

# COMMENTS

## LOCKED OUT: HOW THE DISPROPORTIONATE CRIMINALIZATION OF TRANS PEOPLE THWARTS EQUAL ACCESS TO FEDERALLY SUBSIDIZED HOUSING\*

### I. INTRODUCTION

Low-income trans people<sup>1</sup> living at intersections of marginalization face heightened surveillance, violence, policing, and resultant interactions with the criminal justice system as a daily reality.<sup>2</sup> Often already balancing unemployment, long-term poverty, and homelessness, such disproportionate criminalization is one more barrier to survival for low-income trans people.<sup>3</sup> As a result, federally subsidized housing programs have the potential to be a critical resource for the safety and stability of the most vulnerable members of trans communities.<sup>4</sup>

Federally subsidized housing programs, overseen by the Department of Housing and Urban Development (HUD), are a scarce and important source of support for the poorest Americans.<sup>5</sup> To protect this resource from discriminatory practices, HUD

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1. “Trans” is a broad umbrella term used throughout this Comment to include people who have a gender identity different from the one they were assigned at birth. It includes people who identify as transgender, gender nonconforming, genderqueer, transsexual, and other identity categories. Because trans people use many different gender pronouns to refer to themselves (she/her, he/him, they/them, zie/hir, some combination of several, etc.), I use the gender-neutral pronouns “they” and “them” throughout this Comment to refer to both individuals and groups. *Definition of Terms*, U.C. BERKELEY GENDER EQUITY RESOURCE CENTER, [http://geneq.berkeley.edu/lgbt\\_resources\\_definiton\\_of\\_terms](http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms) (last visited Dec. 12 2014).

2. AMNESTY INT’L USA, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 2 (2005), available at <http://www.streetwiseandsafe.org/wp-content/uploads/2011/01/StonewalledAI.pdf>.

3. See JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, NAT’L CTR. FOR TRANSGENDER EQUALITY, NAT’L GAY AND LESBIAN TASK FORCE 8 (2013), available at [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf) (noting that sixty-three percent of trans study participants experienced discrimination that seriously impacted their quality of life, often leading to job loss, eviction, or incarceration).

4. See HUD’s *Public Housing Program*, HUD.GOV, [http://portal.hud.gov/hudportal/HUD?src=/topics/rental\\_assistance/phprog](http://portal.hud.gov/hudportal/HUD?src=/topics/rental_assistance/phprog) (last visited Dec. 12, 2014) (describing HUD’s mission as providing “decent and safe rental housing for eligible low-income [people],” noting that “[i]n general you may stay in public housing as long as you comply with the lease.”).

5. The average annual income for tenants in federally subsidized housing programs from August 1, 2013 through Nov. 30, 2014 was \$13,444.00, and 88% of tenants are “very low income” or “extremely low income.” *Resident Characteristics Report*, HUD.GOV, <https://pic.hud.gov/pic/RCRpublic/rcrmain.asp> (select “All Relevant Programs” from the “Select Program Type” drop-down menu; then follow the “National”

released the Equal Access rule (EAR) in 2012, stating that subsidized housing providers could not discriminate against tenants or applicants on the basis of gender identity or sexual orientation.<sup>6</sup> Now, federal housing providers can face repercussions for discriminating against trans people based on their actual or perceived gender identity.<sup>7</sup>

However, the scarcity of subsidized housing has also led HUD to substantially limit access to its programs.<sup>8</sup> Under HUD's "One-Strike" policy, applicants for or tenants in subsidized housing programs are regularly rejected or evicted for even one past instance of criminal activity.<sup>9</sup> Many poor trans people have at least one such past instance of criminal activity stemming from their positions within several marginalized communities.<sup>10</sup> For those low-income trans people, the coexistence of the One-Strike policy and the EAR creates a major conflict for subsidized housing access.<sup>11</sup>

Section II of this Comment is split into three Parts. Part II.A delves into the background and mechanics of the One-Strike policy, then addresses the different legal strategies that can be utilized to challenge a One-Strike eviction or admission denial. Part II.B examines the systems that work against trans people to create cycles of poverty and disproportionate criminalization. Part II.C analyzes the goals of the EAR as well as the public's response to the proposed rulemaking. Finally, Section III explores the conflict between the EAR and One-Strike policy, presenting possibilities to work within and outside of their frameworks to support meaningful access to subsidized housing by trans applicants and tenants.

## II. OVERVIEW

### A. HUD's One-Strike Policy and Possible Legal Challenges for Trans Tenants or Applicants

Subsidized housing programs theoretically provide invaluable assistance for trans people who struggle to afford and maintain market-rate housing.<sup>12</sup> Examining how

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hyperlink under "Select Level of Information;" then follow the "Income" hyperlink) (last visited Dec. 12, 2014). However, a housing provider "may close its waiting list when it has more families on the list than can be assisted in the near future," which often happens around the country. *Housing Choice Vouchers Fact Sheet*, HUD.GOV, [http://portal.hud.gov/hudportal/HUD?src=/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](http://portal.hud.gov/hudportal/HUD?src=/topics/housing_choice_voucher_program_section_8) (last visited Dec. 12, 2014).

6. Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5662 (Feb. 3, 2012) (codified at 24 C.F.R. §§ 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982).

7. *Id.*

8. See 42 U.S.C. § 13661(c) (2014) (setting out guidelines for denying admission to any subsidized housing programs based on past criminal activity); 42 U.S.C. § 1437d(l)(6) (2014) (setting out guidelines for initiating an eviction process in public housing owned by a public housing authority); 42 U.S.C. § 1437f(o)(7)(D) (2014) (setting out guidelines for initiating an eviction process for Housing Choice Voucher tenants).

9. See 42 U.S.C. § 13661(c). See *infra* Part II.A.2–3 for a discussion of how the One-Strike policy impacts both admissions and evictions in federally subsidized housing, as well as what constitutes criminal activity.

10. GRANT ET AL., *supra* note 3, at 2, 158.

11. See *infra* Section III for a detailed analysis of the tensions between these two policies.

12. See Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public*

federal housing programs address an applicant's past interactions with the criminal justice system is critical to evaluating access to those programs by low-income trans people.<sup>13</sup> Part II.A.1 discusses the history of federally subsidized housing programs and the One-Strike policy addressing past criminal activity in those programs. Part II.A.2 examines the policy's impact on admission, and Part II.A.3 addresses its impact on continued occupancy. Part II.A.4 explores legal challenges to the One-Strike policy that may successfully increase access to subsidized housing for trans people.

### 1. The History of Federally Subsidized Housing Programs and the One-Strike Policy

Federally subsidized housing programs have been in place since the New Deal era to provide affordable, income-based housing for low-income Americans.<sup>14</sup> Subsidized housing assistance is a vital resource for people who are unable to afford market-rate housing.<sup>15</sup> Today, these programs provide housing for nearly three million Americans.<sup>16</sup> Tenants in subsidized housing programs experience high rates of poverty: eighty-two percent of families in federally subsidized housing have a yearly income of \$20,000 or less.<sup>17</sup> Although there is a great need for affordable housing, neither private housing markets nor federal housing programs have been able to keep up with that need.<sup>18</sup> Years-long waiting lists for subsidized housing are common around the country.<sup>19</sup> According to HUD, “[t]he rapid growth of worst case [housing] needs

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*Housing*, 36 U. TOL. L. REV. 545, 545 (2005) (noting the great potential in “federally subsidized housing . . . [for] millions of low-income people who could not otherwise afford homes on their own”).

13. Kathleen F. Donovan, Note, *No Hope for Redemption: The False Choice Between Safety and Justice in Hope VI Ex-Offender Admissions Policies*, 3 DEPAUL J. FOR SOC. JUST. 173, 182 (2010) (describing the tension in the One-Strike policy between “the lack of adequate public housing to shelter low income families . . . [and] the government’s interest in reducing crime and promoting safety in public housing”).

