Georgetown Journal on Poverty Law and Policy
Volume XXIX, Number 1, Fall 2021

ARTICLES

I Am Not a Nuisance: Decriminalizing Domestic Violence Across New York's Civil Housing & Criminal Justice Systems

Siya U. Hegde*

ABSTRACT

This Article examines how the treatment of domestic violence in New York's civil and criminal legal systems places survivors and alleged abusers at risk of homelessness—on the one hand, it has been underplayed as a 'bothersome' nuisance offense to landlords, while also serving as a basis for state-sanctioned evictions through the issuance of Orders of Protection. Section I incorporates client anecdotes to display how this issue has affected Bronx tenants during the pandemic, explaining theoretical re-framings of domestic violence and providing context on how domestic violence rates in New York City have affected the homelessness epidemic. Section II conducts a deeper dive into nuisance doctrine and the ways that New York tenants affected by domestic violence are entangled in civil judicial and administrative housing disputes. Section III discusses domestic violence prosecutions in criminal courts and the pitfalls that Orders of Protection present in curtailing alleged abusers' housing rights. Section IV offers policy recommendations to combat the impacts of local nuisance laws and Orders of Protection on survivors and alleged abusers, further acknowledging the importance of transformative justice as an advocacy method to decriminalize domestic violence across the civil and criminal legal spectrum.

---

* Attorney & Policy Counsel, The Bronx Defenders' Civil Action Practice. I am extremely thankful to the constructive guidance and editorial support of my colleagues Julia Lake, Runa Rajagopal, William John, Maleeha Riaz, and Eli Northrup, distinguished law scholars Kathryn Sabbeth and Deborah Weissman from the University of North Carolina School of Law, Quisha Mallette from the North Carolina Justice Center, and the incredible student staff of the *Georgetown Journal on Poverty Law and Policy.* I express particular gratitude to my resilient clients, and the peers and friends I have made within the holistic public defender and housing justice communities; their commitment to addressing systems of injustice is unwavering and inspiring. Last, but not least, this writing endeavor would not have been possible without the love and encouragement of my parents, Drs. Poornima and Upendra Hegde.

Introduction

Evictions and homelessness continue as drivers and consequences of the housing crisis, even in jurisdictions like New York City where Right to Counsel became a landmark victory for tenants over four years ago.[1] Ample literature has been written about how housing instability disproportionately affects households experiencing domestic violence. Major upticks in domestic violence arrests and incident reports recorded nationally during the COVID-19 pandemic have reinforced this correlation.[2] But the classification of domestic violence as both a criminal offense and a basis for a tenant's eviction when deemed a 'property nuisance' in housing court raises serious concerns over its harmful legal consequences. This Article will centrally focus on this dual characterization of domestic violence and its implications for New York[3] tenants who are entangled in criminal and civil housing proceedings. Its analyses may be treated as commentary on the intersectionality of the criminal and civil justice systems and the infringement of one's human right to housing through his or her legal system contact.

Section I will present two anecdotes that exhibit some of the challenges that victims and survivors,[4] as well as alleged domestic abusers encounter in obtaining housing stability. It goes on to explain key framings around gender-based violence discourse, subsequently describing how high rates of domestic violence have contributed to New York City's homelessness epidemic (as a microcosm of the housing crisis elsewhere).

---

1. In August of 2017, New York City became the first city in the country to pass and sign into law the historic "Right to Counsel" for tenants facing eviction proceedings in Housing Court. The law guarantees free, full legal representation to income-eligible tenants (i.e., those living in households that are 200% below federal poverty levels) and has since extended to tenants in all five boroughs. *See* N.Y. C. Council Intro. 2050-A (May 11, 2021) (amending the Admin. Code § 26-1301 *et seq*. by providing legal services for tenants who are subject to eviction proceedings); *see also New York City Council Passes Right to Counsel Legislation*, Progressive Caucus of the N.Y.C. Council (July 20, 2017), https://nycprogressives.com/2017/07/20/new-york-city-council-passes-right-to-counsel-legislation/.

2. *See Domestic Violence*, Nat'l Low Income Hous. Coal. (June 10, 2020), https://nlihc.org/resource/domestic-violence (describing how domestic violence correlates with housing instability and the effects of the COVD-19 pandemic, especially across major cities).

3. This Article's geographical scope draws, in part, from my perspective as a civil public defender in the Bronx and my familiarity with New York City's landlord-tenant laws. Several sections also focus more broadly on New York due to the relevancy and recency of the state's former eviction moratorium and its treatment of nuisances, and ongoing legislative advocacy around the enactment of evidentiary hearings in criminal courts for Temporary Orders of Protection.

4. Moving forward in this Article, I will mostly be using "survivor" instead of "victim" to describe those individuals who have suffered the short or long-term effects of domestic and/or interpersonal violence. In dialogue about criminal prosecutions of domestic violence, I will resort to using "victim" as the legal term used in courtroom proceedings and by members of law enforcement. However, I want to acknowledge that there is no 'best practice' or 'default label' on whether to use "victim" or "survivor" in writings like this, especially as the journey to recovery and healing is personal to each individual who navigates it. I recognize each individual's right to process their traumas and identities however they choose to do so, and appreciate the victim/survivor continuum that others have used to describe this journey. For many, being called a 'survivor' represents the experience of empowerment and strength in their recovery, and I have intentionally chosen to reflect that sentiment through this Article.

Section II, structured in five subparts, will examine the nuisance doctrine and the ways it ensnares tenants affected by domestic violence in civil judicial and administrative housing disputes. The first subpart will contextualize the historical, sociological, and legal underpinnings of 'nuisances.' The second subpart narrows in on chronic nuisance ordinances and nuisance abatement laws as draconian legal devices commonly affecting residential tenants involved in domestic violence disputes. It continues with a discussion on court eviction and administrative termination of tenancy proceedings that New York landlords have brought in civil forums to evict tenants on nuisance grounds. The third subpart will discuss the structural power dynamics of landlord-tenant nuisance proceedings as they concern governmental actors, landlords, and marginalized tenants. The fourth subpart critiques New York's former eviction moratorium legislation, assessing the absence of protections it had extended during the pandemic to tenants alleged to have committed nuisances on residential properties. The fifth subpart will debrief the racial and socio-economic disparities of New York tenants who remain at highest risk of these various eviction channels.

Section III shifts in focus to how domestic violence prosecutions in criminal courts often affect alleged abusers' housing rights. This section examines the legal effects and civil consequences of Orders of Protection, relying on two guiding case decisions that have gradually improved the landscape of procedural due process for those accused of committing domestic violence.

Section IV will offer policy recommendations centered on restricting local nuisance property laws, creating fairer criminal court procedures to prevent housing exclusion of alleged abusers, and employing transformative justice as an advocacy method to decriminalize domestic violence across the civil-criminal legal spectrum.

I. Holistic Frameworks of Domestic Violence, its Civil Consequences, and the Scope of New York City's Housing Crisis

As a public defender in the Bronx, I advocate for many clients who have developed associations with domestic violence. While many of them have experienced these acts on at least one prior occasion, others face accusations of the violence. For most of these tenants who come from low-income Black and Hispanic/Latinx communities, the consequences of the domestic violence often make them susceptible to civil penalties like the loss of housing and employment.

In one case that arose during the pandemic, my client, "Ms. M."—a single mother of three young girls—filed criminal charges against a neighbor for the physical abuse and intimidation she suffered in her building. Despite reporting this abuse to her landlord, it continued to recur. As these criminal activities increased in frequency throughout the building, Ms. M. lost her income as a home childcare provider and fell behind in rent payments. Fearing for her and her daughters' physical safety, as well as for the return to housing court and an eventual eviction, Ms. M. worked tirelessly to seek housing elsewhere. After many months of advocacy, the Bronx District Attorney's Crime Victims Assistance

Unit ultimately awarded Ms. M. an emergency housing voucher to re-locate to a subsidized housing unit. While Ms. M. was certainly fortunate for this ourcome, comprehensive support services assisting domestic violence and other crime survivors with housing transfers are difficult to come by. However, as of this writing, Ms. M. still struggles to seek affordable housing using her emergency voucher.

In a separate case that my colleague litigated, "Mr. S." and his wife—who both lived with his sister in a private, unregulated apartment for five years—were parties in a holdover eviction proceeding predicated on allegations of nuisance conduct. One of the allegations concerned a fight in the building lobby, which resulted in Mr. S.'s arrest and the issuance of a full Temporary Order of Protection ("TOP") against him. Consequently, in the course of the proceeding, Mr. S. was rendered homeless while his wife and minor daughter remained in the apartment. The TOP was later modified, affording Mr. S. limited access to the apartment. Mr. S.'s wife, the Complaining Witness in the domestic violence prosecution, ultimately chose not to press charges against him and the case was dropped. However, in spite of this, the couple eventually entered into a probationary stipulation in Bronx Housing Court, agreeing to a four-month voluntary move-out to avoid an eviction.

Narratives like these shed light on how experiences and allegations of domestic violence can trigger evictions and homelessness, disproportionately perpetuating housing instability within historically marginalized communities. Before delving into a broader discussion about the polarization of domestic violence as a 'nuisance' issue in civil housing courts and an overpoliced, criminal offense in criminal courts, we must remain sensitive to the terminologies we use to describe the nature of the violence and those it affects.

A. Language Sensitivities and Theoretical Re-framings of Domestic Violence

Conceptually, domestic violence[5] constitutes a systematic pattern of behavior "used to gain or maintain power and control over an intimate partner."[6] The term intimate partner violence ("IPV") evolved as a subset of this definition and has often been limited to abuse or aggression in a current or former romantic relationship; it may also occur irrespective of whether the individuals involved are/were cohabiting.[7] However, both domestic violence and IPV have been viewed as gendered issues in the ways that they "reinforce stereotyped renditions of gender

5. *See generally Domestic Violence*, N.Y.C. Dep't of Homeless Servs., https://www1.nyc.gov/site/dhs/prevention/domestic-violence.page (last visited Dec. 9, 2021) (providing resources for domestic violence survivors who are at risk of homelessness as a result of the violence and describing the broad scope of what constitutes domestic violence).

6. *See What Is Domestic Abuse?*, U.N., https://www.un.org/en/coronavirus/what-is-domestic-abuse (last visited Dec. 8, 2021).

7. *See Preventing Intimate Partner Violence*, Ctrs. for Disease Control, https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html (last visited Dec. 9, 2021) (explaining that IPV may range from physical violence to sexual violence, stalking, and psychological aggression); *see also Domestic Violence Basics, Intimate Partner Relationships*, N.Y. State Unified Ct. Sys., https://nycourts.gov/CourtHelp/Safety/DVbasics.shtml (last visited Dec. 9, 2021) ("You can have an intimate partner relationship even if you don't live with the abuser . . .").

identity" and represent the intersectionality of womxn's experiences with the anti-violence movement.[8] As such, this Article will reference domestic violence and IPV interchangeably as practices that reflect the broader discourse around gender-based violence.

I will also be using the term 'womxn' to acknowledge the intersectionality of women's, transwomen's, and gender non-binary identities that have been traditionally excluded from feminist and civil discourse. Prominent gender violence scholars have argued that the gender-specific framing of 'violence against women' "no longer does the work feminists hoped it would do"—that by limiting sexual violence and IPV through the "singular lens" of women, the violent experiences of gender non-conforming survivors are discounted and there is a lack of recognition of the power and abuse that occurs across a spectrum of relationships.[9]

The interplay of womxn's experiences and identities in terms of race, class, disability, ethnicity, sexual orientation, and other statuses affect their susceptibility to civil (i.e., eviction) actions and domestic violence prosecutions to differing degrees. Generally, the majority of evicted tenants are womxn and children, and mothers often "experience the suffering [an eviction] causes their children" in their role as primary caretakers.[10] Many marginalized womxn, including those who identify as LGBTQI+, "have repeatedly questioned whether the policy choices made by the anti-violence movement contemplated or comprehended their unique needs," a sentiment that should be extended to the housing justice space.[11] And because womxn living in households with lower gross household annual incomes are generally said to experience significantly higher levels of domestic violence and IPV than womxn in higher-income households,[12] we cannot disaggregate socio-economic status and related poverty indicators from race, gender, and other marginalized identity markers that are most susceptible to evictions and homelessness.

Conversely, the criminalization of domestic violence and IPV has disproportionately affected men of color, heightening their contact with the criminal legal system due, in no small part, to policing practices by law enforcement.[13] As most of these offenses are criminally prosecuted as misdemeanors, the civil consequences that men of color have experienced stem mostly from misdemeanor arrests and convictions, making employment after incarceration all the more difficult for

---

8. *See* LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 7 (2018).

9. *See* Julie Goldscheid, *Gender Neutrality: The "Violence Against Women" Frame, and Transformative Reform*, 82 UMKC L. REV. 623, 625 (2014).

10. *See* Kathryn A. Sabbeth, *Housing Defense as the New* Gideon, 41 HARV. J. L. & GENDER 55, 89-90, 95 (2018).

11. *See* GOODMARK, *supra* note 8, at 7.

12. *See* Cari Fais, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1199 (2008).

