tenants to obtain those necessary third-party documents. Congress already authorized subpoena power under the federal Administrative Procedure Act,[348] which allows people with matters pending

345. Bach, *Poor Support / Rich Support*, *supra* note 205, at 535.

346. *See supra* notes 96–97 and accompanying text.

347. Even with the requested third-party verification, PHAs often do not adjust rent or update records promptly. An investigative report of the Housing Authority of the City of Annapolis documented the experience of various subsidized tenants, including Chermire Gladden, who worked as a school bus driver and part-time at a cleaning company. Ohl et al., *supra* note 90. Despite providing current paystubs showing a change in her hours, the PHA did not adjust her rent for six months, suing her repeatedly for unpaid rent before the district court ruled in Ms. Gladden's favor. *Id.* The PHA ultimately credited her account the $1,128 she had been overcharged for that period, an insignificant amount of money to the PHA but very significant to Ms. Gladden. *Id.* While Ms. Gladden was fortunate to obtain free counsel from a legal services program, many other tenants are not so lucky.

348. Specifically, the APA directs that

before federal agencies to subpoena both individuals and records to support their case.

Congress can and should similarly add subpoena power to the statutes governing how PHAs administer public housing and the HCVP. Doing so would enable tenants to access third-party records like leases, utility bills, and other documents establishing new residence of former household members. Subpoena power would similarly enable tenants to present testimony from witnesses who would not voluntarily appear at agency hearings or disclose otherwise confidential information, such as emergency shelter staff who could testify about a former household member staying at a shelter instead of the subsidized housing unit. Then, subsidized tenants like Ms. Harris would be able to obtain the third-party verification PHAs claim is necessary to adjust household composition records.

The solutions proposed in this Article—treating unreasonable delays in PHA responses as constructive denials and relying on self-certification combined with subpoena power to prove household composition changes—would allow subsidized tenants to more easily update composition records and challenge PHA inaction. As a result, subsidized tenants would have more control over their family life. This control is essential for protecting their fundamental right to privacy, family formation, and decisional autonomy—all integral values protected under the Constitution.

CONCLUSION

Whether PHA delays in responding to requests to change household composition and requirements to produce inaccessible third-party records are motivated by animus towards and distrust of the low-income tenants (consistent with government action throughout U.S. history) or bureaucratic negligence (institutions being slow to evolve once patterns are established), the effects are the same.[349] Subsidized tenants—who are disproportionately Black women—are harmed when they cannot form the family units they want. As private and

> [a]gency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

5 U.S.C. § 555(d).

349. As one scholar recently noted, "We have created a caste system in this country, with African Americans kept exploited and geographically separate by racially explicit government policies. Although most of these policies are now off the books, they have never been remedied and their effects endure." ROTHSTEIN, *supra* note 42, at xvii.

public institutions examine the role they play in perpetuating systemic racism, is it imperative that HUD and PHAs similarly evaluate and correct unnecessary, harmful policies that impact low-income tenants' fundamental rights.

Within a week of taking office, President Biden issued a memorandum to the Secretary of HUD ordering the agency to examine its policies and redress ones that were discriminatory.[350] In it, he acknowledged that "[o]ngoing legacies of residential segregation and discrimination remain ever-present in our society."[351] He further stated that the FHA's mandate to affirmatively further fair housing requires not only that the government refrain from discrimination, but also "take actions that undo historic patterns of segregation and other types of discrimination and that afford access to long-denied opportunities."[352]

For Black lives to truly matter, Black families must be afforded the same protections as other families. This includes the fundamental right to privacy, family formation, and decisional autonomy. Given the critical role that subsidized housing plays in supporting low-income families, who are disproportionately families of color, the solutions proposed in this Article would go a long way toward promoting and protecting those fundamental rights.

350. *See* Joseph R. Biden Jr., *Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies*, WHITE HOUSE (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/ [https://perma.cc/9R2M-BEU6].

351. *Id.*

352. *Id.*