

Jim Crow in the 21st Century: Crime Free Housing Ordinances, Racial Segregation, and Mass Criminalization

Deborah Archer*

Thank you, Dean, for that introduction. Thank you for inviting me to participate in this lecture series in honor of David Bodiker. I am excited to be here to talk about one way the criminal legal system is expanding to further impact the racial justice challenges we face and fight every day.

Broadly, my work focuses on how racism persists in its power. I try to identify and challenge the architecture of racial inequality. Exploring the laws, policies, cultural norms, and structures through which racism continues to constrain the life outcomes of some and expand the life outcomes of others. Recently, my research has had a more specific focus on understanding the modern drivers of racial segregation and concentrated poverty.

America remains profoundly segregated along racial lines—we live separately, we learn separately, and we socialize separately.

The systems this country has so effectively built to protect and maintain segregated communities have a tremendous negative impact on those left out. This is not because Black people and other people of color would get some magical benefit from living closer to white people or sitting in a classroom with white people.

It is because you cannot separate the places people have access to from the opportunities people have access to.

One's home—not only the physical residence, but also the community in which it's located—impacts our lives in numerous and interdependent ways. There is nothing that place does not touch. Our access to education and jobs, our physical safety and our health, our access to healthy food, our social networks. The number and nature of our interactions with the police. Even the quality of the air we breathe, are all deeply impacted by where we live.

In so many ways, the history of Black people in America is a history not only of control, but of exclusion. And legal and social limitations on how and where Black people live are central to that history. These exclusions have proven to be extraordinarily durable, outliving both chattel slavery and Jim Crow.

The United States has a deep-rooted history of exiling marginalized people from communities of privilege. Indeed, America has embraced a tradition of exile for centuries.

Native Americans have long endured attempts at exile, banishment, and

* Professor of Clinical Law, New York University. This is a lightly edited version of the 11th Annual David Bodiker lecture, given on April 15th, 2021 by Professor Archer at The Ohio State University Moritz College of Law.

extermination. There were government-supported campaigns to exile formerly enslaved people to parts of Africa, first to remove a threat to the institution of slavery and later as a proposed solution to racial violence following Emancipation. During World War II, Japanese Americans were forced into internment camps to isolate the threat that they allegedly posed to the country. The embrace of exile was evident in Jim Crow policies around the country, where white people created white-only spaces—like schools, neighborhoods, parks, restaurants—by excluding Black people through violence, law, or custom.

And America's embrace of exile to protect white spaces includes countless acts of racial violence throughout the 19th and early 20th centuries. White people, driven by white supremacy and hatred for Black people, used violence, intimidation, and the law to rid their communities of Black people, separate Black people from opportunity, and keep Black people "in their place" physically, socially, and economically.

But, among the most effective and durable tools of exclusion are the police and the criminal legal system.

From their inception, police have been tasked with protecting power and privilege by exerting control over Black people and enforcing racial order. Modern policing has its roots in the suppression of slave revolts, and in the creation of patrols to capture enslaved people who had escaped. Police were not the only tool of control of formerly enslaved people—every element of the criminal legal system was brought to bear. Even as chattel slavery ended, Black people were pulled back into forced labor through convict leasing systems. Communities created categories of crime as a pretext to arrest Black people, or just arrested them without the pretense of having committed a crime at all, and courts sentenced them back into forced labor.

During Jim Crow, police brutally enforced segregation, and police officers often joined, supported, and protected lynch mobs. During the civil rights movement, police beat protesters who marched for equality on national television. When Black people dared to move into historically white neighborhoods, police were enlisted to ward off residential integration and protected the people who terrorized Black families.