13. *See* GOODMARK, *supra* note 8, at 19.

them to procure.[14] Domestic violence is also disproportionately committed by economically disadvantaged people who face financial disempowerment, uncertainties, and a sense of powerlessness to provide for their families.[15] Alleged abusers and others who are funneled into the criminal legal system tend to come from poorer communities and live in lower-income households.[16] I will use the term 'alleged' throughout this Article to underscore how civil consequences need not stem from offense convictions to affect an accused individual's right to housing—allegations alone can lead to an alleged abuser's loss of housing. In civil housing court, a landlord may commence a summary eviction proceeding against a tenant on the basis of domestic violence allegations, classified as nuisance conduct. In criminal court, when an alleged abuser is issued a full TOP, either he or the survivor loses the right to stay in the home. In other instances, similar allegations and the absence of procedural due process safeguards may lead to an increase in child protective service intervention in households with at least one minor dependent child.[17]

---

14. *See id.*

15. *See* MICHAEL L. BENSON & GREER L. FOX, ECONOMIC DISTRESS, COMMUNITY CONTEXT AND INTIMATE VIOLENCE: AN APPLICATION AND EXTENSION OF SOCIAL DISORGANIZATION THEORY, FINAL REPORT 45-47, 62 (2002) (assessing the extent to which a household's economic distress influences the use of violence by men against women in intimate relationships).

16. *See* Leigh Goodmark, *Should Domestic Violence be Decriminalized?*, 40 HARV. J. L. & GENDER 53, 69-70 (2017) (". . . the U.S. government has increasingly poured resources into the criminal legal system, using that system to address the consequences of unresolved social problems including poverty, lack of employment, lack of housing, mental illness, and drug use."); *see also generally* Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009) (examining the history of welfare programs and explaining how low-income families are often "heavily surveilled and regulated" by welfare officials and the criminal justice system).

17. In May 2004, the New York Civil Liberties Union co-authored an amicus brief on the issue of parental rights of mothers in households reported to face domestic violence allegations. They filed the amicus at the New York Court of Appeals (2nd Circuit). In the case at hand, the Administration of Children's Services ("ACS") called the hospitalized mother, informing her that it had taken custody of her minor children who remained in "imminent risk if they remained in [her] care because she was not . . . able to protect herself nor her children" in the face of the domestic incident. ACS also filed neglect charges against the mother for having engaged in domestic violence conduct in the presence of her child. While the Family Court ordered the return of the children, the mother was listed on the state's records as a "neglectful parent," subsequently filing a class action suit against ACS for deprivation of her constitutional right to due process. The Court of Appeals ruled favorably on her behalf, holding that an agency's decision to remove a child from the household "must be weighed against the psychological harm to the child that could be created by the removal itself . . . ." *See* Nicholson v. Williams *(Defending Parental Rights of Mothers Who Are Domestic Violence Victims)*, N.Y. CIV. LIBERTIES UNION, https://www.nyclu.org/en/cases/nicholson-v-williams-defending-parental-rights-mothers-who-are-domestic-violence-victims (last visited Dec. 9, 2021). *See also A Parent's Guide to a Child Abuse Investigation*, N.Y.C. ADMIN. FOR CHILD. SERVS., https://www1.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page (last visited Dec. 9, 2021). More generally, ACS is mandated to investigate all reports of child abuse and maltreatment reported in the New York State Central Registry. In these investigations, Child Protective Services makes an unannounced visit to the home within 24-48 hours of the report, gathers information from the person who made the report, conduct a home safety inspection, and will ultimately determine if the report is "indicated" or "unfounded."

An ideology coined "carceral feminism" was created to "[increase] state enforcement against violence against women."[18] Proponents of it have defended the criminal legal system's policing, incarcerating, and other punitive practices in support of womxn's liberation and gender justice.[19] But this ideology creates a harmful justification for criminalizing domestic violence. It reinforces the criminal legal system's inherent flaws by failing to recognize its "internal carceral, racist, and masculinist logics."[20] This critique may be similarly extended to the systemic oppression perpetuated by the civil legal system, including consequences affecting one's right to housing. Evictions themselves exhibit the State's use of coercive force, giving rise to a "forcible, violent experience in which property is lost and damaged and lives are disrupted."[21]

B. Domestic Violence as a Catalyst and Condition of Homelessness in New York City

As the COVID-19 pandemic ravaged through New York City in March 2020, leaving it as the virus' national epicenter, the New York City Police Department ("NYPD") responded to a ten percent increase in Domestic Incident Reports ("DIRs") in comparison to March 2019 figures.[22] Although the de Blasio administration proactively instituted a local shelter-in-place order as a public health measure in these earlier weeks of the pandemic, the order left uncontemplated the violent, abusive conditions that made sheltering in place unhealthy and unsafe for those experiencing domestic violence and/or IPV. Other city and statewide policies like it similarly overlooked the *de facto* homelessness that many tenants—disproportionately low-income womxn of color—already risked facing if they were associated with a domestic violence report at a residential property.

Although domestic violence remains among the most underreported crimes,[23] the New York City Mayor's Office to End Domestic and Gender-Based Violence

---

18. *See* Nancy Whittier, *Carceral and Intersectional Feminism in Congress: The Violence Against Women Act, Discourse, and Policy*, 30 GENDER & SOC'Y 791, 792 (2016).

19. *See* Victoria Law, *Against Carceral Feminism*, JACOBIN (last visited Dec. 9, 2021), https://www.jacobinmag.com/2014/10/against-carceral-feminism/ (". . . carceral feminism describes an approach that sees increased policing, prosecution, and imprisonment as the primary solution to violence against women.").

20. *See* Aya Gruber, *The Carceral State Will Not Be Feminist*, UNIV. MINN.: THE GENDER POL'Y REP. (Aug. 4, 2020), https://genderpolicyreport.umn.edu/the-carceral-state-will-not-be-feminist/.

21. *See* Armen H. Merjian, *Righting the Scales of Justice: The Critical Need for Contempt Proceedings Against Lawless Landlords*, 52 COLUM. HUM. RTS. L. REV. 592, 603 (2021).

22. *See* Brad Boserup et al., *Alarming trends in US domestic violence during the COVID-19 pandemic*, 38 AM. J. EMER. MED. 2753, 2753 (2020). *But see* David Abrams, *COVID and Crime: An Early Empirical Look*, FAC. SCHOLARSHIP AT PENN. LAW, 1, 3 (2002) ("The cities with the greatest declines were Pittsburgh, New York City, San Francisco, Philadelphia, Washington DC, and Chicago, which each had declines of at least 35% for overall crime rates.").

23. *See Why Domestic Violence Goes Unreported*, TALKING PARENTS (July 11, 2019), https://talkingparents.com/parenting-resources/unreported-domestic-violence; *see also* Crime & Just. News, *Report: Nearly Half of Domestic Violence Goes Unreported*, THE CRIME REPORT: YOUR CRIM. JUST. NETWORK (May 3, 2017), https://thecrimereport.org/2017/05/03/report-nearly-half-of-domestic-violence-goes-unreported/.

("ENDGBV") totaled 93,235 calls to the city's domestic violence hotline in 2020, in comparison to 81,406 calls made in 2019.[24] Brooklyn and the Bronx presented comparable figures in the numbers of DIRs filed in response to IPV, which was nearly double that of Manhattan, and double that of Queens and Staten Island combined.[25] On average, 56.4 percent of citywide domestic violence police complaints in 2020 involved intimate partner allegations, with 1,644 complaints classified as "chronic domestic violence complaints" pursuant to the New York City Administrative Code.[26] Moreover, while one in three white womxn have reported domestic violence since the pandemic first began, these reporting rates have been closer to one in two womxn who identify as LGBTQI+, Black, Indigenous, or other persons of color, non-citizens, and/or disabled.[27] Accordingly, sheltering-in-place did not "inflict equivalent hardship on all people."[28]

For further context, survivors of domestic violence tend to stay in abusive relationships and refrain from making police complaints due to lack of alternative housing options. For many, "staying can be safer than leaving, at least until a strong and reliable network is established" for them to regain stability.[29] The pandemic's prolonged quarantine months and the spike in unemployment citywide made it nearly impossible for tenants who identify as survivors to tap into alternative housing options, personal and familial networks, and other sources of economic support. Economic and financial stressors in the absence of these support structures have contributed to an increased risk of housing instability and threat of eviction during the pandemic, leaving households in urgent need of housing assistance.[30]

These determinants of gender-based violence are catalysts and conditions of the city's homelessness crisis. Between 2002 and 2012, over twenty percent of

---

24. *See* N.Y.C. Mayor's Off. to End Domestic & Gender-Based Violence, ENDGBV 2020 Domestic Violence Fact Sheet (2020), https://www1.nyc.gov/assets/ocdv/downloads/pdf/2020_Annual_Fact_Sheet.pdf (last visited Dec. 9, 2021).

25. *See id*.

26. *See* N.Y.C. Police Dep't, 2020 Annual Complaint and Radio Run Statistics, *in* Domestic Violence Reports, https://www1.nyc.gov/site/nypd/stats/reports-analysis/domestic-violence.page (last visited Dec. 9, 2021); *see also* N.Y.C. Police Dep't, 2020 Local Law 38 Report for 2020, *in* Domestic Violence Reports, https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/domestic-violence/dv-local-law-38-annual-2020.pdf (last visited Dec. 9, 2021); N.Y.C. Admin. Code, tit. 14, § 14-150(e) (2020) (defining a "chronic domestic violence case" as one involving a chronic offender, or someone "who has been arrested three or more times in an 18-month period for a crime determined by the department to be related to domestic violence").

27. *See* Jeffrey Kluger, *Domestic Violence Is a Pandemic Within the COVID-19 Pandemic*, TIME (Feb. 3, 2021, 11:15 AM), https://time.com/5928539/domestic-violence-covid-19/.

28. Megan L. Evans et al., *A Pandemic within a Pandemic – Intimate Partner Violence during COVID-19*, 383 New Eng. J. Med. 2302, 2302 (2020).

29. *See* Fais, *supra* note 12, at 1197.

30. *See* Whitney Airgood-Obrycki et al., Renters' Responses to Financial Stress During the Pandemic 7-9 (2021), https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_renter_responses_covid_airgood-obrycki_etal_2021.pdf (examining the pandemic's impact on the financial and economic wellbeing of renters in the U.S., and, in turn, noting the imminent risk of eviction-forced moves).

those living in New York City shelter facilities cited domestic violence as their reason for seeking shelter.[31] The city's Human Resources Administration ("HRA") runs a shelter system specifically for survivors of domestic violence, which is recognized as the largest system of its kind in the country.[32] Fifty percent of all homeless women and children, on average, are reportedly homeless because they fled domestic violence.[33] In March 2020, the particularly rapid spread of COVID-19 across the shelter system drew attention to City policies restricting eligibility for isolation hotels.[34] In a letter to the City on March 26, 2020, The Legal Aid Society noted that among those who were denied placements in such isolated sites were single adults in family shelters "who were required to leave [their homes] due to alleged domestic violence circumstances."[35] These profiles of the shelter system, during the pandemic and in the years prior, show how the City's underinvestment in and general lack of housing is a community issue, a human rights issue, and an outcome of the criminalization of poverty.

II. Nuisance Doctrine and the Threat of Evictions from Civil Actions

While domestic violence allegations are most often associated with criminal prosecutions, they also arise within civil landlord-tenant litigation by virtue of the nuisance doctrine. Nuisance property laws remain on the books in several jurisdictions despite their scarce mention in legal literature and in reference to the homelessness crisis. This section will conduct a deeper dive into (i) the evolution of nuisance doctrine as a body of law and its eventual expansion to include domestic violence in the landlord-tenant legal domain; (ii) the ways that domestic violence's characterization as a 'nuisance' issue in these civil legal systems has triggered evictions and homelessness in New York; (iii) the structural power dynamics of landlord-tenant nuisance actions; (iv) New York's former residential eviction moratorium legislation and its nuisance carveout; and (v) the various racial and socio-economic disparities across New York that have most affected tenants in nuisance actions.

---

31. *See* Jack Newton et al., *Civil* Gideon *and NYC's Universal Access: Why Comprehensive Public Benefits Advocacy is Essential to Preventing Evictions and Creating Stability*, 23 CUNY L. Rev. 200, 205 (2020).

32. *See* NYC Comptroller, Housing Survivors: How New York City Can Increase Housing Stability for Survivors of Domestic Violence 4 (2019), https://comptroller.nyc.gov/wp-content/uploads/documents/Housing_Survivors_102119.pdf.

33. *See* Fais, *supra* note 12, at 1197.

34. *See* Giselle Routhier & Shelly Nortz, COVID-19 And Homelessness In New York City: Pandemic Pandemonium for New Yorkers Without Homes 14 (2020), https://www.coalitionforthehomeless.org/wp-content/uploads/2020/06/COVID19HomelessnessReportJune2020.pdf (emphasizing that at least forty-four homeless people across thirty shelter sites had confirmed cases of COVID-19, with restricted City policies preventing many from accessing isolation hotels).

35. *See id.*

A. Development of Nuisance Law

As this Article in part argues, the nuisance doctrine as examined within the contours of landlord-tenant law offers a bewildering, ironic paradigm: on the one hand, it has enabled the criminalization and over-policing of domestic violence, leading to a host of civil penalties (e.g., loss of stable, secure housing) imposed on tenants, many of whom identify as womxn; on the other hand, it has underplayed domestic violence as a merely bothersome offense that is "petty, undeserving of police protection."[36] Ultimately, this reinforcement of nuisance's etymology as either an act of harm or an annoyance may negatively affect tenants, irrespective of whether they are survivors or State-deemed alleged abusers.[37]

1. Early Origins

The etymological origins of "nuisance" derive from the Latin verb "nocēre" and the Old French verb "nuisir," both translating to mean the act of harming someone or something.[38] The term evolved out of a reference to people or circumstances who experienced an annoyance or inconvenience, thus suggesting that nuisance conduct did not necessitate an actual, physical harm imposed, but rather concerned harm that was merely burdensome by definition.[39] The study of nuisances more broadly began to incorporate English common law nuisance doctrine (textually defined as "any unreasonable interference with a right common to the general public"), with state and federal statutes designed to protect "public morality."[40] Nuisances, thus, were historically framed—for the most part—as either violations of public morality or private causes of action committed by landowners.[41]

One of the earliest archived legal applications of "nuisance" was traced to the twelfth century, with the Latin variation "nocumentum" first appearing in approximately 1187 A.D. as a writ termed the *Assize of Novel Disseisin*.[42] Civil litigants were said to invoke a variant of this writ as a private cause of action to redress disruptive practices affecting their "easements or natural rights" to their land,

---

36. *See* Matthew Desmond & Nicole Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 Am. Socio. Rev. 117, 134 (2012).