14. KATHLEEN T. HILL & GERALD N. HILL, ENCYCLOPEDIA OF FEDERAL AGENCIES AND COMMISSIONS 198, 198 (2004).

15. As HUD noted in its 2013 report to Congress about people with the most dire housing needs, “[h]ousing assistance, including that provided by HUD, is an important preventer of worst case needs among very low-income renters. . . . For every very low-income renter who is assisted, however, 1.8 renters have worst case needs for such assistance.” U.S. DEP’T OF HOUS. & URBAN DEV. OFFICE OF POL’Y DEV. & RESEARCH, WORST CASE HOUSING NEEDS 2011: REPORT TO CONGRESS 20 (2013) [hereinafter WORST CASE HOUSING NEEDS], available at [http://www.huduser.org/Publications/pdf/HUD-506\\_WorstCase2011\\_reportv3.pdf](http://www.huduser.org/Publications/pdf/HUD-506_WorstCase2011_reportv3.pdf). This means that “the nation no longer has enough affordable units” to meet our worst case housing needs. *Id.*

16. *Resident Characteristics Report*, *supra* note 5.

17. *Id.* The national poverty rate as of 2012 was 15%, with 46.5 million people living in poverty. CARMEN DE NAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012 at 13 (2013) (U.S. Census Bureau Current Population Reports, Ser. P60-245), available at <http://www.census.gov/prod/2013pubs/p60-245.pdf>.

18. See WORST CASE HOUSING NEEDS, *supra* note 15, at 14 (recognizing the extreme disconnect “between the number of extremely low-income renters and the number of affordable units available to them. For every 100 extremely low-income renters, only 61 affordable units exist, and fewer than 36 are affordable and available.”).

19. See *Housing Choice Vouchers Fact Sheet*, *supra* note 5 (qualifying the availability of subsidized housing by noting that “[s]ince the demand for housing assistance often exceeds the limited resources available to HUD and the local housing agencies, long waiting periods are common”). Waiting lists can also be closed for years at a time; long wait times trigger closure. See U.S. DEP’T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS 4–33 (2009),

continues unabated” without a clear solution.<sup>20</sup>

Such high need means that current federal housing stock cannot serve all extremely low-income Americans.<sup>21</sup> HUD—which is responsible for administering federal housing policy—must therefore set standards to regulate access to federally subsidized housing resources.<sup>22</sup> Responding to public concern about crime in public housing developments, Congress made past instances of criminal activity grounds for initiating evictions and denying admission to federally subsidized housing programs in 1988.<sup>23</sup>

## 2. The One-Strike Policy in Admission to Subsidized Housing Programs

Prospective tenants can be barred from admission to federally subsidized housing programs based on a single instance of past criminal activity under the One-Strike policy.<sup>24</sup> A public housing agency (PHA)<sup>25</sup> is authorized to subject all prospective tenants to background screening for criminal activity before admitting them into a subsidized program.<sup>26</sup>

PHAs can exclude members of an applicant family or reject a family entirely based on evidence of a single past instance of criminal activity by a household member.<sup>27</sup> Such evidence does not have to be a conviction or an arrest: PHAs may deny admission based on a determination that criminal activity has taken place.<sup>28</sup>

available at [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_35639.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35639.pdf) (noting that public housing authorities can close their waiting lists “when the average wait time is excessive . . . e.g., one year or more”).

20. WORST CASE HOUSING NEEDS, *supra* note 15, at 2. HUD recently reported that “[t]he number of worst case needs in 2011 was 19 percent greater than 2009 levels and 43 percent greater than 2007 levels.” *Id.*

21. *Id.* at vii.

22. See 42 U.S.C. § 3532 (2014) (establishing HUD’s role in housing policymaking).

23. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 15, 19, 20, 21, 25, 29, 40 and 42 U.S.C.). See also Carey, *supra* note 12, at 553 (“From the perspective of public housing authorities trying to ration a scarce resource, the exclusion [of applicants with past criminal activity] is . . . an easy one to sell publicly. The public views people with criminal records with suspicion, fear, hate and anger. It is not going to protest the exclusion of ‘bad’ people from public housing.”).

24. See 42 U.S.C. § 13661(c) (2014) (outlining how “in selecting among applicants for admission to the program or to federally assisted housing, if the public housing agency or owner of such housing (as applicable) determines that an applicant or any member of the applicant’s household is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing agency employees, the public housing agency or owner may . . . (1) deny such applicant admission to the program or to federally assisted housing”).

25. Throughout this Comment, the term PHA is used to include agencies that operate public housing or Housing Choice Voucher programs—the major providers of federal rental housing assistance. See *Housing Choice Vouchers Fact Sheet*, *supra* note 5 (describing how PHAs receive federal funds from HUD and then administer vouchers to subsidize rent). PHAs are typically county- or city-based agencies that administer federal housing programs. See *HA Profiles List*, HUD.GOV., <https://pic.hud.gov/pic/haprofiles/haprofilelist.asp> (last visited Dec. 12, 2014) (listing all PHAs by state or territory).

26. 24 C.F.R. § 960.203(c)(3) (2014).

27. 24 C.F.R. § 960.203(c)(3)(i)-(ii).

28. See 24 C.F.R. § 960.203(c)(3) (stating that PHAs may make admissions decisions by considering

Denials can be due to past or current “crimes of physical violence . . . and other criminal acts which would adversely affect the health, safety or welfare of other tenants.”<sup>29</sup> PHAs can also broadly consider any “living or housekeeping habits at prior residences which may adversely affect the health, safety or welfare of other tenants.”<sup>30</sup>

PHAs are required to deny prospective applicants in only four circumstances, when (1) applicants have been evicted for drug-related criminal activity in the past three years; (2) applicants are currently illegally using drugs; (3) applicants have been convicted of methamphetamine production (lifetime bar); and (4) applicants are subject to a lifetime sex offender registration requirement (lifetime bar).<sup>31</sup> However, PHAs may also set their own “reasonable” time bars on how long an applicant must wait to apply for subsidized housing after an incident of criminal activity outside of the required four, without any statutory limits.<sup>32</sup> This regulation gives PHAs substantial discretion to deny applicants based on past criminal activity outside of the four required rejection categories.<sup>33</sup>

PHAs also have considerable discretion to accept applicants with past instances of criminal activity.<sup>34</sup> When PHAs receive information about an applicant’s past criminal activity, they are required to consider “the time, nature, and extent of the applicant’s conduct (including the seriousness of the offense).”<sup>35</sup> Additionally, PHAs can consider any circumstances that may demonstrate “a reasonable probability of favorable future conduct.”<sup>36</sup> PHAs may “consider all relevant information” when evaluating an applicant with past criminal activity.<sup>37</sup>

In a 2011 letter to PHAs, former HUD Secretary Shaun Donovan wrote to “remind [PHAs] of the discretion given to public housing agencies . . . when considering housing people leaving the criminal justice system.”<sup>38</sup> While there is no

“all relevant information, which may include . . . [a] history of criminal activity,” without reference to the level of proof required); *see also* 24 C.F.R. § 5.855(a) (2014) (allowing other subsidized housing providers to deny admission “if [they] determine” that criminal activity has taken place).

29. 24 C.F.R. § 960.203(c)(3).

30. *Id.* § 960.203(c)(2).

31. 24 C.F.R. § 960.204 (2014).

32. 24 C.F.R. § 5.855(b).

33. *See* 24 C.F.R. § 5.852(a) (2014) (“If the law and regulation permit you to take an action but do not require action to be taken, *you may take or not take the action in accordance with your standards for admission and eviction.*”) (emphasis added). For example, even if an applicant with a past instance of criminal activity does not fall within one of the mandatory bans—acts like trespassing, prostitution, or drunkenness—a PHA may still deny the applicant if it has set its own time bars for those other crimes (i.e., a PHA could require that an applicant must wait three years to apply after a prostitution conviction). 24 C.F.R. § 5.855(b).

34. 24 C.F.R. § 960.203(d).

35. *Id.* The regulatory language is silent on how much weight such considerations should be given or how much they should influence an admission decision.