Underlying all of this is the narrative linking race and crime, which has endured for centuries as a justification for segregation and subjugation. This began during slavery, when a common narrative was that Black people were savages, prone to violence and criminality unless domesticated and made docile. Slavery was, they said, to Black peoples' benefit. This narrative of excessive Black criminality has evolved, but it remains a central thread in the conversation about racism in the United States. During Reconstruction and throughout Jim Crow, as Black Codes in the South and discriminatory policing in the North criminalized Blackness, sociology and statistics replaced Darwinism and eugenics as alleged proof of innate Black criminality. In the progressive era, well-meaning reformers advocated for more humane treatment of people convicted of crimes but still warned that the "Black criminal" was a breed apart because we innately had a propensity for crime. In conversations ranging from criminal justice reform to family law to education, to

housing, these racialized narratives fuel a general state of anxiety and fear, and brand Black people, as dangerous and inhuman. As Ibram Kendi recently wrote: “To be Black in racist America is to be armed and dangerous even when we are unarmed and walking away.”

The mark of criminality exists for Black people and other people of color even in the absence of actual criminality.

Today, this country continues to use exile and exclusion as a means to define the boundaries of citizenship and belonging. And, given our long history of using the narrative myth of Black criminality as a justification for segregation and subjugation, it should be no surprise that central among the modern tools of exclusion are laws ostensibly motivated by the desire to keep certain communities safe, that use contact with the criminal legal system as the measure of dangerousness, and use the police as the enforcement tool.

These newest tools in the arsenal of exclusionary tools are what I refer to as policing-based housing policies which bring together all of these threads. These housing policies take various forms, but all encourage or require property owners to keep out people with criminal legal system contacts. I think the name policing-based housing policies is apt because these policies not only use the police for enforcement, but are also grounded in popular theories of policing, such as “broken windows” and “hot-spots” policing, and adopt many of the enforcement goals, strategies, values, and narratives of the criminal legal system.

The adoption of policing-based housing policies has become entangled with societal assumptions about the criminality of Black people and the criminal legal system’s steady march toward mass criminalization. Despite a growing consensus about the harms caused by mass incarceration, and many high-profile efforts to reverse America’s race-driven overreliance on imprisonment, mass criminalization has nonetheless seeped into virtually every aspect of society.

Against this backdrop, the adoption of policing-based housing policies act as a system of essentially racialized agreements between community members to exclude people of color and define the boundaries of who is allowed to live and thrive within their borders, and thus who can shape and be shaped by living in these communities. By combining the brutal efficiency of mass criminalization and the racism of the criminal legal system, policing-based housing policies risks profound damage to the physical, economic, and psychological well-being of its victims—mostly Black and Brown people.

I want to focus in on one category of policing-based housing policies – crime-free housing ordinances. Crime-free housing ordinances are local laws or policies that either encourage, or require, private landlords to evict tenants who have had varying levels of contact with the criminal legal system, or to decline to rent to those tenants in the first place. These local ordinances have the purported goal of stemming crime in rental housing. But they are much more effective at excluding racial minorities and promoting racial segregation than they are at stemming crime.

Crime-free housing ordinances have their roots in the law enforcement

community. The first ordinances were created by the International Crime Free Association, an organization founded in 1992 by a member of the Mesa Police Department in Mesa, Arizona. And the ICFA has successfully spread the adoption of crime-free ordinances across the United States.

Today, according to one study, over 2500 municipalities across 44 states have adopted crime-free housing ordinances or programs. In California, for example, almost one-third of local governments have a crime-free ordinance or program. Additional towns and cities have adopted nominally voluntary programs administered through the local police department.

In their most problematic form, crime-free housing ordinances make even alleged criminal activity a violation of the rental agreement, allow police officers to decide whether a potential tenant's criminal history disqualifies them from rental housing in the community, or whether a tenant must be evicted because of alleged "criminal activity" without any meaningful due process, and allow revocation of a private landlord's authorization to rent their property for failing to act on those police determinations.

Significantly, a resident does not have to be convicted in order to be evicted. A common crime-free lease addendum provision, which is the model pushed by ICFA, explicitly states that proof of violation shall not require a criminal conviction. This creates the possibility that a mere arrest—or even a stop that results in neither arrest nor conviction—might be sufficient to evict someone from their home.

I want to share two examples of programs—one mandatory and one nominally voluntary.