37. *See id.* (displaying how some landlords have threatened to "immediately start the eviction process for the tenant or tenants where the [alleged domestic violence] problem originates from" so long as the situation is not deemed life-threatening).

38. *See Nuisance*, Merriam-Webster Dictionary (2021), https://www.merriam-webster.com/dictionary/nuisance.

39. *See id.*

40. *See* Fais, *supra* note 12, at 1184.

41. *See* Fais, *supra* note 12, at 1184-87 (discussing the history of public nuisance doctrine and its long history of holding landowners responsible for criminal activity on the premises).

42. *See* Bryan M. Seiler, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 Minn. L. Rev. 883, 886 (2008) (citing Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future*, 54 Alb. L. Rev. 189, 192-93 (1989-1990)).

making available monetary damages as the sole remedy.[43] However, this cause of action was limited to protecting *landowners* who were allegedly wronged by other landowners, thus limiting "absolute protection" and "a strict standard of absolute liability"[44] in nuisance cases to landlords and freehold estates.[45] Abatement evolved as a remedy from the separate courts of equity, developing principles that differed in effect from those employed by courts of law on behalf of landlords.[46] Blackstone's *Commentaries*, treated as the primary legal authority in post-colonial America, rehashed the rule of *sic utere tuo ut alienum non laedas* (translating to "one should use his own property in such a manner as not to injure that of another"), which had stemmed from a 1611 decision about a land interference.[47]

As such, nuisance conduct in this original property law context did not consider the experiences of domestic violence and/or IPV between anyone who was not a landowner on residential property (i.e., tenants' claims were excluded from consideration). The legal landscape at this juncture, supported by the common law "rule of thumb,"[48] instead paved a grave and disturbing legacy that sanctioned domestic violence "incident to the man's role as head of the family."[49]

2. Nineteenth Century Expansion

As the application of nuisance law gradually inched into the nineteenth century, it offered additional considerations for private individuals' conduct. With the advent of colonial economic expansion, larger-scale manufacturing enterprises began interfering with landowners' use and enjoyment of their property, thus exponentially growing the body of nuisance litigation.[50] Private parties to civil actions started seeking injunctions to enjoin certain activities that both rendered their businesses as "nuisances" and interfered with their function.[51] Throughout the mid- and latter-half of the century, "courts conceded that a private party could enjoin a public nuisance if special damages were shown to have been incurred," signifying a shift in the courts' jurisdiction to preside over matters not limited exclusively to landowners.[52] Civil court actions began to increasingly

---

43. *See* Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 193 (1989-1990).

44. *See* Paul M. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621, 623 (1976).

45. *See* Lewin, *supra* note 43, at 193-94.

46. *See* Lewin, *supra* note 43, at 195.

47. *See* Lewin, *supra* note 43, at 196.

48. *See* Henry Ansgar Kelly, *"Rule of Thumb" and the Folklaw of the Husband's Stick*, 44 J. LEGAL EDUC. 341, 344 (1994) (explaining that the "'rule of thumb' stipulated that a husband could discipline his wife with any reasonable instrument, including a rod no thicker than his thumb").

49. *See* James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L. J. 1149, 1157-58 (1995).

50. *See* Lewin, *supra* note 43, at 197.

51. *See* Kurtz, *supra* note 44, at 625.

52. *See* Kurtz, *supra* note 44, at 626.

involve aggrieved homeowners and landowners who alleged private nuisances against individuals such as mill owners, railroad builders, and factory operators.[53]

Nuisance doctrine further expanded during America's Temperance Movement, with roots as early as the 1830s, as the public sought to reform and control alcohol's growing influence. Inebriated individuals were stigmatized by members of their immediate communities, connoting the unruly nature of drunkenness as a moral wrong equating to a nuisance.[54] While noxious odors, fumes, and noises from public industrial activities were alleged to create major interferences with the use and enjoyment of private property, thus constituting private nuisances, public nuisance actions occupied a different space. Public nuisance actions used to control the sale and use of alcohol during the nineteenth and twentieth centuries—leading, in part, to the Eighteenth Amendment's ratification in 1919—evolved into legal devices to "restrict the use of property for illegal purposes."[55]

3. Twentieth Century and Modern-Day Expansion into Criminal Nuisance Law

As the Eighteenth Amendment's repeal in 1933, during the Franklin Delano Roosevelt ("FDR") Administration, ended the nationwide prohibition of alcohol,[56] police forces gradually shifted away from controlling public welfare and social order (which included the policing of drunkenness).[57] Instead, they focused increasingly on controlling crimes against people and property.[58] Police departments were often the first line of contact for needy people who sought protection.[59] Homeless individuals, ranging from the severely disabled to orphans and poor pregnant women, were temporarily lodged in police "station houses."[60] However, concerns by reformers erupted around these so-called "indiscriminate" services, which they worried did nothing to improve the corruption of poverty.[61] Instead, reformers believed that crime could be controlled if local social services

53. *See* Kurtz, *supra* note 44, at 629.

54. *See generally* Paul Aaron & David Musto, *Temperance and Prohibition in America: A Historical Overview*, *in* ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 127 (Mark H. Moore & Dean R. Gerstein eds., National Academies Press 1981) (detailing the history of the temperance movement and noting that in the early 1800s, "preoccupation with alcohol" was seen as a "disturbing diagnosis of social ills").

55. *See* Fais, *supra* note 12, at 1184-85; *see also* Filomena Gehart, *Domestic Violence Victims A Nuisance to Cities*, 43 PEPP. L. REV. 1101, 1104 (2016).

56. *See Document for December 5th: Presidential Proclamation 2065 of December 5, 1933, in which President Franklin D. Roosevelt announces the Repeal of Prohibition*, NAT'L ARCHIVES, https://www.archives.gov/historical-docs/todays-doc/?dod-date=1205 (last visited Dec. 9, 2021).

57. *See* Eric H. Monkkonen, *History of Urban Police*, 15 CRIME & JUST. 547, 559 (1992) ("Whether or not public behavior became less disorderly, it is very clear that the policing of drunkenness had been in a long downswing prior to the movement in the 1970s to decriminalize public drunkenness.").

58. *See* Desmond & Valdez, *supra* note 36, at 118; *see also* Monkkonen, *supra* note 57, at 558.

59. *See* Monkkonen, *supra* note 57, at 555.

60. *See id.*

61. *See id.*

entities, rather than law enforcement, would be tasked with sheltering the homeless.[62]

Against this early twentieth century backdrop of hyper-criminalized responses to poverty and racialized demographics, nuisance charges arose in response to prostitution and other sex-related activities and were expanded to include drug dealing offenses, illegal gambling, and other code violations.[63] Moreover, those actions deemed to be "nuisances" were subject to the penalties of vagrancy laws, which the Supreme Court first declared as "unconstitutionally vague" in the early 1970s.[64] The role of law enforcement as we know it was shaped by subsequent government-led efforts such as the 1980s War on Drugs, the extensive "stop-and-frisk" police practices imposed on poor Black and Latinx communities,[65] and other methods of over-policing that continued into the present day.

Landlords increasingly interfaced with police officers in reporting conduct or disruptions to their property. These reports involving law enforcement were facilitations of "third-party policing"[66] in an effort to control alleged criminal activities taking place on landlords' property, and to coerce landlords to modify their property regulations more effectively.[67] These policing practices prioritized responses to community concerns, namely activities aimed at "reducing the fear, disorder, and incivility that some argue create conditions that breed crime."[68] As it concerned landlords, third-party policing consequently became a method of extending "the long arm of the law" as a resource-allocation and cost-saving measure for city law enforcement officials who policed tenants across different properties.[69] These officials began "offloading service calls to landlords" and went so

---

62. *See id.* at 556.

63. *See* Gretchen Arnold & Megan Slusser, *Silencing Women's Voices: Nuisance Property Laws and Battered Women*, 0 Law & Soc. Inquiry 1, 3 (2015); *see also* Desmond & Valdez, *supra* note 36, at 120 (citing Lorraine Mazerolle & Janet Ransley, Third Party Policing (2005)).

64. *See* Desmond & Valdez, *supra* note 36, at 120; *see also* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (holding that the Jacksonville vagrancy ordinance was "plainly unconstitutional" because its vagueness "place[d] almost unfettered discretion in the hands of the police").

65. *See* N.Y. Civ. Liberties Union, Stop-and-Frisk in the de Blasio Era 4 (2019), https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf (indicating that innocent New Yorkers are said to have been subjected to these stops and interrogations for low-level offense allegations over five million times since 2002, most predominantly under the Bloomberg mayoral administration in 2011); *see also* Desmond & Valdez, *supra* note 36, at 118 (citing Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 Fordham Urb. L. J. 457 (2000) and Bruce Western, Punishment and Inequality in America (2006)).

66. *See* Michael E. Buerger, *The Politics of Third-Party Policing*, 9 Crime Prevention Stud. 89, 90-93 (1998) (discussing the origins of the third-party policing doctrine, which evolved as an alternative to traditional police enforcement—third-party policing describes police efforts to "convince or coerce non-offending persons" to act outside the scope of their authority to "indirectly minimize disorder caused by other persons," and encourages the use of civil remedies to control criminal activity).

67. *See* Desmond & Valdez, *supra* note 36, at 119.

68. *See* Arnold & Slusser, *supra* note 63, at 3 (citing Eve S. Buzawa & Carl G. Buzawa, Domestic Violence: The Criminal Justice Response (3rd ed. 2003)).

69. *See* Desmond & Valdez, *supra* note 36, at 119.

far as to designate properties as "nuisances" based on excessive service calls made within a specified timeframe.[70]

The statutory text of criminal nuisance laws later codified an incentive for landlords with knowledge of illegal conduct on their property to enforce this third-party policing, as even failing to take action to prevent the nuisance would impose a criminal (and civil) liability on them.[71] Such penalties ranged from monetary fines and incarceration to suspension or revocation of their rental license.[72] Under New York Penal Code Section 240.45, for example, the State may move forward in a criminal prosecution for Second Degree Criminal Nuisance if it establishes that someone (e.g., a property owner) "knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct."[73]

4. Classifying Domestic Violence as a Nuisance Issue in Civil Courts

Outside of the criminal legal context, nuisances were traditionally aimed at addressing noxious odors and other hazards that affected a community's use and enjoyment of property rights.[74] However, regardless of whether a landlord committed such nuisance activity on the subject premises, this type of nuisance cause of action could still lead to punitive responses against them.

Despite many states codifying domestic violence as a crime by the start of the twentieth century, domestic violence was a problem perceived as a "private family matter that courts should not be involved in" and treated, in effect, with less seriousness than other crimes.[75] The criminalization of domestic violence-related disputes across civil courts arose instead as a byproduct of new property ordinances that local municipalities drafted and implemented. I will examine this issue in further detail below.[76]

B. Causal Connections Between Local Governments and Eviction Violence

Even when domestic violence is characterized as a nuisance issue in civil landlord-tenant disputes, there is simply no justification for it to lead to evictions—a

70. *See* Desmond & Valdez, *supra* note 36, at 120; *see also Calls for Service*, POLICE DATA INITIATIVE, https://www.policedatainitiative.org/datasets/calls-for-service/ (last visited Dec. 9, 2021) (defining "service calls" to law enforcement officials as those which commonly include 9-1-1 dispatch calls for emergency assistance, as well as calls to non-emergency numbers).

71. *See* Fais, *supra* note 12, at 1185.

72. *See id.* at 1185, 1209.

73. *See* N.Y. PENAL CODE § 240.45(2) (McKinney 2021).

74. *See* N.Y. CIV. LIBERTIES UNION, MORE THAN A NUISANCE: THE OUTSIZED CONSEQUENCES OF NEW YORK'S NUISANCE ORDINANCES 6 (2018), https://www.nyclu.org/sites/default/files/field_documents/nyclu_nuisancereport_20180809.pdf; *see also infra.* Section II.A-2.

75. *See* Gehart, *supra* note 55, at 1109; *see also* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 5-6 (2006) (discussing the criticism around extending criminal law into the private domestic space and how "feminists have sought to recast as 'public' matters previously considered 'private'").

76. *See infra.* Section II.B-1.

form of government sanctioned homelessness.[77] For domestic violence survivors in particular, the local government's interest in "efficiently using its police force and promoting peaceful living environments" is "not reasonably related" to survivors being issued a warrant of eviction for seeking police intervention.[78] Ironically, when a nuisance is considered "cured" through a tenant's eviction, the community inherits a spiral of cyclical trauma. When evicted, tenants lose their right to a home—in an act of violence—and are often rendered homeless as a direct result.[79] The record of this eviction often makes finding new housing even harder for them.[80] Instead, cycles of trauma, violence, and poverty recur and deeply affect communities and lives.[81]

Landlords across New York have invoked nuisance claims as a basis of disguising domestic violence as a property problem. Though less widely recognized in legal literature, it is a practice that has historically foisted homelessness on tenants. This subpart will discuss local chronic nuisance ordinances, nuisance abatement laws, and the judicial or administrative channels landlords may pursue to evict tenants (i.e., those affected by domestic violence) who they deem alleged nuisances.