36. 24 C.F.R. § 960.203(d)(1).

37. 24 C.F.R. § 960.203(c); *see* 24 C.F.R. § 982.552(c)(2)(i) (2014) (explaining that other factors to consider include the “seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure”). In addition, PHAs can consider whether a particular denial will impact the “integrity” of their program, enabling PHAs to look at larger patterns in admission to see if it fits within their broader statutory mandate. 24 C.F.R. § 960.203(b).

38. Letter from Shaun Donovan, HUD Sec’y & Sandra B. Henriquez, Assistant Sec’y for Pub. and

available data on how many people are rejected from subsidized housing programs based on past criminal activity, many PHAs have created policies that reject applicants “with even the most minor criminal backgrounds.”<sup>39</sup> Often, PHAs use discretion only to deny applicants.<sup>40</sup> As a result, “individualized review of an application typically occurs, if at all, during a hearing challenging a rejection.”<sup>41</sup> Rejected applicants can individually challenge their admissions decisions through an informal review process.<sup>42</sup> However, many low-income applicants struggle to afford legal counsel, making successful challenges against a PHA’s lawyers difficult.<sup>43</sup>

Despite considerable discretion to accept applicants with past instances of criminal activity and even requests for flexibility from HUD, PHAs often use their discretion to broadly deny applicants with such histories, however minor.<sup>44</sup> PHAs also set up time bars as a barrier to admission to prevent applicants with certain past convictions from applying for a certain number of years.<sup>45</sup> Nonetheless, the regulatory language regarding admission to federal housing is very broad, allowing PHAs to accept applicants as long as they examine the circumstances of an applicant’s past instances of criminal activity.<sup>46</sup>

### 3. The One-Strike Policy in Evictions from Subsidized Housing Programs

For current tenants in federally subsidized housing, the One-Strike policy also has serious consequences.<sup>47</sup> Once federal housing assistance is granted, it may only be

Indian Hous., to PHA Exec. Dir. 1 (June 17, 2011), available at [http://csgjusticecenter.org/documents/0000/1130/HUD\\_letter.pdf](http://csgjusticecenter.org/documents/0000/1130/HUD_letter.pdf). Secretary Donovan noted that “PHAs have broad discretion” and can evaluate “all relevant information, including factors which indicate a reasonable probability of favorable future conduct” when considering an applicant with a history of criminal activity. *Id.* at 2.

39. Carey, *supra* note 12, at 567–68. Prior acts like writing bad checks, shoplifting, and even jaywalking—just arrests, convictions are not required—can form the basis of an admission denial by a PHA. *Id.* In contrast, the New York City Housing Authority recently became one of the first PHAs in the country to “ease its ban on recently released prisoners and allow some of them to live in public housing” starting in December 2013 in an effort to reduce recidivism and homelessness. Mireya Navarro, *Ban on Former Inmates in Public Housing Is Eased*, N.Y. TIMES, Nov. 15, 2013, at A25.

40. See Rue Landau, *Criminal Records and Subsidized Housing: Families Losing the Opportunity for Decent Shelter*, in EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 41, 45 (Community Legal Services & Center for Law and Social Policy eds., 2002), available at [http://www.clasp.org/resources-and-publications/files/every\\_door\\_closed.pdf](http://www.clasp.org/resources-and-publications/files/every_door_closed.pdf) (noting that “while PHAs can use discretion when screening applicants, they often default to rigid enforcement of the rules,” resulting in constant denials).

41. Carey, *supra* note 12, at 572, 573–74. This approach places the burden on applicants to appeal to get such a review. *Id.* at 574. See also MARIE CLAIRE TRAN-LEUNG, SHRIVER CTR., WHEN DISCRETION MEANS DENIAL: THE USE OF CRIMINAL RECORDS TO DENY LOW-INCOME PEOPLE ACCESS TO FEDERALLY SUBSIDIZED HOUSING IN ILLINOIS 9 (2011), available at <http://povertylaw.org/sites/default/files/webfiles/when-discretion-means-denial.pdf> (noting that “individualized review by PHAs and project owners is the exception rather than the rule”).

42. 24 C.F.R. § 982.554 (2014).

43. Although tenants and applicants both have trouble affording either housing or legal services, “many legal service organizations that provide free legal services to the poor do not make admissions cases a priority.” Carey, *supra* note 12, at 590–91.

44. *Id.* at 572.

45. See TRAN-LEUNG, *supra* note 41, at 6–8.

46. 24 C.F.R. § 960.203(d) (2014).

47. See, e.g., 24 C.F.R. § 966.4(l)(5)(iii)(A) (2014).

terminated for good cause; past or current criminal activity is good cause for termination.<sup>48</sup> While tenants typically have the right to an administrative hearing before a PHA files for eviction, PHAs can either provide an expedited process or disallow hearings entirely when they choose to evict tenants based on criminal activity.<sup>49</sup> All PHA leases provide that “criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants” or others in nearby residences constitutes good cause for eviction.<sup>50</sup>

Like an admissions denial based on criminal activity, an eviction on the same grounds does not require a conviction, an arrest, or even a filing of criminal charges—PHAs must only prove that the criminal activity happened by a civil preponderance of the evidence standard to evict.<sup>51</sup> Just a suspicion or accusation of criminal activity can be enough for a PHA to file for eviction.<sup>52</sup> With such a low standard to file for eviction, personal relationships with managers of subsidized housing units and other tenants can play a large role in a tenant’s continued occupancy in their home.<sup>53</sup>

Existing tenants can be evicted from a federally subsidized housing program if a member of their household or a household guest engages in criminal activity.<sup>54</sup> The U.S. Supreme Court unanimously held in *Department of Housing and Urban Development v. Rucker*<sup>55</sup> that such evictions are acceptable whether or not tenants had knowledge of the criminal activity by a family member or guest.<sup>56</sup> The Court found that the statutory text regarding criminal activity decisions “does not *require* the eviction of any tenant who violated the lease provision. . . . it entrusts that decision to the local

48. See 42 U.S.C. § 1437d(l)(6) (2014) (providing the standard for PHA-owned public housing tenants); 42 U.S.C. § 1437f(o)(7)(D) (providing the same standard for Housing Choice Voucher and other subsidized housing program tenants). PHAs may terminate a tenant’s subsidized housing benefits for a number of reasons relating to criminal activity. 24 C.F.R. § 5.851(b) (2014). However, only the owner of a tenant’s unit—which may or may not be a PHA, depending on the program the tenant is in—may move for eviction. 24 C.F.R. §§ 5.850(a), 5.852(a) (2014). For example, the Housing Choice Voucher (HCV) Program (also called the Section 8 program) provides federal subsidies directly to eligible individuals who rent from private landlords, as administered through PHAs. *Housing Choice Vouchers Fact Sheet*, *supra* note 5. Basing rent calculations on family composition, income, and other factors, the HCV program pays for a portion of an eligible family’s rent in the private housing market. *Id.* These vouchers remain with the family if they decide to move to a different private market unit, as long as they remain eligible for the program, but eviction proceedings may jeopardize a family’s housing assistance. *Id.*

49. See 42 U.S.C. § 1437d(k).

50. 42 U.S.C. § 1437f(d)(1)(B)(iii).

51. See 24 C.F.R. § 966.4(l)(5)(iii)(A) (stating that a PHA can move for eviction “if the PHA determines that the covered person has engaged in the criminal activity, *regardless of whether the covered person has been arrested or convicted* for such activity and *without satisfying the standard of proof used for a criminal conviction*”) (emphasis added); 24 C.F.R. § 982.310(c)(3) (2014) (setting out the same standard for owners of HCV-assisted units).

52. Cf. 24 C.F.R. § 966.4(l)(5)(iii)(A). See Landau, *supra* note 40, at 51 (noting that “[l]ittle more than an allegation [of criminal activity] is needed” to jeopardize a tenant’s subsidized housing).