The example of a mandatory program is Faribault, Minnesota. First, the ordinance creates a requirement that all owners of rental housing obtain a license from the city to operate a rental dwelling and lays out a series of requirements for obtaining and retaining that license. One of the requirements is compliance with the ordinance's crime-free housing provisions. The ordinance also provides a number of reasons that a landlords' license can be revoked, including failing to actively pursue the eviction of a tenant who has been accused of violating the crime free lease addendum.

Faribault's ordinance also provides the text of a crime-free lease provision that is mandatory for every lease. It prohibits a resident or guest from engaging in "illegal activity" on or near the premises. Notably, the ordinance does not define what constitutes illegal activity, making any alleged violation of the law grounds for eviction after a single violation.

Finally, the ordinance gives the Faribault police the power to order eviction of a tenant pursuant to the lease addendum without an arrest or conviction. If the police department determines that a tenant or occupant is in violation of the provision, the landlord must terminate the tenancy of everyone in the unit and may not enter into a new lease with any of them for one year.

Orlando, Florida is an example of a voluntary program. It has several components. The centerpiece of the program allows a property to advertise that it is "crime free" if the property management agrees to include a specific crime-free lease

addendum in all of its leases. The language in the Orlando lease addendum provides that once a property owner or manager is notified that a tenant has been arrested, they can fill out an eviction form and give the accused resident just seven days to move out. Again, a resident does not have to be convicted in order to be evicted.

Properties that participate in the crime free program also receive a weekly Tenant Eviction List which identifies all renters who have been evicted pursuant to the Crime Free Program. The purpose of this list, according to the City of Orlando, is to ensure that someone evicted under this program will not be able to move to new housing in the community.

Although Orlando's program is nominally voluntary, in a single five-year period approximately 1400 people were evicted under the program. And the overwhelming majority of those evicted were Black or Latinx. One of those people was Leroy Ebanks. When he was 21-years old, police suspected that Mr. Ebanks broke into a car. Police questioned him and he denied any involvement. In connection with his questioning, the police checked Mr. Ebanks' criminal history which showed that he had two prior arrests, but no convictions. The officers turned that information over to the rental complex where he lived, and the building management immediately started eviction proceedings.

It should be no surprise that crime-free housing ordinances disproportionately exclude people of color and further racial segregation. Involvement with the criminal legal system effectively functions as a racialized criterion for who can live in that community. This is because there are extreme racial disparities in who has contact with the criminal legal system. The impact is heightened because of the breadth of crime-free ordinances. The exclusions are not only based on convictions but, by design and implementation, on *any* contact with the criminal legal system—from convictions to arrests to even stops and mere suspicion. And, they impact not just one building, but an entire community.

The discretion these laws give to police officers and landlords is also ripe for abuse. It is easy to see how bias by law enforcement and the disproportionate enforcement of criminal laws lead to a regime where people are excluded from housing and community for reasons having nothing to do with safety and everything to do with racism. In Hesperia, California, a city with a particularly onerous mandatory ordinance, the U.S. Department of Justice determined just last year that Black residents were almost four times more likely than white residents to be evicted under that city's crime-free housing policy and Latinx renters were three times more likely than white tenants to face eviction. They also determined that nearly all evictions under the policy occurred in nonwhite neighborhoods within the City.

It is not just the potential for abuse that is problematic. There is evidence surrounding the adoption of some of these ordinances that racial segregation may be more than an unfortunate by-product. Crime-free housing ordinances are often adopted following burgeoning racial diversity, not burgeoning crime. For example, of the 20 California cities with the largest increase in Black population since 1990, 80% have a crime-free ordinance or policy. Of the 20 California cities with the

largest increase in Latinx population since 1990, 75% have a crime-free ordinance or policy.

Again, Faribault, Minnesota is an instructive example. The Black population of Faribault, composed almost entirely of Somali immigrants and refugees, nearly tripled between 2000 and 2010. The 2010 census showed an increase of 214% in Faribault's Black population since 2000 and a 263% increase in the Black population living in the downtown area of Faribault during the same period. Although residents of Faribault began complaining about increases in crime during this period, the overall crime rates in Faribault did not, in fact, increase dramatically.