1. Chronic Nuisance Ordinances

There are roughly 2,000 towns and cities across America that have enacted chronic nuisance ordinances, or local laws requiring landlords to "evict tenants based on minor infractions" the city considers "nuisances."[82] Mirroring the previous discourse about criminal nuisance laws and third-party policing, nuisance property ordinances were similarly tasked with sanctioning landlords if their tenants alerted police attention. Irrespective of whether the tenant was a victim of the nuisance conduct, a certain number of police calls and the accrual of

77. *See* Mike Konczal, *The Violence of Eviction*, DISSENT (2016), https://www.dissentmagazine.org/article/the-violence-of-eviction-housing-market-foreclosure-gentrification-finance-capital ("The state . . . [is] not just responsible for the violence deployed by the courts and sheriffs, who create and implement the terms under which people are forced out of their homes and the subsequent penalties they suffer . . . 'Nuisance property ordinances' . . . penalize landlords for their tenants' behavior . . . something that is particularly devastating for households suffering from domestic violence.").

78. *See* Gehart, *supra* note 55, at 1128.

79. *See id.* at 1111.

80. *See* Matthew Goldstein, *The Stigma of a Scarlet E*, N.Y. TIMES (Aug. 9, 2021), https://www.nytimes.com/2021/08/09/business/eviction-stigma-scarlet-e.html ("Eviction cases are a stubborn blot on any renter's history. They are nearly impossible to scrub away, even if the tenant made good on obligations or it was only a scare tactic by an aggressive landlord.").

81. *See* Konczal, *supra* note 77 ("Housing insecurity creates a special kind of exhausting poverty, one that threatens the very security of one's family. It breeds depression. In addition to their homes, the evicted lose their possessions, their neighborhoods, their official address for interacting with the state and businesses, their very sense of self and liberty.").

82. *See* Sejal Singh & Alisha Jarwala, *Nuisance Ordinances: The New Frontier in Social Control*, CURRENT AFF. MAG. POL. & CULTURE (Aug. 6, 2019), https://www.currentaffairs.org/2019/08/nuisance-ordinances-the-new-frontier-in-social-control (citing Nicole Livanos, *Crime-Free Housing Ordinances: One Call Away from Eviction*, 19 PUB. INT. L. REP. 106 (2014)).

violations (or "points") would apply a "nuisance" classification to the property itself.[83] The adoption of these ordinances has been recognized as a "national trend" and, in the words of scholar Deborah Archer, has restricted affordable housing access while "promoting racial segregation."[84]

Historically, approximately twenty-five out of forty of the most populous localities outside of New York City had codified a nuisance ordinance.[85] A detailed study of nuisance ordinances conducted by the New York Civil Liberties Union revealed that a comprehensive list of the state's ordinances does not exist.[86] However, the study provided data on certain localities, including Cheektowaga and Syracuse.[87] In Cheektowaga, a town of about 74,000 people,[88] reports of public nuisance activity "on the dwelling unit" triggered the issuance of a notice from the Town Council office to the property owner.[89] If said property owner did not "take appropriate action to notify the tenant to cease any such activity, or evict said tenant," and the incident persisted, he or she would be issued subsequent notices and fined accordingly.[90] Studies show that "landlords commonly react to such [cease and desist] letters by instructing their tenants not to call 9-1-1, refusing to renew their lease, or evicting them."[91] In some jurisdictions, these letters are notices to the landlord to take "reasonable measures to abate the nuisance."[92] Landlords who do not comply with the terms of the notice may be summoned to appear in a civil court action.[93]

The town of Amherst's public nuisance ordinance offers a separate but related framework for defining public nuisances. A public nuisance in Amherst included, but was not limited to, any property structure "wherein an occupant . . . commits . . . assault, harassment or disorderly conduct" pursuant to the New York State Penal Law.[94] Any landlord or property owner whose property was deemed a public nuisance risked the Town Attorney filing a civil action against him or her for hefty monetary fines.[95]

A public nuisance ordinance in Syracuse seemed to exempt domestic violence arrests from those with three or more arrests for assault allegations or any

---

83. *See* N.Y. CIV. LIBERTIES UNION, *supra* note 74, at 6.

84. *See* Deborah Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 175-76 (2019).

85. *See* N.Y. CIV. LIBERTIES UNION, *supra* note 74, at 10.

86. *See id.* at 10.

87. *See id.* at 22.

88. *See American Community Survey 1-year estimates*, U.S. CENSUS BUREAU (2019), https://censusreporter.org/profiles/16000US3615000-cheektowaga-ny/.

89. *See* CHEEKTOWAGA, N.Y., CODE § 194-4(A) (2021).

90. *See id.*

91. *See* N.Y. CIV. LIBERTIES UNION, *supra* note 74, at 22.

92. *See* Arnold & Slusser, *supra* note 63, at 3.

93. *See id.*

94. *See* AMHERST, N.Y., CODE § 152-3(8) (2021).

95. *See id*. §§ 152-8(a), 152-9 ("If . . . a finding is made that defendants have conducted, maintained, permitted or allowed a public nuisance, a [$1,000] penalty may be awarded" for each day the public nuisance was found to have been unabated).

"[disorderly conduct] violation . . . predicated on events, circumstances or activities occurring on the subject premises" within a two-year period.[96] However, such statutory language contemplating protections for tenants affected by domestic violence is absent in the Cheektowaga and Amherst chronic nuisance ordinances.[97] As such, the application of chronic nuisance ordinances like these in other jurisdictions have a disproportionate impact on womxn because most survivors of domestic violence are womxn; on average, womxn are in fact five times more likely than men to be survivors of domestic violence.[98] Battered womxn's lack of security in housing and their economic vulnerabilities—especially as they pertain to poor womxn of color—are exacerbated through the issuance and implementation of chronic nuisance ordinances.[99] Based on these various factors and the perverse incentives these laws have produced, we can infer that womxn are often made to choose between seeking community support and losing housing or remaining in an abusive relationship while maintaining housing.

In comparison to many other parts of the country, New York's continued enactment and enforcement of public nuisance ordinances encouraging landlords to evict tenants are fewer in number. The State passed legislation in 2020 to establish a residential tenant's right to seek emergency assistance without fear of losing his or her housing due to local nuisance laws.[100] By doing so, the legislature recognized what many legislatures nationally have fallen short of addressing: employing "nuisance laws to punish domestic violence survivors is callous and misguided" and these devices "directly undermine public safety and confidence in our justice system."[101] The very fact that New York is an outlier on the national scale in condemning nuisance laws and policies as they affect victims and survivors signals progress. But it also suggests a vast need for cutting edge legislative reform in other major cities in America where legacies of localism and racial and

96. *See* SYRACUSE, N.Y., REV. GEN. ORDINANCES § 45-2 (2021), https://library.municode.com/ny/syracuse/codes/code_of_ordinances?nodeId=REGEOR_CH45NUAB ("Notwithstanding the foregoing, an arrest for assault in violation of New York Penal Law Sections 120.00, 120.05, or 120.10 which involves domestic violence shall not be considered as a qualifying arrest for purposes of enforcement of this chapter.").

97. *See* CHEEKTOWAGA, N.Y., CODE § 194-4(A) (2021) (defining criminal or public nuisance activity on a residential property to be the result of "criminal activity [reports] or public nuisance activity on the dwelling unit"); *see also* AMHERST, N.Y., CODE § 152-3(8) (2021) ("defining public nuisance to include the commission of "criminal activities, including but not limited to, assault, harassment or disorderly conduct, as . . . defined by the New York State Penal Law.").

98. *See* Fais, *supra* note 12, at 1196 ("Women constitute the overwhelming majority of domestic violence victims, representing 84.3% of spousal abuse victims and 85.9% of the victims of dating violence.").

99. *See* Arnold & Slusser, *supra* note 63, at 6 (citing Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, *in* DOMESTIC VIOLENCE AT THE MARGINS 369-88 (N.J. Sokoloff, ed. 2008)).

100. *See* S. 4657A, 2019-2020 Leg., Reg. Sess. (N.Y. 2019).

101. *See* Press Release, N.Y. State Senate, Senate Passes Hoylman Bill Giving Tenants the Right to Call 911 Without Fear of Eviction (May 14, 2019), https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/senate-passes-hoylman-bill-giving-tenants-right-call-911.

economic segregation continue to criminalize domestic violence and lead to homelessness.

2. Nuisance Abatement Laws

The examination of local nuisance abatement laws is tied to that of public, or chronic, nuisance ordinances. Abatement actions are responses to the enforcement of nuisance ordinances. When landlords are issued citations or have accrued a threshold number of "points" for conduct reported onto their property,[102] "the only certain way" for them to avoid the penalties is to abate the nuisance in its entirety.[103] This often equates to removing, or evicting, tenants who were the subject of police citations from the residential property altogether, irrespective of whether those tenants were victims or alleged abusers of the offense at hand.[104] In at least one nuisance enforcement case reported in Syracuse over the last five years, for example, a landlord defended himself at an administrative hearing by offering proof of his tenant's eviction.[105]

New York City enacted its original Nuisance Abatement Law ("NAL") in the 1970s with the intent to "push the sex industry out of Times Square," though the law's use and application was broadly expanded and exploited by the New York City Police Department ("NYPD") to target residential properties and commercial businesses alleged to be sites of repeated criminal activity.[106] Many tenants and small business owners were forced to settle nuisance abatement actions by entering into stipulations enabling "warrantless searches and unbridled police access to video cameras."[107] In effect, the NYPD's response to these *perceived* nuisances was a token measure of its self-enforced broken windows policing strategy that patrolled low-level offenses to combat public disorder and further lawlessness, "often unwittingly targeting [those] not connected to the crimes in question."[108] It is a prime example of a draconian no-fault eviction ordinance, grossly infringing on the constitutional rights of tens of thousands of New Yorkers.

---

102. *See supra*, Section II-B.1.

103. *See* ACLU Women's Rts. Project, *Chronic Nuisance and Crime-Free Ordinances: Endangering the Right of Domestic Violence Survivors to Seek Police Assistance* (last visited Dec. 9, 2021), https://www.aclu.org/sites/default/files/assets/nuisance_ordinance_issue_summary_-_final.pdf.

104. *See* ACLU, Silenced: How Nuisance Ordinances Punish Crime Victims in New York, 19 (2015), https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisanceord-rel3.pdf.

105. *See* N.Y. Civ. Liberties Union, *supra* note 74, at 22.

106. *See* Sarah Ryley, *New York City Set to Pass Sweeping Nuisance Abatement Reforms*, ProPublica (Feb. 14, 2017, 1:37 PM), https://www.propublica.org/article/new-york-city-set-to-pass-sweeping-nuisance-abatement-reforms.

107. *See* Sarah Ryley, *NYPD targets immigrant shops with nuisance cases, pushing for closures over minor allegations*, N.Y. Daily News (Apr. 22, 2016), https://www.nydailynews.com/new-york/nypd-pummels-mom-and-pop-shops-nuisance-cases-article-1.2610492.

108. *See* Press Release, N.Y. City Council, Council to Vote on Implementation of the Nuisance Abatement Fairness Act and to Expand Language Access to Government Services for City Residents (Feb. 15, 2017), https://council.nyc.gov/press/2017/02/15/1367/.

More recently, in 2017, the New York City Council passed sweeping reform measures to NAL to achieve greater transparency and protect tenants and landlords more equitably. City Council members, stewarded by then-Speaker Melissa Mark-Viverito, amplified concerns of NAL's role in "quickly uprooting crime" and negatively impacting New Yorkers of color in minority neighborhoods particularly.[109] These amendments, collectively titled the Nuisance Abatement Fairness Act (Intro. #1308-A, or "NAFA"), also recognized the necessity of informing residential tenants and business owners of their property rights if they were unaware of the alleged nuisance conduct. Under NAFA, low-level misdemeanor drug and marijuana offenses were no longer designated as nuisances under law, and the maximum amount of time that the city could prohibit people from accessing properties deemed "nuisances" would no longer exceed one year, "or three years in 'unique circumstances.'"[110]

Nuisance abatements are codified to a certain degree within the NYC Administrative Code. In one section of the Code, counsel can seek a civil penalty by "bring[ing] and maintain[ing] a civil proceeding . . . to permanently enjoin the public nuisances."[111] It also authorizes the City to issue either a temporary restraining order on the landlord or property owner upon a showing by clear and convincing evidence that the "public nuisance is being conducted, maintained or permitted," or a temporary closing order by means of a preliminary injunction.[112]

However, even with NAFA's passage, this section of the Code appears to leave out several salient protections for tenants and occupants. As its name suggests, a temporary closing order would trigger the closure of residences, though the Code glosses over any procedural due process opportunity afforded to tenants and occupants in defending their right to housing. The Code also does not create explicit protections for those affected by domestic violence who are at risk of homelessness upon their landlord's issuance of a closing order. As monumental as NAFA has been in ensuring comprehensive, transparent reporting of 9-1-1 and 3-1-1 nuisance-related calls, barring tenants' permanent exclusion from certain types of property and narrowing the scope of drug-related nuisance activities, there is still no city or state law on the books that enhances protections for those at risk of eviction due to criminal allegations.

One of the NYPD's comprehensive bi-annual reports totaled 8,800 nuisance abatement filings in 2020 on the basis of criminal nuisance allegations (as opposed to alleged drugs and gambling activity, prostitution, forgery, and other conduct).[113] To the extent that New York City's nuisance abatement laws offer a

109. *See* Ryley, *supra* note 106.