53. When a manager who does not get along with a public housing tenant needs only a suspicion of criminal activity to move for eviction, a simple disagreement or misunderstanding can jeopardize a tenant’s housing. Tenants who have relationships with private landlords in addition to PHAs through the HCV Program also face such challenges. See § 982.310(c)(3).

54. 42 U.S.C. § 1437d(l)(6).

55. 535 U.S. 125 (2002).

56. *Rucker*, 535 U.S. at 136.

public housing authorities,” who may look at various factors before deciding.<sup>57</sup> The Court stated that there was no due process issue with evictions where tenants had no knowledge of the underlying criminal activity because tenants can resolve any factual disputes when they are taken to court.<sup>58</sup> Although judicial eviction proceedings have inherent due process protections for tenants, subsidized housing tenants are typically unrepresented by counsel, leading to a high rate of default judgments and losses.<sup>59</sup>

Terminations of subsidized housing benefits exist within the same One-Strike framework as admissions denials. The same discretionary factors that PHAs may use in screening applicants apply to PHAs evicting tenants.<sup>60</sup> PHAs may move to evict a tenant on the basis of the same factors, where just a suspected act of criminal activity can be enough.<sup>61</sup> Like for applicants, relevant details of a tenant’s past instance of criminal activity “are rarely, if ever, considered in a ‘one strike’ eviction.”<sup>62</sup> Nevertheless, as the Court noted in *Rucker*, PHAs are never required to evict: they may consider the circumstances of an instance of criminal activity, and retain discretion to refrain from terminating a tenant’s benefits.<sup>63</sup>

#### 4. Possible Challenges to One-Strike Policy Admission Denials and Evictions

Due to its focus on past criminal activity, the One-Strike policy has a significant impact on communities that experience high rates of criminalization.<sup>64</sup> Under the One-Strike policy, an applicant or tenant with even a single suspected past instance of criminal activity is at risk of an admissions denial or eviction.<sup>65</sup> For many trans people, interaction with the criminal justice system is an unavoidable part of living at the intersections of poverty, police surveillance, and discrimination.<sup>66</sup> Existing legal tools

57. *Id.* at 133–34.

58. *Id.* at 136.

59. See Carey, *supra* note 12, at 590–91 (discussing how although tenants in court for admissions denials often succeed when they are represented, securing legal counsel is difficult because “[a]lmost by definition, applicants for [public] housing assistance lack the funds to hire private attorneys”).

60. See *supra* note 37 and accompanying text for the factors a PHA may consider in such screenings.

61. 42 U.S.C. § 1437d(l)(5)–(6) (2014). One limitation on PHA’s discretion in both admissions and evictions is the Violence Against Women Act, which prevents PHAs from evicting or denying admission to people whose past instances of criminal activity stem from having been a victim of domestic violence, stalking, sexual assault, or dating violence. 24 C.F.R. § 5.2005(c)(2) (2014) (“Criminal activity directly related to domestic violence, dating violence, or stalking, engaged in by a member of a tenant’s household . . . shall not be cause for termination of tenancy of, occupancy rights of, or assistance to the victim, if the tenant or immediate family member of the tenant is the victim.”). PHAs or housing owners can only evict if they can prove that a failure to act would cause an “actual and imminent threat” to other tenants or employees of a PHA or subsidized program. 24 C.F.R. § 5.2005(d)(2). However, such action can be taken “only when there are no other actions that could be taken to reduce or eliminate the threat.” 24 C.F.R. § 5.2005(d)(3).

62. Lauren E. Burke, Comment, “One Strike” Evictions in Public Housing and the Disparate Impact on Black Public Housing Tenants in Washington, D.C., 52 HOW. L.J. 167, 183 (2008). See also Landau, *supra* note 40, at 42 (noting how PHAs routinely evict tenants using strict liability rather than considering any mitigating factors).

63. *Rucker*, 535 U.S. at 133–34.

64. COLUMBIA LEGAL SERV., FAIR HOUSING DISPARATE IMPACT CLAIMS BASED ON THE USE OF CRIMINAL AND EVICTION RECORDS IN TENANT SCREENING POLICIES 12 (Jan. 2011), available at <http://nhlp.org/files/PRRAC%20Disparate%20Impact%201-2011.pdf>.

65. 24 C.F.R. § 5.855(a) (2014).

66. See *infra* Part III.A for a discussion of why and how trans people disproportionately face this

for trans applicants or tenants to challenge PHA decisions include administrative remedies, contract law, and statutory antidiscrimination law.

*a. Abuse of Discretion*

Legal scholars have suggested that one method to challenge evictions under the One-Strike policy—which may also apply in admissions cases—is to argue that a PHA abused its discretion in order to void a PHA decision.<sup>67</sup> This is an individualized approach, where denied applicants or evicted tenants can challenge a PHA’s action in court by arguing a PHA abused its discretion during eviction proceedings, after termination, or after denial.<sup>68</sup> While the *Rucker* decision permits evictions of innocent tenants, the Court did not address when a PHA’s discretionary decisions are “arbitrary and capricious or otherwise an abuse of its discretion.”<sup>69</sup> *Rucker* also did not interpret the One-Strike policy as giving “unreviewable discretion” to PHAs when they make decisions to evict.<sup>70</sup> Therefore, a tenant may challenge a PHA’s discretionary decision because they do not significantly vary from “other types of discretionary decisions” that PHAs regularly make when they move to evict tenants.<sup>71</sup> By bringing the realities of their lives into the hearing room, tenants and applicants can contest a PHA’s application of discretion to evict or deny admission.<sup>72</sup>

*b. Exercising Discretion in Good Faith*

Current PHA tenants may be able to maintain that an implied covenant of good faith exists in all leases and requires that evictions not take place in bad faith.<sup>73</sup> By using a contract theory with a tenant’s lease, “the implied duty of good faith provides an external substantive requirement imposed by the common law.”<sup>74</sup> Such an argument could function both in situations where PHAs use discretion and where they choose “not to consider any relevant circumstances,” in which case a tenant can argue that the PHA’s decision was arbitrary and capricious.<sup>75</sup> Both of these approaches rely on an individual actively pursuing judicial review of a PHA’s decision to evict, as PHAs can eliminate administrative hearings for evictions based on criminal activity.<sup>76</sup>

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reality.

67. Robert Hornstein, *Litigating Around the Long Shadow of Department of Housing and Urban Development v. Rucker: The Availability of Abuse of Discretion and Implied Duty of Good Faith Affirmative Defenses in Public Housing Criminal Activity Evictions*, 43 U. TOL. L. REV. 1, 28–34 (2011); see also, e.g., *Cuyahoga Metro. Hous. Auth. v. Harris*, 139 Ohio Misc. 2d 96, 98–100 (Cleveland Mun. Ct. 2006) (affirming a decision by the magistrate judge that, based on principles of PHA discretion, a PHA could not evict an innocent PHA tenant whose guest was found to have drugs).

68. See Hornstein, *supra* note 67, at 30–31 (indicating that “a hallmark of public housing law has been the right of a tenant to challenge and defend against” abuse of discretion).

69. *Id.* at 33.

70. *Id.* at 32–33.

71. *Id.* at 32.

72. *Id.* at 32–33.

73. See *id.* at 39–49 for a discussion of how to argue an implied duty of good faith defense for innocent public housing tenants facing eviction under the One-Strike Policy.

74. *Id.* at 43.

75. *Id.* at 46.