The motivation behind these laws is permeated with racial bias.

Moreover, crime-free housing ordinances can lead to exclusions or evictions because of police contacts resulting from the weaponization of police by community members suspicious or resentful of people of color, solely because of their race. The phrase "Living While Black" has been used to encompass the innumerable ways Black people are viewed with suspicion and required to justify their presence in spaces where they are seen as not being in the norm. As sociologist Elijah Anderson explains, there are "white spaces" where Black people are often not present or exist in a limited number. When in white spaces, Black people are often required to provide justification and proof—to police or other citizens—that they belong. When those suspicious of Black people in white spaces call the police to enforce those exclusions, these criminal legal system contacts can pose numerous risks to the health and safety of those being policed and can result in "criminal records" justifying housing exclusion.

The combination of expanding policing-based housing policies and the spike in police officers responding to complaints about Black people living their lives in white spaces increase the likelihood that Black people will experience exclusion from traditionally white residential spaces. And, again, together, they risk working in the same way as racially restrictive covenants—community-based contractual agreements prohibiting the rental to certain groups of people.

Crime-free housing ordinances also ensnare people who have not engaged in activities that meet any reasonable notions of "crime." The entanglement of policing-based housing policies and mass criminalization is pushing already marginalized people further to the edges of society. And the more we criminalize relatively innocuous behavior, the worse the problem gets. In the end, these policies exclude people who pose little or no threat to the community: families banned because their children engaged in behavior that would be of little consequence in other communities; people fighting substance abuse disorders; people targeted by the over-policing of Black people and Black communities; and victims of the weaponization of the police.

An example is Thelma Jones, a Black woman who lives in Faribault, Minnesota. After living in Faribault for almost a decade and in her then apartment for five years, Ms. Jones was informed by her landlord that she and her children had two weeks to move out. The landlord told Ms. Jones that the police advised the landlord to evict Ms. Jones because the police had responded to complaints at her

home 82 times and characterized Ms. Jones' home as a location of "ongoing criminal activity."

In fact, Ms. Jones and her children did not have any criminal convictions. However, the police had come to Ms. Jones' home repeatedly because of harassing calls to the police by her white neighbors. On one occasion, police responded to calls because Ms. Jones was hosting a family barbecue. On another occasion, police were called when Ms. Jones hosted a child's birthday party. Police even responded to calls when her children were outside playing on their trampoline. Ms. Jones and her family were evicted not because they were engaged in criminal activity on or off her property, but because she was a Black woman who was unwelcomed by her predominantly white neighbors.

Mass criminalization feeds the myth of criminality and validates unwarranted fear. In turn, crime-free housing ordinances weaponize that fear. And, crime-free housing ordinances provide an already racist criminal legal system with a broader province of impact and influence. Race plays an undeniable role in policing in the United States. By utilizing the principles of policing in both design and implementation, crime-free ordinances import racially discriminatory policing practices into the private housing market and weave housing policy and the criminal legal system together, both ideologically and functionally.

Ideologically, the normative values of the criminal legal system are infiltrating housing determinations. Specifically, housing policy is adopting the policing-based values of exclusion and punishment, and treating applicants and tenants as suspects, blurring the line between housing determinations and policing.

Functionally, crime-free housing policies give police officers outsized power to determine who can and cannot live in certain communities. These policies essentially allow police officers to pick and choose who may live in their community simply by making the practically unreviewable assertion that an applicant or tenant engaged in illegal activity. Ultimately, the denial of housing is used to punish "criminalized people"—both those with meaningful criminal legal system contacts and, increasingly, those without. The consequences for those exiled are devastating. And, given the close connections between law enforcement, the criminal legal system, and race, for many people of color, exile is almost fate.

Today, we are having long overdue conversations about the need to reimagine policing and public safety. But, this conversation must be about more than a re-examination of traditional policing and instead must explore police violence in all of its forms. It must also examine the expanding role and power of the police and stop providing our criminal legal system with a broader province of impact and influence. Crime free housing ordinances are a move in the wrong direction.