110. *See id.*

111. *See* N.Y.C. ADMIN. CODE, tit. 7 § 7-704 (2020).

112. *See* N.Y.C. ADMIN. CODE, tit. 7 § 7-711 (2020).

113. *See* N.Y.C. POLICE DEP'T, JANUARY – JUNE 2020, *in* NUISANCE ABATEMENT REPORTS (last visited Dec. 9, 2021), https://www1.nyc.gov/site/nypd/stats/reports-analysis/nuisance-abatement.page (finding that 2,907—approximately one-third—of these classified criminal nuisance filings occurred out of Bronx police precincts).

cause of action to evict individuals for certain criminal allegations, less is known about whether they may punish domestic violence and/or IPV incidents. In theory, however, we could potentially infer that reported crimes like domestic violence may still authorize the City to close a residential property altogether. If we make this inference, we must remain critical of local governments' continued enforcement of nuisance property laws due to their harmful effects in causing a survivor's (risk of) eviction.

3. Actionable Legal Channels for Nuisance Conduct

As local nuisance laws have risked homelessness for survivors and alleged abusers, a landlord may pursue judicial eviction proceedings against a tenant for conduct he finds to be a nuisance. These "summary eviction" actions may allege a tenant's pattern of objectionable course of conduct, as generally defined by the courts or local administrative rules.[114] Nuisance pleadings arising out of allegedly objectionable conduct range from excessive noise complaints and toxic odors to incidents of domestic violence or antisocial conduct.[115] Notices to Cure predicate most nuisance-related eviction actions, carving out an opportunity for the tenant to correct the alleged conduct before being taken to housing court.[116]

The New York City Housing Authority's ("NYCHA") administrative mandate is to create for its tenants an environment conducive to healthful living, family stability, sound family and community relations and proper upbringing of children," barring any conduct that is detrimental "to health or safety of the community" or damaging to its property.[117] However, several of its policies advance the dichotomy between domestic violence survivors and alleged abusers when it comes to tenants' housing security.

In one of the wider known examples of this dichotomy, NYCHA's incorporation of the Violence Against Women Act ("VAWA") enables it to bifurcate (or split) a tenancy in order "to terminate the rights of a tenant or authorized

---

114. *See* N.Y.C. ADMIN. CODE § 26-408(a)(2) (2021) (equating a nuisance as conduct that interferes "substantially with the comfort and safety of the landlord or of other tenants or occupants of the same or other adjacent building or structure"); *see also* Domen Holding Co. v. Aranovich, 802 N. E.2d 135, 139 (N.Y. 2003) (defining a nuisance as a "continuous invasion of rights . . . a pattern of continuity or recurrence of objectionable conduct"); *see also* 160 W. 118th St. Corp. v. Gray, 801 N.Y. S.2d 238, 238 (Civ. Ct. 2004) (holding that tenant's "[repeated engagement] in an unabated course of conduct which [posed] a grievous, imminent and serious threat of harm to the petitioner's other tenants and employees" constituted a "legally cognizable claim of nuisance").

115. ANDREW SCHERER, RESIDENTIAL LANDLORD-TENANT L. IN N.Y. § 8:95, Westlaw (updated Nov. 2020) (describing the nature of objectionable conduct as "real and imminent to justify eviction").

116. *See* N.Y. REAL PROP. ACTS. § 753(4) (2021) ("In the event that such proceeding is based upon a claim that the tenant or lessee has breached a provision of the lease, the court shall grant a thirty day stay of issuance of the warrant, during which time the respondent may correct such breach."); *see also* Sacchetti v. Rosen, No. 01-227, 2001 WL 1535466, at *1 (N.Y. App. Term. Sept. 25, 2001) (finding that a tenant's abusive conduct and antisocial tendencies towards other tenants were not deemed 'cured' when his psychiatrist testified to their potential to recur).

117. *See* N.Y.C. HOUS. AUTH., MGMT. MANUAL ch. 4, app. B, at 2 (Mar. 3, 2016) [hereinafter NYCHA MGMT. MANUAL].

household member who engages in [domestic violence] criminal activity" against another household member.[118] In some instances, the alleged abuser may be allowed to remain in the apartment during a termination of tenancy proceeding, while the survivor and other authorized household members sign a lease elsewhere through an emergency transfer process.[119] In other instances, the alleged abuser is evicted, while other household members are allowed to remain.[120] When the alleged abuser is the sole signatory of the lease, a survivor must establish eligibility to gain succession rights to that lease.[121] The process of seeking a VAWA emergency transfer often requires the survivor to submit specific documentation (i.e., police reports, surveillance footage, etc.)[122] that, in reality, may be too cumbersome and invasive to obtain.

A lesser discussed application of survivor-alleged abuser dichotomies in NYCHA's policies concerns common law nuisance—a catch-all category that NYCHA deems as "any other unacceptable behavior"—as a ground of terminating one's tenancy.[123] It affords tenants the opportunity to partake in a hearing before they are found ineligible, or "non-desirable," for public housing.[124] However, settlement negotiations may leave a tenant with no choice but to consent to permanently exclude a family member from the home to avoid going to trial for the alleged nuisance at issue. Although landlords who file either of these actions must go through judicial or administrative channels before acquiring the legal grounds to evict a tenant for domestic violence or other nuisance allegations, they typically cannot obtain a judgment for an eviction warrant simply based on an isolated allegation of nuisance conduct. It is instead the landlord's burden to prove a *habitual* set of incidents that rise to the level of "objectionable."[125] However, courts have recognized particularly egregious behaviors as nuisances if they produced extremely violent outcomes.[126]

As such, a series of criminal allegations pertaining to domestic violence can risk devastating civil consequences for a household. While nuisance holdover

---

118. *See id.* ch. 1, at 254 (Nov. 28, 2017).

119. *See id.*

120. *See* ACLU Women's Rts. Project, *The Rights of Domestic Violence Survivors in Public and Subsidized Housing*, https://www.aclu.org/sites/default/files/pdfs/subsidizedhousingdv.pdf (last visited Dec. 9, 2021).

121. *See* NYCHA Mgmt. Manual, *supra* note 117, at 69.

122. *See* NYCHA Mgmt. Manual, *supra* note 117, at 71.

123. *See* NYCHA Mgmt. Manual, Ch. IV, Appendix B: Termination of Tenancy – Non-Desirability Actions 6 (2016).

124. *See id.* at 2.

125. *See* Gerald Lebovits & Daniel J. Curtin, Jr., *Nuisance Holdovers in New York*, 33 N.Y. Real Prop. L. J. 68–69 (2005) (citing Domen Holding v. Aranovich, 802 N.E.2d 135, 139 (2003) ("Nuisance imports a continuous invasion of rights – 'a pattern of continuity or recurrence of objectionable conduct'") (quoting Frank v. Park Summit Realty, 175 A.D.2d 33, 34 (N.Y. App. Div. 1st Dep't. 1991)).

126. *But see* 772 E. 168 St. LLC v. Holmes, 110 N.Y.S.3d 798 at *3 (Civ. Ct. Bronx Cty. 2018) (holding that Petitioner-Landlord's predicate notice for a nuisance eviction action failed to include details of the Tenant-Respondent's egregious conduct, thus failing to demonstrate that he affected the "health, welfare and safety of other residents").

proceedings are a much narrower classification of summary eviction cases—in contrast to non-payment proceedings for the accrual of rental arrears, and no-cause holdovers for the overstay of an expired lease—they might nevertheless render a tenant homeless. Similarly, termination of tenancy proceedings brought by NYCHA deem nuisance conduct as a basis for potential eviction.[127] Residents face the risk of eviction just the same as if that individual chronically failed to pay full rent, endangered his or her neighbors, or violated a substantial lease provision. And in the same vein that local laws like chronic nuisance ordinances often hamper the reporting of domestic disputes, the highly litigious nature of nuisance eviction proceedings[128] and termination of tenancy proceedings might similarly disincentivize tenant-survivors to alert police attention or seek intervention from their landlord.

Finally, just as an individual's criminal record history is a barrier to employment and other civil rights, an eviction record may similarly preclude her from gaining access to housing. A "Scarlet E"—the term coined to describe the deleterious consequences of a single eviction filing—can be a figurative death sentence for a prospective tenant, irrespective of the civil proceeding's merits.[129] Certain landlords in both private and public housing complexes routinely screen prospective tenants' credit and eviction histories.[130] In doing so, they may not always consider the basis of the eviction filings.[131] We can interpret this to mean that prospective tenants once affected by domestic violence and/or IPV contributing to a past eviction may face the same risk of future housing denials as individuals evicted for outstanding rental arrears, engaging in conduct dangerous or threatening to their residential community, or overstaying an expired lease.

As this section has discussed at length, the existence of local nuisance laws and the legal avenues that enable landlords to evict tenants because of them lay the groundwork for housing instability. However, even in jurisdictions like New York City that have enacted a citywide Right to Counsel for tenants at risk of evictions or tenancy terminations, some state legislation has afforded inadequate protections to tenant-respondents. This latter issue is discussed further in Subpart D below.

---

127. *See* NYCHA MGMT. MANUAL, *supra* note 117 (listing common law nuisance and a "source of danger to the peaceful occupation of other tenants" as categories and criteria of non-desirability).

128. *See generally* Lebovits & Curtin, Jr., *supra* note 125 (describing the "unsettled" landscape of nuisance-based holdovers and detailing the "pitfalls and practicalities" of litigating these proceedings).

129. *See* Goldstein, *supra* note 80, at 1; *see also* Kathryn A. Sabbeth, *Erasing the 'Scarlet E' of Eviction Records*, THE APPEAL (Apr. 12, 2021), https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records/.

130. *See* GOODMARK, *supra* note 8, at 42.

131. *See* Sabbeth, *supra* note 129 (". . . perhaps most disturbingly, tenants can get marked as undesirable simply because the data collection method used by most tenant-screening bureaus includes anyone named as a defendant in an eviction case . . . The bureaus capture all tenants listed in eviction court files, often without any further inquiry.").

C. Structural Power Dynamics in Landlord-Tenant Nuisance Actions

As the analysis around chronic nuisance ordinances and nuisance abatement actions infers, there is an inherent power differential between landlords, tenants, and city and state municipalities, especially where acts of domestic violence on the property are concerned. While landlords are often given a "special physical and psychological power over the tenant and all other occupants" due to tenants' dependence on them for shelter, they are also scrutinized by governmental regulations to ensure that their property is free of nuisances and violations.[132]

When landlords are confronted with problems leading to repeated police calls and the increased issuance of DIRs on their residential properties, "even those with good intentions may decide to pressure [tenant-survivors or alleged abusers] to vacate."[133] Domestic violence incidents, as common examples, fall within the broad ambit of prohibited conduct under nuisance ordinances. Many nuisance ordinances trigger the revocation of a landlord's rental license if his or her property is deemed as a 'nuisance', propelling the commencement of an eviction proceeding against the tenant(s) who induce police activity on the property.[134]

While proponents of these laws would argue that they necessitated the deterrence of neighborhood crimes, there is evidence that they suppress vulnerable tenants—i.e., domestic violence and IPV survivors, people of color, undocumented tenants, those with mental disabilities, and those living in poverty—from filing reports altogether. Legal literature has recently brought to light the racially exclusionary impact of crime-free ordinances, of which chronic nuisance ordinances are an example. Many of these local laws and policies have exercised the authority to "relegate poor people of color to marginalized, resource-starved neighborhoods, away from the economic prosperity of their own communities."[135] Thus, as will be discussed in the latter half of this section, local governmental power has proven to have a nexus to race and poverty through the lenses of chronic nuisance ordinances.

Some nuisance ordinances may still categorize domestic violence incidents as nuisances if the activity in question has been found to violate "any federal, state or local law", or includes particular types of conduct alleged to disturb the peace of the premises.[136] What constitutes an "excessive" number of emergency calls for purposes of defining a nuisance also varies by jurisdiction. In some localities,

---

132. *See* Sabbeth, *supra* note 10, at 99.

133. Arnold & Slusser, *supra* note 63, at 18.

134. *See* Gehart, *supra* note 55, at 1102.

135. Archer, *supra* note 84, at 185.

136. U.S. Dep't. Hous. & Urb. Dev., Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services 1, 3 (2016) [hereinafter "HUD Guidance"] (citing Anna Kastner, *The Other War at Home: Chronic Nuisance Laws and the Revictimization of Survivors of Domestic Violence*, 103 Cal. L. Rev. 1047, 1058 (2015) ("Similarly, the ordinance could cause survivors to be evicted either because the 911 call was not coded as 'domestic violence' or because the landlord was not aware that domestic violence was occurring and could not create a plan to remediate the issue

a nuisance arises upon three calls for emergency services within a thirty-day timeframe, while others may require only two calls within a one-year timeframe for the activity to be deemed a nuisance.[137] While these ordinances may have been well intended in their original design, their unintended consequence—forcing upon an at-risk tenant the choice between keeping silent and experiencing perpetual abuse or alerting the police and facing an eviction—undercuts the foundational principle of housing as a human right. This so-called "devil's bargain"[138] is often induced by the fact that nuisance ordinances concerning domestic violence lack explicit, codified protections for tenant-survivors altogether.