76. 42 U.S.C. § 1437d(k) (2014).

c. *Selected Discrimination and Disparate Impact Theories*

An additional approach to the issue of trans access to federally subsidized housing is to use a tactic that involves existing antidiscrimination statutes.<sup>77</sup> Under the Fair Housing Act (FHA),<sup>78</sup> it is unlawful for a federal government actor to discriminate due to “race, color, religion, sex, familial status, or national origin” in a wide range of housing practices, including lease terms, renting, and advertising.<sup>79</sup>

In early 2013, HUD released a rule interpreting the FHA to allow disparate impact claims by showing “discriminatory effects.”<sup>80</sup> HUD intended to standardize the disparate impact test around the country, in line with the eleven circuit courts that have ruled on this issue.<sup>81</sup> Under HUD’s rule, the plaintiff “bears the burden of proving its prima facie case that a practice results in, or would predictably result in, a discriminatory effect on the basis of a protected characteristic.”<sup>82</sup> If the plaintiff does so, the burden of proof shifts to the defendant to show that “the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests.”<sup>83</sup> If the defendant meets this burden, the plaintiff can still hold the defendant liable if the plaintiff can prove that the aforementioned interests “could be served by a practice that has a less discriminatory effect.”<sup>84</sup> Through its own administrative judicial proceedings, HUD has found many violations of the FHA by “facially neutral practices” that nevertheless discriminate against a protected class.<sup>85</sup>

i. *Disparate Impact by Sex*

Sex is a protected category under the FHA through which trans tenants and applicants may allege a policy’s disparate impact.<sup>86</sup> Trans people have been successful

77. While such a large-scale approach would be difficult for poor tenants who cannot afford counsel—since many social service agencies are limited by their funding sources in the kinds of action they can take on behalf of a class—it remains a potential recourse. *See Carey, supra* note 12, at 592 (exploring the limitations on legal services providers in the kinds of cases they can choose to take).

78. 42 U.S.C. §§ 3601–3619, 3631.

79. *Id.* § 3604.

80. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

81. *See id.* at 11,461. Applying slightly different standards, eleven circuits have allowed disparate impact claims under the FHA. *See, e.g.,* Langlois v. Abington Hous. Auth., 207 F.3d 43, 50–51 (1st Cir. 2000); Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996); Mountain Side Mobile Estates P’ship v. Sec’y of Hous. & Urban Dev., 56 F.3d 1243, 1251 (10th Cir. 1995); Jackson v. Okaloosa Cnty., 21 F.3d 1531, 1543 (11th Cir. 1994); Keith v. Volpe, 858 F.2d 467, 482–83 (9th Cir. 1988); NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988); Arthur v. City of Toledo, 782 F.2d 565, 574–75 (6th Cir. 1986); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987–88 (4th Cir. 1984); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148–49 (3d Cir. 1977); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974). The D.C. Circuit “assume[s] the availability of the disparate impact theory,” but has not set a standard. Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep’t of Hous. & Urban Dev., 639 F.3d 1078, 1085 (D.C. Cir. 2011).

82. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,460.

83. *Id.*

84. *Id.*

85. *Id.* at 11,461.

86. *See* Daniella Lichtman Esses, Note, *Afraid to Be Myself, Even at Home: A Transgender Cause of Action Under the Fair Housing Act*, 42 COLUM. J.L. & SOC. PROBS. 465, 501 (2009).

in bringing discrimination suits based on sex in the employment context in a few circuits,<sup>87</sup> but such results are in the minority.<sup>88</sup> Depending on the jurisdiction, trans litigants may be able to bring a large-scale challenge to the One-Strike policy if they prove a disparate impact and convince courts to “utilize a broad and literal understanding of the prohibition against discrimination on account of ‘sex.’”<sup>89</sup>

No trans person has yet brought a FHA claim about federally subsidized housing, and the ability to do so may vary by the prevailing interpretation of sex discrimination in the jurisdiction in which the claim is filed.<sup>90</sup> However, in private housing, the U.S. Attorney General recently filed an action in federal court seeking to enforce the FHA against an RV park owner after a HUD investigation concluded that there was “reasonable cause . . . to believe” the owner discriminated against a trans resident in the park.<sup>91</sup> This indicates that both HUD and the Obama administration believe that trans people can bring sex-based FHA claims if they are discriminated against due to their sex, a protected class.<sup>92</sup>

*ii. Disparate Impact on Protected Classes by Criminal Conviction*

Criminal convictions disparately impact several protected classes under the FHA; the effects are “almost incontrovertible.”<sup>93</sup> While people with criminal convictions are not a protected class under the FHA, those people with past instances of criminal activity who fit under another protected class can argue that they have been disparately impacted.<sup>94</sup> Because HUD’s newest rulemaking interpreting the FHA’s disparate impact protections<sup>95</sup> exists within the context of the One-Strike policy, arguably “HUD is subsidizing the very practice they are charged with fighting against.”<sup>96</sup>

The One-Strike policy has been heavily critiqued because of its disparate impact

87. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 578 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008).

88. See, e.g., *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 705 (8th Cir. 2012); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 F. App’x 492, 494 (9th Cir. 2009); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1226 (10th Cir. 2007).

89. *Esses*, *supra* note 86, at 508.

90. See *id.* at 500–01.

91. Complaint at 7, *United States v. Toone*, No. 6:13-CV-00744 (E.D. Tex. Oct. 3, 2013), 2013 WL 5548840. Allegations include forcing the trans resident, who identifies as a woman, to wear men’s clothing in public areas, then initiating and winning an eviction action after she did not conform to the RV park owner’s standards of gender presentation. *Id.*

92. See *Fair Housing LGBT Page*, HUD.GOV, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/LGBT\\_Housing\\_Discrimination](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination) (last visited Dec. 12, 2014) (“[The FHA] does not specifically include sexual orientation and gender identity as prohibited bases. However, a lesbian, gay, bisexual, or transgender . . . person’s experience with sexual orientation or gender identity housing discrimination may still be covered by the Fair Housing Act.”).

93. COLUMBIA LEGAL SERV., *supra* note 64, at 11–12.

94. BRUCE REILLY, FORMERLY INCARCERATED & CONVICTED PEOPLE’S MOVEMENT, COMMUNITIES, EVICTIONS & CRIMINAL CONVICTIONS: PUBLIC HOUSING AND DISPARATE IMPACT: A MODEL POLICY 35 (2013), <http://fcpmovement.files.wordpress.com/2013/04/communities-evictions-criminal-convictions.pdf>.

95. See *supra* notes 80–85 and accompanying text for a discussion of HUD’s regulation interpreting the FHA’s disparate impact protections.

96. See REILLY, *supra* note 94, at 34.

on people of color, especially black tenants.<sup>97</sup> Due to high rates of criminalization in communities of color, the One-Strike policy's substantial systemic bars to subsidized housing access can be challenged by a race-based disparate impact action.<sup>98</sup> The cases that have established disparate impact analyses in housing have dealt primarily with discrimination on the basis of race.<sup>99</sup>

*B. Cycles of Exclusion, Violence, and Poverty: The Disproportionate Criminalization of Trans People*

This Part addresses the life experiences and challenges of many trans people in the United States that make access to federally subsidized housing programs a vital tool for survival.<sup>100</sup> Trans people experience staggering rates of interaction with the criminal justice system, particularly poor trans people of color living at intersections of marginalization.<sup>101</sup> While fully comprehensive national data on trans people is not currently available, activist groups have undertaken wide-reaching advocacy surveys that demonstrate the substantial discrimination that trans people face at every level of society.<sup>102</sup> Part II.B.1 examines the challenges facing trans youth that lead to entanglement within the juvenile justice system. Part II.B.2 assesses employment, discrimination, and housing barriers that cause many trans adults to juggle poverty and homelessness. Finally, Part II.B.3 discusses how survival work and targeted police surveillance leads to the disproportionate criminalization of trans communities. This background is not meant to negate the resilience of trans people, but to bring to light the realities of many trans people's lives that make access to housing resources critical.

1. Starting Young: Trans Youth and the Juvenile Justice System

Many trans youth begin interacting with the criminal justice system at an early age due to problems in school.<sup>103</sup> Students who are harassed for their gender expression

97. See Burke, *supra* note 62, at 168–72, 196 (providing an in-depth analysis of how the One-Strike policy impacts black public housing tenants).

98. See REILLY, *supra* note 94, at 5–7, 34–35.

99. See, e.g., Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 387–88 (3d Cir. 2011) (vacating and remanding for a more developed record in a housing discrimination case where a township redevelopment plan required acquiring, demolishing, and replacing a neighborhood's housing stock, which had a disparate impact on its low-income black and Hispanic tenants and homeowners, the only such community in the township).