D. COVID-19 Emergency Eviction and Foreclosure Act

In late December 2020, the New York State legislature enacted a moratorium on evictions.[139] Many tenant advocates found the COVID-19 Emergency Eviction and Foreclosure Prevention Act ("CEEFPA")[140] to be inarguably stronger in its protections than any piecemeal Executive Order promulgated by the Cuomo administration had been in months prior.[141] However, while extending protections to tenants in summary non-payment and certain other types of eviction proceedings, CEEFPA eliminated protections for tenants accused of nuisances.[142] Under Section 9 of the law, a pending eviction proceeding alleging that "the tenant persistently and unreasonably engaged in [objectionable or nuisance behavior] that substantially infringes on the use and enjoyment of the other tenants or occupants or causes a substantial safety hazard to others" would move forward if a landlord-Petitioner established an ongoing recurrence of the conduct.[143] It predetermined that a "mere allegation of the behavior" would be insufficient evidence that would fall short of establishing the tenant's association to it.[144]

However, even after the sixty-day automatic stay for all residential eviction cases lapsed on February 28, 2021, the New York legislature authorized courts to resume nuisance eviction cases full-tilt.[145] In practice, this meant that virtually all

properly.")); *see also* SPOKANE MUN. CODE § 10.08A.20(H)(2)(q) (2016), https://my.spokanecity.org/smc/?Section=10.08A.020.

137. *See* HUD GUIDANCE, *supra* note 136, at 4.

138. *See* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 192 (Arnold Rampersad & David Rossel eds., 1st ed. 2016).

139. *See* Dana Rubinstein, *New York Bans Most Evictions as Tenants Struggle to Pay Rent*, N.Y. TIMES (Dec. 28, 2020), https://www.nytimes.com/2020/12/28/nyregion/new-york-eviction-ban.html.

140. *See generally* 2020 N.Y. Sess. Laws ch. 381 amend, COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (McKinney) [hereinafter, "CEEFPA-I"].

141. *See* Rubinstein, *supra* note 139 ("The New York Legislature on Monday overwhelmingly passed one of the most comprehensive anti-eviction laws in the nation, as the state contends with high levels of unemployment caused by a pandemic that has taken more than 330,000 lives nationwide.").

142. *See* CEEFPA-I, *supra* note 140, § 1(4) (creating a temporary procedure for tenants in pending eviction proceedings to declare a COVID-related hardship (i.e., financial hardship or risk of contracting COVID-19 if they re-locate), so that they are afforded eviction protections until at least May 1, 2021).

143. *See* CEEFPA-I, *supra* note 140, §§ 9(1), (4).

144. *See* CEEFPA-I, *supra* note 140, § 9(3).

145. *See* CEEFPA-I, *supra* note 140, § 9(2); *see also* Sarah Taddeo, *Eviction protections in NY: Here's what the new law means for landlords and tenants*, DEMOCRAT & CHRONICLE (Dec. 29, 2020,

nuisance-related cases in the state were scheduled for a court status conference so that housing court judges could conduct a fact-finding inquiry into the nuisance allegations. The same tenants who landlords accused of an incapability to maintain peace in their homes then somehow had to acquire the technological means to appear in virtual court. Respondents in nuisance eviction proceedings had to participate in the same virtual proceedings that New York courts previously had coordinated exclusively for attorneys.

At least one housing court judge in New York City, however, interpreted Section 9 of CEEFPA as saying that "the additional [pre-trial] hearing is required only where a judgment based upon objectionable conduct was granted prior to the effective date of the Act."[146] The decision established the precedent that a pending pre-judgment nuisance eviction proceeding would move forward to trial without a stay.[147] Accordingly, the judge held that CEEFPA's statutory language did not explicitly require a pre-trial hearing or status conference in pending nuisance eviction proceedings where a judgment for a warrant of eviction had not already been issued.[148]

Findings of ongoing nuisance conduct based on DIRs and other domestic violence allegations at the premises seem to have been a less frequent byproduct of CEEFPA thus far. Case decisions rendering the execution of an eviction warrant since CEEFPA's enactment mostly focused instead on issues concerning loud music complaints, tenants' destruction of property, and other habitual, disruptive incidents on the premises.[149]

In the amended CEEFPA[150] landlords could theoretically invoke it as a basis of trying to evict a tenant(s) from his or her home if they believed the tenant(s)

5:00 AM), https://www.democratandchronicle.com/story/news/2020/12/29/eviction-protections-new-york-what-new-law-means-landlords-and-tenants/4066361001/ (stating that after the sixty-day automatic stay, the law allowed "for the eviction of tenants who [violated] their lease by 'persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others'").

146. *See* Trustees of Columbia v. Grant, L&T-62400-19/BX 1, 3 (N.Y. Civ. Ct. 2021).

147. *See id.* This decision was dated January 22, 2021, less than three weeks after CEEFPA-I went into effect. In our office's records, and information that was shared across other New York City legal service providers, it appeared to be the first adverse decision interpreting the nuisance exception of CEEFPA-I. In short, it held a pre-judgment eviction case based on nuisance allegations could move forward to a hearing/trial so long as the court found a sufficient pleading of a nuisance claim.

148. *See* Trustees of Columbia, L&T-62400-19/BX at 3.

149. *See* 2857 Sedgwick Ave. LLC v. Drummond, 144 N.Y.S.3d 526 (Bronx Cty. 2021) (finding that tenant-Respondent's purposeful damage of the building's front door and the severe leaks he purposefully caused in his apartment amounted to a substantial safety hazard for other tenants, allowing landlord-Petitioner to execute a warrant of eviction); *see also* Hudson River Hous. v. Griffin, 70 Misc.3d 1209(A) (Dutchess Cty. 2021) (finding that tenant-Respondent's ineligibility for CEEFPA protections was based in his repeated verbal abuse of other tenants and children in the building, physical assaults on the premises, destruction of tenants' property, and other conduct creating a substantial safety hazard for tenants).

150. *See* 2021 N.Y. Laws ch. 56 amend, COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 [hereinafter "CEEFPA-II"]. Part A of the original CEEFPA, in application to residential tenants who self-attested to their financial hardship during the pandemic, was blocked by a U.S. Supreme Court injunction on August 12, 2021. Governor Hochul convened a special session for the legislature to craft new legislation for an extension of the moratorium, which subsequently expired on

had engaged in recurring domestic violence on the property. While CEEFPA did not explicitly name domestic violence as an example of objectionable conduct that constitutes a nuisance by legal definition, we may still turn to the historical constructions of private nuisances in the landlord-tenant context to infer that domestic violence could be a basis for evictions.[151] This holds true regardless of whether a tenant-Respondent is the alleged abuser or the survivor in a nuisance eviction proceeding predicated on domestic violence allegations. Moreover, in many jurisdictions outside of New York City in which Right to Counsel has still not been implemented, the consequences of this nuisance exception to the eviction moratorium remained especially risky for *pro se* tenants alleged to be the subject of recurring domestic violence conduct, as they did not have an attorney in court to represent them.

E. Racial and Socio-Economic Disparities of Tenants Affected by Nuisance Laws

Unsurprisingly, chronic nuisance ordinances, nuisance abatements, and summary litigation processes are racially and socio-economically divisive in effect.[152] The city of Rochester, for example, issued nearly five times as many nuisance enforcement actions in neighborhoods with the highest concentration of people of color than it had done in neighborhoods that were predominantly white.[153] Another upstate New York jurisdiction, Troy, presents similar statistics when it comes to neighborhoods of color.[154] Outside of New York, a tenant residing in a black neighborhood in Milwaukee was "three times more likely" to be issued a nuisance citation, leading to his or her eviction, in comparison to a tenant in a white Milwaukee neighborhood who had violated the same nuisance ordinance.[155]

Many NYCHA public housing residents of color are sharply overrepresented —in 2019, African-American households constituted twenty-five percent of New York City's households living in poverty, but nearly forty-six percent of households living in NYCHA; by the same token, Hispanic and Latinx households had

---

January 15, 2022. *See* NY ADMIN. ORD. 34/22 (2022), https://www.nycourts.gov/whatsnew/pdf/ExhibitA-AO34-22.pdf. However, Sec. 9-a of CEEFPA-II had made explicit that a tenant who "intentionally causes significant damage to the property or is persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or occupants . . ." (i.e., commits a nuisance) could still be evicted. At the time of this writing, no federal moratorium existed to offer protections, if any, to tenants in nuisance eviction proceedings.

151. *See supra* Section II.

152. *See* Archer, *supra* note 84 at 185-86 (explaining that localism has been deemed "the modern successor to legal racial segregation").

153. *See* Singh & Jarwala, *supra* note 82 (citing N.Y. CIV. LIBERTIES UNION, *supra* note 65, at 12-13).

154. *See* N.Y. CIV. LIBERTIES UNION, *supra* note 65, at 10.

155. *See* Sandra Park, *With Nuisance Laws, Has 'Serve and Protect' Turned Into 'Silence and Evict'?*, ACLU (March 25, 2016, 1:15 PM), https://www.aclu.org/blog/womens-rights/violence-against-women/nuisance-laws-has-serve-and-protect-turned-silence-and (citing generally Desmond & Valdez, *supra* note 36 (analyzing nuisance citations in Milwaukee over a two-year period)); *see also* Arnold & Slusser, *supra* note 63, at 5.

constituted one-third of the city's poverty households, but nearly forty-five percent of NYCHA households.[156] All of this data corroborates that people of color and other historically marginalized communities, especially those within low-income demographics, are most likely to experience the harms of nuisance ordinances or other nuisance-related allegations and suffer homelessness as a result of them. It also demonstrates the insidious barriers that tenants of color encounter in securing and sustaining the safety net of a home.

III. Arrest as an Entry Point to Home Exclusion

While civil judicial and administrative actions pertaining to domestic violence have been shown to evict tenants who are survivors, criminal laws and procedures governing domestic violence may also render alleged abusers, and survivors, homeless. Our institutional culture of mass incarceration "has warped our psyches into thinking that lengthy jail or prison terms are always the answer to criminal behaviors."[157] This way of thinking has also reinforced the paradigm that womxn are always victims and men's conduct should be criminalized, without acknowledging the gradients of how the civil and criminal legal systems are deeply harmful to both. The effects of summary eviction and/or termination of tenancy proceedings, and the policing of residential properties due to nuisance allegations predicated on domestic violence, in essence, contribute to criminalizing homelessness and poverty.

In highlighting how criminal court Temporary Orders of Protection ("TOPs") trigger a tenant's exclusion from the home, this section discusses the civil consequences of domestic violence prosecutions in the absence of due process hearings for alleged abusers. It examines two seminal decisions issued by New York courts on this topic, the second of which—*Crawford v. Ally*[158]—has been actively shaping the landscape of alleged abusers' constitutional protections. Though domestic violence offenses are prosecuted differently in criminal courts than nuisance actions are in civil courts, the underlying outcome of property deprivation is a common consequence bridging the civil-criminal system divide.

A. Civil Consequences of Orders of Protection

Conditions of homelessness and poverty for many of our clients in the Bronx and those like them in other under-resourced communities are perpetuated across judicial forums that are not limited to housing court. A common issue we see as

156. *See* Howard Husock, *Ending NYCHA's Dependence Trap: Making Better Use of New York's Public Housing*, Manhattan Inst. (2019), https://www.manhattan-institute.org/making-nycha-more-efficient.

157. *See* I. India Thusi, *Feminist Scripts for Punishment*, 134 Harv. L. Rev. 2449, 2461 (2021) (quoting Sajid Khan, *Debriefing and Defending the Brock Turner Sentence*, Closing Arguments (May 31, 2016, 1:15 PM), https://www.publicdefenders.us/blog_home.asp?display=109) (reviewing Aya Gruber, The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration (2020)).

158. *See* Crawford v. Ally, 197 A.D.3d 27, 27 (N.Y. Sup. Ct. 2021). *See also infra* Section III.C.

holistic public defenders—at times in tandem with nuisance eviction and termination of tenancy proceedings—is the issuance of a full TOP arising out of criminal and/or family court. Just as Mr. S.'s circumstances demonstrate, these orders are issued against clients who have allegedly committed a domestic violence-related offense, at times raising allegations of child abuse or neglect and interventions by child protective services.[159]

Shortly after a criminal charge has been filed and presented before a judge at arraignments, the standard procedure adopted by New York criminal courts has been the judge's rubber-stamping of TOPs and the lack of an evidentiary hearing afforded to the accused individual to determine its need. A TOP typically contains a fixed expiration date in the duration of the criminal case, but is renewable by the judge through the continuance of the case. They are temporary orders rather than final orders because of the accused individual's presumption of innocence at the time of the issuance. However, a criminal court later has the ability to make the Order of Protection "final" following a criminal conviction—a maximum of five years for misdemeanors and a maximum of ten years for felonies.[160]

A criminal court judge in New York jurisdictions "may issue or extend a [TOP] . . . ex parte simultaneously with the issuance of a warrant for the arrest of the defendant."[161] More commonly, a full TOP has been issued at arraignments as a condition of pretrial release.[162] Under Section 530.12 of the Criminal Procedure Law, although the court is expected to "make a determination" as to whether a stay-away condition(s) may be imposed against the criminal defendant, its "failure to make such a determination shall not affect the validity of such temporary order of protection."[163] In Bronx County, criminal court arraignments for misdemeanor charges average about five minutes, during which a presiding judge must depend almost entirely on the prosecutor's limited record, often unsubstantiated by further evidence from the Complaining Witness and/or their family.

This rubber-stamping procedure raises a number of frustrating and unsettling concerns for advocates in the context of an accused individual's civil liberties. Pending the outcome of a criminal conviction or finding of culpability, the mere issuance of a TOP has the legal authority to exclude the accused individual from his or her home almost instantaneously. In potentially rendering accused individuals homeless in this fashion, without any fundamental procedural due process afforded to the accused individual, these TOPs may further limit their ability to parent their children. The procedure is also an avenue for critiquing judicial

159. *See supra* Section I.

160. *See* N.Y. Law Crim. Proc. § 530.13(4) (Consol. 2021).

161. *See id.* § 530.13(3).

162. *See id.* § 530.13(1); *see also id.* § 530.12(1) (providing that in criminal actions "involving a complaint charging any crime or violation between spouses, parent and child, or between members of the same family or household . . . the court . . . may issue a temporary order of protection as a condition of any order of recognizance or bail"); Christopher R. Frank, *Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats With Snakes*, 50 U. Miami L. Rev. 919, 922 (1996).

163. *See* Crim. Proc. § 530.12 (1)(a).

discretion. The presiding judge in a criminal court proceeding has the agency to determine if excluding the accused individual from his or her home through a TOP "would truly be necessary in order to achieve [its] aims . . . ."[164] As the section on the *Crawford* hearings will further discuss, several criminal courts across New York City are recognizing the need to determine the legitimacy of an accused individual's property interest.

While a judge's factual determination may rest on evidence regarding the accused individual's tenancy, they do not issue any legal conclusions around landlord-tenant disputes (i.e., alleged illegal lockout of a tenant, a tenant's alleged breach of a lease, a tenant's long-term possessory rights of a residence, etc.). Instead, a landlord may still commence a summary eviction action based on alleged domestic violence at the premises pending a TOP's issuance. In those civil cases, the assigned housing court judge (rather than a criminal court judge) will adjudicate the dispute pursuant to any TOP's terms and conditions. As a matter of public policy, however, at least one court recognized the "diversion of important judicial resources" needed for a criminal court to determine landlord-tenant and real property law issues in association to these TOPs.[165]

Thus, in effect, TOPs are elements of certain criminal prosecutions and catalyze *de facto* evictions, demonstrating the ways our clients are ensnared in both criminal and civil legal systems at the cost of losing their homes. Housing courts and family courts do not have the jurisdiction to modify a criminal court TOP, regardless of whether a criminal court judge makes it modifiable in housing court.[166] Rather, only the court that issued the order may terminate or modify it,[167] leaving housing court judges to default to a criminal court judge's determination.

B. Case Study: *People v. Forman*

Criminal and civil public defenders in New York have been challenging the procedures around the issuance of TOPs for years. In the 1989 ruling of *People v. Forman*, the New York County criminal court held that the full TOP issued against defendant Milton Forman was "totally lacking in specificity" and could not be used as a prosecuting device.[168] The *Forman* court applied the U.S.

---

164. *See* People v. Carrington, No. 2006KN004007, 2006 WL 2135516, at *4 (N.Y. Crim Ct. May 3, 2006).

165. *See id.*

166. *See Order of Protection in New York*, LEGAL ASSISTANCE OF N.Y. (Sept. 7, 2021), https://www.lawny.org/node/13/order-protection-new-york; *see also Frequently Asked Questions, Obtaining An Order of Protection*, N.Y.COURTS.GOV. (Jan. 4, 2019), https://www.nycourts.gov/faq/orderofprotection.shtml.

167. *See Legal Information: New York, Restraining Orders*, WOMENSLAW.ORG, https://www.womenslaw.org/laws/ny/restraining-orders/orders-protection/after-hearing (last visited Dec. 9, 2021).

168. *See* People v. Forman, 145 Misc.2d 115, 134 (N.Y. Crim. Ct. 1989). Mr. Forman and his wife had been experiencing marital conflict and were living in separate apartments (jointly owned by them) in the same apartment building. One day, his wife called the police alleging that Mr. Forman had "punched her in the face and knocked out one of her teeth" after he refused to let her into one of the apartments. Charged with assault in the third degree and harassment, he was issued a full TOP and, in effect,

Supreme Court's landmark *Matthews v. Eldridge* factor test in upholding the proposition that the State could not arbitrarily deprive anyone of a property or liberty interest, acknowledging one's legitimate property interest in his or her home.[169] Doing so otherwise marked a violation of the Fourth and Fourteenth Amendments (due process) of the U.S. Constitution.[170] Mr. Forman had not only been excluded from his home by terms of the TOP, but was charged with criminal contempt in violation of the order.[171] Upon his alleged violation of the first TOP, a second order had been issued to him, without a hearing.[172] He moved for a hearing pursuant to Section 510.20 of the Criminal Procedure Law, but the court denied review of the order while the motion was pending.[173]

While the *Forman* court recognized that the TOP's continuance rendered Mr. Forman homeless by a preponderance of the evidence, it ultimately "refused to decide" on the issue of whether a higher standard of proof for an evidentiary standard "might be constitutionally compelled."[174] Rather, it merely interpreted Criminal Procedure Law Section 530.12 to mean that "danger of intimidation or injury" to the victim sufficed as the appropriate standard in consideration of a bail or Release on Own Recognizance pre-trial outcome.[175] No higher or more objective standard has been established through legislative means, leaving the question of an accused individual's *de facto* eviction as a consequence of these orders deserving of greater attention by lawmakers.

On the issue of homelessness, the *Forman* court held that a TOP's issuance required considerations of "procedural due process" and "fundamental fairness."[176] Section 530.12(1)(a) had previously been amended to include factors for future courts to consider in determining whether to issue a TOP.[177] This list of

---

excluded from both of the couple's apartments. Two days after his arrest, Mr. Forman was charged with criminal contempt for allegedly threatening his wife with violence during a telephone conversation with her, in violation of the TOP. It was on the basis of these facts that Mr. Forman's constitutional challenge of the TOP's evidentiary basis was decided.

169. *See* Mathews v. Eldridge, 424 U.S. 319, 321 (1976) (establishing the consideration of the following three factors in affording an evidentiary hearing prior to the termination of benefits: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.").

170. *See Forman*, 145 Misc.2d at 126 ("In the arrest and pre-trial detention phase of criminal proceedings the Fourth Amendment likewise imposes hearing requirements as an aspect of fair procedure") (citing *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975)). *See also Forman*, 145 Misc.2d at 126 ("Certain factors have consistently been considered in evaluating the adequacy of procedures both under the Due Process Clause of the Fourteenth Amendment and under the Fourth Amendment.") (citing *Mathews*, 424 U.S. at 335).

171. *See Forman*, 145 Misc.2d at 118.

172. *See id.* at 116.

173. *See id.* at 118.

174. *See* Frank, *supra* note 162, at 930.

175. *See Forman*, 145 Misc.2d at 125 ("There must be a 'reasonable foundation' for the court's determination . . . and the reasons for the court's determination should be stated or, at minimum, must be ascertainable from the record.").

176. *See Forman*, 145 Misc.2d at 130.

177. *See id.* at 131.

factors included "'whether the [TOP would be] likely to achieve its purpose in the absence of . . . a condition' excluding defendant from the home."[178]

In defense of an accused individual's residential property and other fundamental civil interests, "Forman hearings" have since been demanded by defense attorneys across New York criminal courts to resolve any factual issues concerning the necessity of a full TOP.[179] These filings challenge the validity of such orders.[180] The relief they seek is usually the modification of the full order, in favor of the victim/complainant, to a limited order. This allows for contact between the parties, but mandates that the defendant refrain from harassing, intimidating, or threatening the protected party.[181] However, because *Forman* is a non-binding criminal court decision, judges have frequently denied these demands.[182] Several courts have even rendered decisions undermining the *Forman* holding on the basis of its substantive merits.[183]

C. Case Study: *Crawford v. Ally*

As of late, the First Department Appellate Division's ruling has relieved concerns over the lack of judicial scrutiny around TOPs in criminal court. In *Crawford v. Ally*, the Court held that Bronx resident Shamika Crawford's writ of mandamus petition for an evidentiary hearing regarding the propriety of the TOP in her case should have been granted by the Bronx Criminal Court judge.[184] Even though Ms. Crawford did not face a summary eviction or administrative termination of tenancy action, the issuance of her full TOP still rendered her homeless from her NYCHA apartment.[185] Continuing to pay rent, the effects of this full

178. *See id.* at 131-32.

179. *See* Jeremy Saland, *Rights to Your Property Affected Because of a New York Order of Protection: The "Forman Hearing" & Your Criminal Defense*, CROTTY SALAND PC (Oct. 3, 2010), https://www.newyorkcriminallawyer-blog.com/rights-to-your-property-affect/ ("It is the accused's burden to establish this direct and specific affect. Once having done so, the court must ascertain and weigh this affect against the danger(s) to the complainant.") (citing *Forman*, 145 Misc.2d at 127).

180. *See id.*

181. *See* N.Y. CRIM. PROC. § 530.13(1)(b) (2020).

182. *See* People v. Carrington, No. 2006KN004007, slip op. at *4 (N.Y. Crim. Ct. May 3, 2006) (". . . *Forman* hearings should be sparingly ordered" in instances that "the Court would consider sufficiently compelling . . . and where there exists some valid reason why the defendant cannot expeditiously obtain relief in another forum.").

183. *See generally* People v. Koertge, 182 Misc.2d 183 (Nassau Cty. Dist. Ct. 1998) (finding that *Forman* is "not good law" because the court "ignored the defendant's burden of proof", disregarded an opportunity to challenge a temporary order of protection upon its issuance, failed to mention procedures of issuance or continuance in Family Court or the Supreme Court, and failed to recognize that a defendant's "enclave of personal security and privacy" is often a "torture chamber" for domestic violence victims); *see also Carrington*, No. 2006KN004007, slip op. at *3 ("Of all possible forums, the Criminal Court is the one least able to expeditiously resolve any party's claim to a particular location as constituting a residence to which that party is entitled.").

184. *See* Crawford v. Ally, 197 A.D.3d 27, 33 (N.Y. Sup. Ct. 2021).

185. On or about October 2019, another Civil Attorney from The Bronx Defenders advocated for an emergency safety transfer on Ms. Crawford's behalf due to the nature of the domestic violence that she experienced as a NYCHA tenant. However, based on our office's representation and knowledge of

TOP forced Ms. Crawford to remain separated from her minor children for 88 days.[186] Her misdemeanor assault complaint was eventually dismissed when the prosecution could not meet its burden of proof. In applying an exception to the mootness doctrine,[187] the First Department recognized the critical need to hold a prompt evidentiary hearing when a full TOP implicates an accused individual's deprivation of personal liberty *and/or* property interests.[188] In the immediate aftermath of the unanimous decision, courts of criminal jurisdiction across New York City began holding "Crawford hearings," marking a significant shift in the installment of due process mechanisms.[189]

Although Ms. Crawford's case did not implicate a nuisance eviction dispute in housing court, it may still reflect the courts' treatment of domestic violence as a bothersome, nuisance-type offense. Her arrest deemed her an alleged abuser, entirely overlooking her tenancy status, role as her children's primary caretaker, and history of her relationship to the complainant—her ex-boyfriend with a documented history of abusing her. The nature of her prosecution, the charges she was arraigned on, and the absence of adequate fact-finding in contemplating the civil consequences of her arraignment exhibit the hyper-criminalization of domestic violence in instances where it would be raised as a "nuisance" in non-criminal legal contexts. These components of her case are also demonstrable of the court's discretionary power to overburden the rights of a presumably innocent individual.[190]

All of this is to say that complementing the way that nuisance allegations on the basis of domestic violence in landlord-tenant civil proceedings may lead to court-ordered evictions, allegations of domestic violence and/or IPV in criminal courts has "led to increased state control over [womxn]."[191] And even though Ms. Crawford did not become the accused parent in a case against ACS, legal literature reveals that the policing of families experiencing domestic violence has often left "mothers subjected to abuse at greater risk of being reported to child protective services agencies . . . ."[192]

---

her circumstances, it is factually accurate that she was not a party to any summary eviction or NYCHA termination of tenancy proceeding.

186. *See* Andy Newman, *Barred From Her Own Home: How a Tool for Fighting Domestic Abuse Fails*, N.Y. TIMES, June 17, 2021, https://www.nytimes.com/2021/06/17/nyregion/order-of-protection-domestic-violence-abuse.html.

187. *See Crawford*, 197 A.D.3d at 32 (citing U.S. CONST. art. III, § 2, cl. 1). The First Department more precisely moved forward with a ruling on the merits upon recognizing (i) a likelihood of recurrence, (ii) an issue typically evading review, and (iii) the presence of substantial and novel legal issues at stake.

188. *Id.* at 34.

189. In city-wide coalition meetings that discussed the *Crawford* decision and its implications moving forward, criminal defense attorneys have shared their experiences conducting Crawford hearings in each of the five boroughs. In several (but not all) cases, full TOPs have been modified to allow at least some contact between the alleged abuser and complaining witness/victim, further enabling the alleged abuser to access his or her home.

190. *See* Frank, *supra* note 162, at 934.

191. Goodmark, *supra* note 16, at 71.

192. *Id.* at 71-72.

Accordingly, for tenants who are alleged abusers, domestic violence allegations may produce fateful consequences of homelessness in jurisdictions that fail to enforce Crawford hearings and the legislation that would mandate them in criminal court procedures. In this manner, we often overlook the fact that these allegations—at times disguised as "nuisances" in housing court jurisdictions and "crimes undeserving of due process to defendants" in criminal court jurisdictions—can result in inhumane outcomes depriving accused individuals of their homes.

Conversely, survivors of domestic violence are also frequently denied alternate housing as a result of having issued a full TOP against an alleged abuser, a problem exhibiting the scope of housing impacts on prospective tenants ensnared by the criminal and/or civil legal systems.[193] Several landlords have reasoned that they "[do] not want domestic violence victims in [their] apartments" upon the notion that "abusers have often found them and caused property damage."[194] Other landlords have denied rental applications against prospective tenants as a blatant basis of housing discrimination.[195] As such, domestic violence in the criminal context—and its long-arm extension into the civil housing context—implicates more than the mere consequences of a property nuisance for both the alleged abusers (i.e., subjects of TOPs) and the complainants in a prosecution.