100. See GRANT ET AL., *supra* note 3, at 106 (emphasizing that “[d]irect discrimination as well as the aggregate effects of mistreatment and denied opportunities across multiple aspects of life create a tenuous and often threatening housing landscape” for trans people).

101. See Kylar W. Broadus, *The Criminal Justice System and Trans People*, 18 TEMP. POL. & CIV. RTS. L. REV. 561, 561–62 (2009).

102. See, e.g., GRANT ET AL., *supra* note 3, at 2–9.

103. JEROME HUNT & AISHA MOODIE-MILLS, CTR. FOR AM. PROGRESS, THE UNFAIR CRIMINALIZATION OF GAY AND TRANSGENDER YOUTH: AN OVERVIEW OF THE EXPERIENCES OF LGBT YOUTH IN THE JUVENILE JUSTICE SYSTEM 1 (June 29, 2012), available at [http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/juvenile\\_justice.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/juvenile_justice.pdf). In a national school climate study for LGBT youth, trans students experienced “the most hostile school climates” compared to other LGBT youth. JOSEPH G. KOSCIW, EMILY A. GREYTAK, MARK J. BARTKIEWICZ, MADELYN J. BOESEN & NEAL A. PALMER, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS, GAY, LESBIAN, AND STRAIGHT EDUCATION NETWORK XIX (2012),

miss school at more than double the rate of other students.<sup>104</sup> Students missing school risk truancy charges—one of many ways into the juvenile justice system.<sup>105</sup> Breaches of gendered dress code policies, sex-segregated activity regulations, and gendered-space rules also often lead to discrimination and school disciplinary actions against trans youth.<sup>106</sup> Facing severe reprimands as a result of zero-tolerance policies in many schools, “suspension and expulsion are the first steps toward time behind bars” for trans youth, particularly trans youth of color.<sup>107</sup>

Families are another source of rejection, harassment, and abuse for many trans youth.<sup>108</sup> When living with one’s family is no longer an option, trans youth must find ways to survive, which can involve “theft, prostitution, and drug sales, to obtain life necessities like adequate housing and food.”<sup>109</sup> A lack of safe, affirming shelters keeps trans youth homeless on the street and in danger because of their involvement in “deviant subsistence strategies and [their] higher visibility.”<sup>110</sup>

Although between five and seven percent of youth in America are LGBT,<sup>111</sup> LGBT youth represent fifteen percent of youth in the juvenile justice system.<sup>112</sup> This high level of criminalization is due to the disproportionate levels of discrimination that trans youth face from all sides, including discrimination by their families, educational institutions, and law enforcement officers.<sup>113</sup> For example, trans youth are regularly cited for activities ranging from “curfew violations to running away from home”<sup>114</sup> and

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<http://glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf>

104. KOSCIW ET AL., *supra* note 103, at 40–41.

105. KATAYOON MAJD, JODY MARKSAMER & CAROLYN REYES, THE EQUITY PROJECT, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 76 (2009), available at [http://www.equityproject.org/pdfs/hidden\\_injustice.pdf](http://www.equityproject.org/pdfs/hidden_injustice.pdf). One-sixth of respondents in a national study of trans people reported dropping out of school due to harassment. GRANT ET AL., *supra* note 3, at 33. For those respondents who reported having to leave school due to harassment, nearly half reported having been homeless. *Id.*

106. See KOSCIW ET AL., *supra* note 103, at 76–80.

107. HUNT & MOODIE-MILLS, *supra* note 103, at 4. With many schools relying on law enforcement officers to manage school disciplinary issues, youth are being funneled into the juvenile justice system at an alarming rate. Rachel Wilf, *Disparities in School Discipline Move Students of Color Toward Prison*, CTR. FOR AM. PROGRESS (Mar. 13, 2012), <http://www.americanprogress.org/issues/race/news/2012/03/13/11350/disparities-in-school-discipline-move-students-of-color-toward-prison>.

108. MAJD ET AL., *supra* note 105, at 69–70. Fights with family members sometimes lead to prosecutions of trans youth for “incorrigibility”—that is, being out of control. *Id.* at 71.

109. *Id.* at 72.

110. Nusrat Ventimiglia, *LGBT Selective Victimization: Unprotected Youth on the Streets*, 13 J.L. SOC’Y 439, 449 (2012).

111. HUNT & MOODIE-MILLS, *supra* note 103, at 1.

112. See Angela Irvine, “We’ve Had Three of Them”: Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System, 19 COLUM. J. GENDER & L. 675, 681 (2010). The acronym LGBT is an umbrella term that stands for “lesbian, gay, bisexual, and transgender” but that also encapsulates other sexual orientations and gender identities. MAJD ET AL., *supra* note 105, at 11 (internal quotation marks omitted).

113. MAJD ET AL., *supra* note 105, at 61–62, 70–78.

114. Wesley Ware, “Rounding Up The Homosexuals”: The Impact of Juvenile Court on Queer and Trans/Gender-Non-Conforming Youth, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 77, 79 (Eric A. Stanley & Nat Smith eds., 2011).

policed for infractions like “loitering’ or ‘unreasonable’ noise.”<sup>115</sup> Trans youth are much more likely than other youth to be charged for “age-appropriate consensual sexual activity,”<sup>116</sup> carrying potentially lifelong barriers and stigma as registered sex offenders after conviction.<sup>117</sup>

## 2. Trans Realities: Employment and Housing Access

Whether or not trans youth have been pulled into the juvenile justice system, maintaining self-sufficiency can be a difficult task upon reaching adulthood.<sup>118</sup> Stemming from discrimination and stigma, many trans adults live in extreme poverty: fifteen percent of trans respondents to a national survey reported a household income under \$10,000 per year, four times the rate of the general population.<sup>119</sup> Trans unemployment is reported at twice the national average, rising to four times the national average for trans people of color.<sup>120</sup>

Struggles with employment and education attainment stemming from pervasive marginalization lead to poverty for many trans people, which has consequences ranging from negative health outcomes to housing instability.<sup>121</sup> Nineteen percent of trans respondents to a national survey reported having been homeless because of their gender identity.<sup>122</sup> In addition, nearly thirty percent of respondents reported having been turned away from shelters.<sup>123</sup> Homelessness triggers long-term social, health, and economic ramifications, particularly when not even the shelter system is an option for temporary housing.<sup>124</sup>

## 3. Survival Work and Police Targeting: Pathways to the Systematic Criminalization of Low-Income Trans People

### a. *Survival Work*

Daily survival is a challenge for low-income trans people, who often lack steady employment, housing, and a social support network.<sup>125</sup> Such roadblocks lead some

115. AMNESTY INT’L USA, *supra* note 2, at 35.

116. MAJD ET AL., *supra* note 105, at 62.

117. HUNT & MOODIE-MILLS, *supra* note 103, at 5.

118. See GRANT ET AL., *supra* note 3, at 33 (revealing that discrimination against LGBT youth in educational settings correlates with hardships later in life, including homelessness, lower income earning potential, and suicide).

119. *Id.* at 51.

120. *Id.* Nearly half of trans survey respondents reported having been fired, not hired, or denied a promotion because of their gender identity. *Id.* at 53.

121. See generally *id.* at 32–61, 106–123 (describing the consequences of poverty for trans respondents).

122. *Id.* at 106.

123. *Id.* Professor Dean Spade has noted that trans people’s attempts to access benefits, services, and programs are impacted “by the ways gender is an organizing principle of both the economy and the seemingly banal administrative systems that govern everyone’s daily life, but have an especially strong presence in the lives of poor people.” DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW 11 (2011).

124. GRANT ET AL., *supra* note 3, at 106.

125. *Id.* at 2–4.

low-income trans people to survival crimes in order to meet their basic needs.<sup>126</sup> In poverty and without other support structures in place, criminalized work, such as sex work, “becomes, perhaps, the *only* means for survival.”<sup>127</sup> Participating in survival work leads to arrests and a cycle of interactions with the criminal justice system, which only make it more difficult to find alternate means of supporting oneself.<sup>128</sup>

*b. Police Profiling of Trans People*

Law enforcement officers often enforce social order by policing small infractions.<sup>129</sup> Frequently, such minor offenses are not clearly defined, giving the police significant freedom to decide who to stop for these petty offenses.<sup>130</sup> This discrimination often “determine[s] both the initiation and outcome of interactions” with the police.<sup>131</sup>

The same types of discrimination and stereotyping that lead to higher rates of poverty and homelessness for trans people also increase the rate of targeted policing.<sup>132</sup> For example, trans people are sometimes arrested for being in the “wrong” bathroom, although “there is generally no law requiring individuals who use bathrooms designated as for men or women to have any particular set of characteristics.”<sup>133</sup> Trans people report routinely being arbitrarily stopped by law enforcement for wearing tight clothes, having condoms,<sup>134</sup> waiting for public transportation, buying groceries,<sup>135</sup> or just walking down the street.<sup>136</sup>

126. Survival crimes or survival work includes “offenses such as prostitution and theft, that become the only means by which homeless [LGBT] youth believe they can sustain themselves.” John M. Keating & Nina C. Remson, *Selective Enforcement and the Impact on LGBT Juveniles*, N.J. LAW., June 2013, at 54, 55–56.

127. Lori A. Saffin, *Identities Under Siege: Violence Against Transpersons of Color*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 141, 151 (Eric A. Stanley & Nat Smith eds., 2011).

128. Arrests for survival crimes are common for poor and homeless individuals because no other options are available to them; paired with increased policing, trans people are particularly vulnerable to such criminalization. *Systems of Inequality: Criminal Justice*, SYLVIA RIVERA LAW PROJECT, <http://srlp.org/wp-content/uploads/2012/08/disproport-incarc.pdf> (last visited Dec. 12, 2014).

129. Such acts include petty offenses and misdemeanors like “aggressive panhandling, street prostitution, drunkenness and public drinking, menacing behavior, harassment, obstruction of streets and public spaces, vandalism and graffiti, public urination and defecation, unlicensed vending and peddling . . . and other such acts.” GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 15 (1996).

130. See AMNESTY INT’L USA, *supra* note 2, at 12–13. See JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 48–52 (Michael Bronski ed., 2011) for a discussion of how this discretion in “quality of life” policing impacts LGBT people.

131. AMNESTY INT’L USA, *supra* note 2, at 12–13.

132. See *id.* at 2–3.

133. MOGUL ET AL., *supra* note 130, at 65–66.

134. See Pooja Gehi, *Gendered (In)security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357, 370–71 (2012).

135. AMNESTY INT’L USA, *supra* note 2, at 3.

136. Such profiling happens so frequently that many trans people use the phrase “walking while trans” to characterize the reason for their stops by the police: “derivative of the more commonly known term *driving while Black*, [“walking while trans”] was coined to reflect the reality that transgender women often cannot walk down the street without being stopped, harassed, verbally, sexually and physically abused, and arrested,

Stops are often based on “how visible an individual’s perceived gender variance is.”<sup>137</sup> While sumptuary laws—laws requiring people to wear a certain number of articles of gendered clothing at all times or risk arrest—no longer exist in America,<sup>138</sup> police continue profiling trans people based on their perceptions about appropriate gender presentation.<sup>139</sup> Law enforcement officers frequently rely on assumptions about trans people to profile them as sex workers,<sup>140</sup> whether or not they are engaging in sex work or any criminal activity at all.<sup>141</sup> For trans women in particular, gender presentation is often linked to assumptions about sexual activity, leading not just to sex work–related arrests but also “quality of life offenses including ‘lewd conduct’ . . . [and] ‘public indecency.’”<sup>142</sup>

Due to a presumed connection between “sex work, the drug trade, and violent crime,” trans people are swept up within a larger system of regularly policing the poor, particularly in communities of color.<sup>143</sup> Once arrested, fear of “hyper-gendered (and gender policed) spaces” is a driving force for many trans people to plead guilty to crimes they never committed.<sup>144</sup> While taking a plea speeds up court proceedings and avoids additional time in jail awaiting trial, these pleas have significant consequences for trans people far beyond the immediate issue.<sup>145</sup> Trans noncitizens often risk deportation,<sup>146</sup> while trans people receiving public benefits contingent on their criminal records risk losing them.<sup>147</sup>

Overpoliced through discretionary laws and afraid of incarceration, many trans people get caught in a cycle of criminalization.<sup>148</sup> Sixteen percent of trans respondents to a national survey reported having been incarcerated, far higher than the incarceration rate for non-trans people.<sup>149</sup> This rate rises dramatically for trans people of color, as nearly half of black trans respondents (forty-seven percent) reported having been incarcerated.<sup>150</sup> While there are no exact numbers on how many trans people have been involved at different levels of the criminal justice system, the most recent studies indicate that trans people, especially trans people of color, are stopped by the police,

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regardless of what they are doing at the time.” MOGUL ET AL., *supra* note 130, at 61.

137. AMNESTY INT’L USA, *supra* note 2, at 13.

138. MOGUL ET AL., *supra* note 130, at 73.

139. FRANK H. GALVAN & MOHSEN BAZARGAN, INTERACTIONS OF LATINA TRANSGENDER WOMEN WITH LAW ENFORCEMENT, THE WILLIAMS INSTITUTE 1 (2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Galvan-Bazargan-Interactions-April-2012.pdf>. This type of profiling often results in harassment and disrespectful behavior towards trans people in the process. *Id.*

140. See AMNESTY INT’L USA, *supra* note 2, at 15.

141. Gehi, *supra* note 134, at 368. Being read as trans by police officers is often enough of a basis to trigger an “intent to prostitute” arrest. MOGUL ET AL., *supra* note 130, at 61–62.

142. MOGUL ET AL., *supra* note 130, at 67.

143. *Id.* at 53.

144. Gehi, *supra* note 134, at 375–76.

145. See *id.*

146. *Id.*

147. See *supra* Parts IIA.2–3 for a discussion of how past or present criminal activity impacts a recipient of or applicant for a federally subsidized housing program.

148. See Broadus, *supra* note 101, at 564 (explaining how unemployment, homelessness, and poverty lead trans people to participate in illegal economies, such as sex work).

149. GRANT ET AL., *supra* note 3, at 163.

150. *Id.*

arrested, charged, and convicted of crimes at much higher rates than the general population.<sup>151</sup> Such disproportionate criminalization, paired with associated employment barriers and rampant housing discrimination, makes access to affordable housing an enormous challenge for many trans people.<sup>152</sup>

C. *The Equal Access Rule: Regulating Discrimination Based on Gender Identity or Sexual Orientation*

This Part lays out one of HUD's recent responses to the rampant discrimination against LGBT people in federally subsidized housing programs. Part II.C.1 addresses the impetus for HUD's rulemaking. Part II.C.2 outlines the changes made by the rule. Part II.C.3 lays out the critical and supportive public responses to the proposed rulemaking. Through this rule, HUD has created an additional way to challenge overtly discriminatory action by individual acts of federally subsidized housing providers.<sup>153</sup>

1. Surveys, Legislative Action, and Existing Antidiscrimination Laws: Driving Forces Behind HUD's Initiation of an Equal Access Rulemaking

In early 2012, HUD released what became known as the EAR to support equal access to subsidized housing for LGBT people.<sup>154</sup> HUD proposed the EAR based on evidence from national surveys of LGBT housing discrimination.<sup>155</sup> Prior to proposing the EAR, HUD had previously released a guidance policy to assist LGBT people experiencing housing discrimination; the EAR was the next step in these efforts.<sup>156</sup> The proposed EAR noted that many states and municipalities had already enacted laws preventing discrimination on the basis of sexual orientation and gender identity.<sup>157</sup> HUD also credited congressional hate crime legislation for crimes motivated by a victim's sexual orientation or gender identity as further support for this rulemaking.<sup>158</sup> Responding to a national problem, HUD started the rulemaking process "in an effort to ensure that its rental housing and homeownership programs remain open to all eligible persons regardless of sexual orientation or gender identity."<sup>159</sup>

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151. *Id.* at 158.