IV. Policy Recommendations

Re-framing domestic violence as less deserving of punitive, carceral responses in criminal courts requires an acknowledgment of the enmeshed civil penalties—particularly loss of the human right to housing—affecting both parties involved. We attorneys, advocates, and policymakers have a collective responsibility to adopt holistic measures to understand the laws' impact on the survivor as well as the accused. As at least one scholar has asserted, "[a] fair and equal justice system requires not only representation in individual proceedings but also institutional work on social welfare policies," which may include protecting individuals from State intrusions.[196]

This section offers recommendations on how to engage in this re-imagining and decriminalization of domestic violence to advance housing justice. It issues the following three proposals: (1) repealing chronic nuisance ordinances and further strengthening current legislation that protects tenant-victims who seek emergency assistance; (2) enacting legislation to codify a stronger procedural safeguard in criminal courts with regards to full TOPs; and (3) applying a restorative, transformative justice lens to the study of nuisance doctrine to mitigate, if not eliminate, the risk of homelessness and evictions that scores of tenants have endured in its current conditions.

---

193. *See* Fais, *supra* note 12, at 1197.

194. *Id.* at 1198.

195. *See id.* at 1198.

196. *See* Kathryn A. Sabbeth, *The Prioritization of Criminal over Civil Counsel and the Discounted Danger of Private Power*, 42 Fla. St. U. L. Rev. 889, 933 (2015).

A. Strengthening Civil Housing Legislation to Decriminalize Domestic Violence

Local chronic nuisance ordinances have been a longstanding problem for tenants nationwide, as landlords in jurisdictions that still enforce them remain incentivized to deny tenants the right to housing on the basis of alleged domestic violence activity on the premises. Challenging these ordinances through aggressive litigation and advocacy in the civil court system may have its own pitfalls, depending on the ordinance's textual clarity and degree of enforcement.[197] In some instances, a tenant may attempt to challenge an ordinance as being "overly vague."[198] However, legal defenses to these laws would be unnecessary if the laws were amended or repealed altogether to reduce the harms incurred by tenants. Local governments should remain more mindful of nuisance ordinances as drivers of housing loss, and should instead work to eliminate any such ordinance that permits tenants' displacement based on law enforcement response to a property's activities.[199]

However, even in jurisdictions like New York State where the legislature has identified a clear need to ensure that domestic violence victims have a right to access emergency assistance to avoid homelessness, statutory language still seems to suggest that domestic violence is a nuisance issue that implicates loss of housing for some. Even though New York's law was enacted to amend its own Civil Rights Law, it nevertheless criminalizes domestic violence by offering grounds to remove the alleged perpetrator through "termination, eviction or refusal to renew a leasehold interest . . . ."[200] Those tenants alleged to have committed domestic violence are likely to be excluded from the home without being offered alternative housing remedies from the State to ensure their stability in other ways. For those tenants who have not been convicted or issued any full TOP out of criminal court for the reported conduct, language like this raises valid legal questions around what these laws are doing in effect—that is, they exhibit how landlords may invoke local civil laws to penalize allegedly criminal actions set to occur on their residential properties, even with well-intended protections for tenant-survivors to retain their occupancy rights.

B. Due Process to Decriminalize Domestic Violence

Without any legislation requiring evidentiary hearings pursuant to Section 530.13 of New York's Criminal Procedure Law, the *Crawford* decision remains insufficient. New York is an outlier in the national criminal procedure landscape around the issuance of full TOPs in criminal prosecutions. In contrast, California's Penal Code has codified the requirement that "a court with

197. *See* Anna Kastner, *The Other War at Home: Chronic Nuisance Laws and the Revictimization of Survivors of Domestic Violence*, 103 CALIF. L. REV. 1047, 1071-72 (2015).

198. *See id.* at 1072.

199. *See* N.Y. CIV. LIBERTIES UNION, *supra* note 74, at 27.

200. *See* 2019 N.Y. SESS. LAWS. 4657-A § 96 ("Removal of the perpetrator of violence while assuring continued occupancy by victim.").

jurisdiction over a criminal order may issue orders" that "[call] for a hearing to determine if [the] order . . . should be issued."[201] Ohio has similarly administered a rule mandating that upon a victim's motion for a temporary protection order, "but not later than twenty-four hours after the filing of the motion, the court shall conduct a hearing to determine whether to issue the order."[202]

As of this writing, there is a bill pending before the New York Senate and Assembly to address this exact issue. Assemblyman Dan Quart and Senator Jessica Ramos introduced A4558A/S2832A on February 4, 2021 as an act "to amend the criminal procedure law, in relation to the issuance of temporary orders of protection" during the pendency of a criminal proceeding.[203] Its language creates an evidentiary standard by which a prosecutor must show "by clear and convincing evidence" that the TOP "is the least restrictive means of protecting [a Complaining Witness] from intimidation or injury."[204] As such, it codifies the mandate of a hearing to ensure that there is adequate procedural due process afforded to the accused individual such that there is an opportunity for more thorough fact-finding before a full TOP is issued against them.[205]

For there to be a standard, uniform practice of implementing *Crawford* hearings in criminal court jurisdictions, it is critical for the legislature to create a more rigid enforcement mechanism altogether. Criminal courts have otherwise been left with precedent to guide their discretionary authority on the subject matter. In its ruling, the First Department Appellate Division only requires that the Crawford hearing be held (i) promptly (a term that reads ambiguously), (ii) on notice to all parties involved, and (iii) in a manner enabling the court to ascertain the necessary facts to decide whether the TOP should be issued. The New York Office of Court Administration has already attempted to minimize the impact of the *Crawford* ruling, underscoring that its contours "should not be read . . . as a matter of law."[206]

Accordingly, the New York legislature should swiftly pass this legislation. The bill requires judges to consider evidence and facts around an accused individual's access to housing before making a determination. Enacting legislation that is responsive to the criminal procedural, and in turn, the civil enmeshed consequences of full TOPs' issuance in this manner would mitigate the imminent risk of homelessness that so many defendants have historically experienced in the absence of due process safeguards.

---

201. *See* CAL. PENAL CODE § 136.2(a)(1)(E) (West 2020).

202. *See* OHIO REV. CODE § 2919.26(C)(1).

203. The bill's amendments were filed on October 25, 2021. *See* S2832B, 2021-2022 Leg. Sess. (N.Y. 2021); *see also* A4558B, 2021-2022 Leg. Sess. (N.Y. 2021).

204. *See* A4558B § 1 (amending § 530.15 of the Crim. Proc. Law).

205. *See id.*

206. *See* Internal Memorandum from the State of New York Unified Court System, Anthony R. Perri, Deputy Couns.: Crim. Just. 1 (June 27, 2021) (on file with author).

C. Alternative Models of Restorative Justice

These legal channels of criminalizing domestic violence and the ways they have given rise to homelessness must force us to re-examine our framework for achieving fair and equal justice. It is critical for housing attorneys, criminal defense attorneys, and domestic violence advocates to "challenge the failure of the courts" in compliance with civil and human rights jurisprudence.[207] Although nuisance doctrine has permeated the civil legal system for so long—particularly as we have seen in landlord-tenant summary eviction procedures—it has produced exclusionary outcomes for survivors and alleged abusers of domestic violence.[208] However, an emphasis on more innovative justice genres, namely restorative and transformative justice, can prompt a well-intended shift away from the racist, oppressive carceral systems that disproportionately punish low-income Black and Latinx people in the absence of supportive safety measures.

One reform measure for implementing restorative justice is to adopt a community-based justice forum for landlords and tenants to avoid contact with judicial court processes. In application to nuisance housing disputes involving domestic violence allegations, an infrastructure like this can help to enforce perpetrator accountability while simultaneously facilitating the survivor's own healing.[209] Creating intentional space for a survivor-centered process would ideally equip survivors with a mechanism for acknowledging and addressing the harm they suffer, while helping the community as a whole to "identify sites for structural change as well as individual reparation."[210] The alleged abuser, rather than undergoing punitive methods of accountability that have often produced shame-based results, would benefit from community-based justice forums as well.[211] Thus, in remaining trauma-informed, these spaces would account for the alleged abuser's own past trauma narrative, eliminating the civil consequence of an eviction and working to honor his or her right to housing elsewhere.

This alternative restorative justice model has already manifested in the form of a multi-jurisdictional community court. Brooklyn's Red Hook Community Justice Center ("RHCJC"), the first of its kind in the nation, focuses on restoring the "quality of life" in local, under-resourced neighborhoods.[212] This "not only

---

207. *See* Deborah M. Weissman, *Rethinking a New Domestic Violence Pedagogy*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 635, 639 (2015).

208. *See supra* Section II.

209. *See* GOODMARK, *supra* note 8, at 139.

210. *See* GOODMARK, *supra* note 8, at 140.

211. *See* Leigh Goodmark, *"Law and Justice Are Not Always the Same": Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 722 (2015) ("[R]estorative justice seeks to repair harms caused by the actions of offenders by asking offenders to acknowledge the harm they have caused and to identify ways to redress that harm . . . . Offenders also report perceiving restorative justice processes as fair in both process and outcome.").

212. *See* CYNTHIA G. LEE ET AL., A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER 4 (2013); *see also* Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573, 1574 (2003).

refers to local [nuisance-like] problems such as noise, trash, poor services and urban blight" but has also "been redefined to constitute a new moral category."[213] Re-shaping the traditional parameters of a court structure in this way has invited more community engagement and devised metrics to improve public safety based on shared community consensus.[214] RHCJC has coordinated a holistic space for impending civil, family, and criminal court matters to be adjudicated by a single presiding arbitrator, "[seeking] to resolve local problems before they become court cases" and in the absence of police intervention.[215]

In jurisdictions that still enforce chronic nuisance ordinances and nuisance abatement laws, and in those enabling summary eviction court and administrative processes based on nuisance allegations, community-based infrastructures like RHCJC could avoid state-sanctioned homelessness by looking to alternative remedies of housing stability for both the survivor as well as the alleged abuser. These infrastructures could help to further debunk the notion that domestic violence is a nuisance issue, holding space for an integrated, holistic discussion about the unintended civil penalties of someone being issued a full TOP. And finally, they could foster and center the voice of the tenant(s) subjected to the alleged abuse to determine whether exclusion of a household member from the home is a desired outcome.

Conclusion

This Article has examined the criminal-civil legal crossroads of domestic violence as a catalyst and condition of homelessness. Residential tenants who are either survivors or alleged abusers risk the threat of eviction in jurisdictions that enforce local nuisance ordinances and nuisance abatement laws, while also navigating challenging court and administrative eviction proceedings for domestic violence allegations harmfully characterized as nuisances. Meanwhile, in criminal courts, alleged abusers often experience immediate exclusion from their home when they are issued a full TOP in the absence of due process considerations.

It should not come as a surprise that survivors and alleged abusers entangled in the criminal and civil legal systems are disproportionately indigent, by virtue of typically being public defender clients.[216] As such, they are also the ones who most often experience the criminalization and over-policing of their poverty. However, widely absent from the criminalization of poverty discourse are the

---

213. *See* Malkin, *supra* note 212, at 1574.

214. *See* Lee et al., *supra* note 212, at 11-12 (sharing the ways that RHCJC has paved the way for building community ties, helped reduce recidivism among juvenile delinquents, established a Public Safety Corps, and enhanced the legitimacy of procedural justice).

215. *See The nation's first multi-jurisdictional community court, the Red Hook Community Justice Center seeks to solve neighborhood problems in southwest Brooklyn.*, Red Hook Cmty. Just. Ctr., https://www.courtinnovation.org/programs/red-hook-community-justice-center/more-info (last visited Dec. 9, 2021).

216. *See* Lauren Sudeall & Ruth Richardson, *Unfamiliar Justice: Indigent Criminal Defendants' Experiences with Civil Legal Needs*, 52 UC Davis L. Rev. 2105, 2109 (2019).

ways in which nuisance doctrine across civil, landlord-tenant disputes has perpetuated harmful consequences upon tenants affected by domestic violence. This Article offered a perspective of how employing nuisance doctrine across civil courts has enabled tenants to suffer the loss of housing. Importantly, we cannot disassociate the history of how civil nuisance ordinances originated from the ways this particular body of law continues to make disparately impacted tenants susceptible to evictions.

In assessing the threat of evictions and homelessness faced by many of these tenants, this Article has offered critical policy solutions that our courts and legislatures should adopt to advance housing justice. Repealing any pre-existing nuisance ordinances will not go far enough if stronger legislation is not enforced to ensure survivors access to stable housing. Furthermore, codifying a stronger evidentiary basis in criminal courts to afford alleged abusers better due process would contribute to a fairer system of procedures that considers their significant property interests. Finally, creating a more holistic, restorative system of accountability with regards to domestic violence would offer alternative remedies of housing stability for both the survivor as well as the alleged abuser, diverting them away from the oppressive, often punitive infrastructure of court and administrative processes.

Each of these measures would enable the recognition of housing as a fundamental human right, while debunking the flawed, harmful notion of domestic violence as a ‘nuisance’ issue. Re-imagining the treatment of domestic violence within our civil and criminal legal systems requires an understanding and acknowledgment of how the human right to housing should be preserved for both parties involved. Ideally, a critical examination of these system effects would contribute remedies to eliminate the violence of evictions altogether.