152. *Id.* at 51, 106, 158.

153. See *infra* Parts III.C and III.E for an examination of the potential uses of the EAR for trans people within the context of the One-Strike policy.

154. Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5662 (Feb. 3, 2012) (codified at 24 C.F.R. §§ 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982).

155. Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity, 76 Fed. Reg. 4194, 4194 (Jan. 24, 2011).

156. See *Fair Housing LGBT Page*, *supra* note 92. With the EAR, HUD announced a "new policy that provides lesbian, gay, bisexual and transgender (LGBT) individuals and families with further assistance when facing housing discrimination." Press Release, Nat'l Ctr. for Lesbian Rights, NCLR Applauds New Federal Fair Housing Policy Protecting LGBT People (July 2, 2010), <http://www.nclrights.org/press-room/press-release/nclr-applauds-new-federal-fair-housing-policy-protecting-lgbt-people/>.

157. Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity, 76 Fed. Reg. at 4195.

158. *Id.*

159. *Id.*

## 2. HUD's Final Rule: Mandating Antidiscrimination for Gender Identity and Sexual Orientation

The EAR became effective on March 5, 2012 and contained several significant changes to federal housing policy.<sup>160</sup> First, HUD updated its standard of nondiscrimination and equal opportunity to require that admission evaluations for covered federal housing programs be made without regard to actual or perceived LGBT identity or marital status.<sup>161</sup>

Next, HUD prohibited inquiries regarding LGBT identity in eligibility or continued-occupancy determinations for HUD housing programs, while allowing voluntary self-identification by LGBT applicants or occupants.<sup>162</sup> This change comes with an important exception. Evaluators may inquire about a person's sex "where the housing provided or to be provided to the individual is temporary, emergency shelter that involves the sharing of sleeping areas or bathrooms" or "for the purpose of determining the number of bedrooms to which a household may be entitled."<sup>163</sup> Finally, HUD updated its definition of "family" to include a list of potential family structures "regardless of actual or perceived sexual orientation, gender identity, or marital status," including a single person, a group of people with or without children, and a disabled family.<sup>164</sup>

## 3. The Public Response to the Proposed Equal Access Rule

HUD noted in its final rulemaking announcement that the vast majority of commenters supported the EAR.<sup>165</sup> Some people feared that landlords would leave the Housing Choice Voucher Program because of the rule,<sup>166</sup> or that the EAR would create

160. Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5662 (Feb. 3, 2012) (codified at 24 C.F.R. §§ 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982).

161. 24 C.F.R. § 5.105(a)(2)(i) (2014). This change was meant to provide protection to LGBT people who choose come out to federal housing providers, as well as people who are perceived to be LGBT, to prevent arbitrary denials on this basis. Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity, 76 Fed. Reg. at 4195.

162. 24 C.F.R. § 5.105(a)(2)(ii). By providing a policy outlining when a federal housing provider can ask about a person's LGBT status, LGBT people now have a statutory basis under which they can submit complaints if discrimination occurs as a result. See Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. at 5666 ("If an LGBT person experiences any of the forms of discrimination enumerated in the Fair Housing Act . . . that person can invoke the protections of the Fair Housing Act to remedy that discrimination.").

163. 24 C.F.R. § 5.105(a)(2)(ii). HUD noted in this rule that "lawful inquiries as to sex would be permitted primarily for emergency shelters and like facilities" where there is "no application process to obtain housing, but rather involves immediate provision of temporary, short-term shelter for homeless individuals." Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. at 5663. See *infra* Part III.B for an examination of how this exception impacts trans people.

164. 24 C.F.R. § 5.403 (2014). This regulation also updated the definition of family in specific subsections that discuss the definition of family, such as the regulations for the Housing Opportunities for Persons With AIDS (HOPWA) program. 24 C.F.R. § 574.3 (2014). It has also been updated in the Section 202 Supportive Housing for the Elderly Program, and the Section 811 Supportive Housing for Persons with Disabilities Program. 24 C.F.R. § 891.105 (2014).

165. Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. at 5663.

166. See *supra* note 48 for a description of the Housing Choice Voucher Program.

an “unsuitable housing environment.”<sup>167</sup> However, HUD determined that none of those fears had realistic negative repercussions.<sup>168</sup> Most respondents saw the EAR as a very positive move toward LGBT inclusion in federally subsidized housing programs.<sup>169</sup>

Of the supporters, multiple commenters expressed concern about the breadth of the exception for federal housing providers asking people to identify their sex in temporary emergency shelters.<sup>170</sup> While “gender identity” is defined, there is currently no definition of “sex” codified in the housing regulations.<sup>171</sup> This was a particular concern because it may leave trans people who greatly need emergency shelter services “particularly vulnerable to discrimination.”<sup>172</sup> Leaving “sex” undefined assumes an understanding of and facility with the difference between sex and gender, which may cause shelter providers to cross the line of the exception without one or the other party necessarily knowing about it.<sup>173</sup>

Many commenters proposed additions to HUD’s new definition of “family” that would incorporate the many forms LGBT families take.<sup>174</sup> Commenters also suggested additions or word changes to the definition of “gender identity” to clearly protect trans people.<sup>175</sup> Similarly, another comment asked HUD to define “sex” to limit inquiries about a person’s sex.<sup>176</sup>

Finally, commenters worried that the rule did not prevent discrimination directly enough.<sup>177</sup> Several commenters suggested that HUD compile data on how and when LGBT people access HUD housing programs.<sup>178</sup>

HUD responded to the concerns about the shelter exception by recognizing how hard it is for trans people to find safe shelter spaces but noting that the exception is

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167. Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. at 5663.

168. *Id.*

169. *Id.*

170. *Id.* at 5667–69.

171. *See id.* at 5666 (“HUD does not . . . believe that it is necessary to define ‘sex’ as the commenter suggests. The rule makes clear that housing must be available without regard to actual or perceived gender identity and prohibits inquiries concerning such.”).

172. *Id.* at 5665, 5669.

173. *See id.* at 5666 (noting a comment, which HUD rejected, that suggested a definition of sex “to foreclose the possibility of using the allowed inquiry into sex” to discriminate against trans people). On its simplest level, sex refers to a person’s biological and physiological characteristics, while gender is a broader term that includes a person’s behaviors, dress, self-identification and the activities with which a person constructs their gender identity. *See Understanding Gender*, GENDER SPECTRUM, <https://www.genderspectrum.org/quick-links/understanding-gender/> (last visited Dec. 12, 2014) for more information on the distinction. *See infra* Part III.B for examples of how this uncertainty in terms may create issues with the shelter exception.

174. Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. at 5664. For example, one commenter suggested amending the definition of family to “include any person or persons, regardless of their sex or relationship to one another, with the only restriction being to allow at least one, but no more than two, persons per bedroom.” *Id.*

175. *Id.* at 5665. Gender identity is now defined as “actual or perceived gender-related characteristics.” 24 C.F.R. § 5.100 (2014).

176. Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. at 5666.

177. *Id.*

178. *Id.* at 5669–70.

narrow, so there would be no additional guidance at this time.<sup>179</sup> Instead, due to the “regulation’s overall purpose, [HUD] anticipat[ed] that transgender individuals will have greater access to shelters.”<sup>180</sup> HUD also declined to make further changes to the definition of family,<sup>181</sup> add a definition of sex,<sup>182</sup> or further define gender identity, having drawn the last definition from a prior congressional act preventing hate crimes against LGBT people.<sup>183</sup> HUD also declined to begin any data collection process.<sup>184</sup>

### III. DISCUSSION

Losing access to federally subsidized housing is just one of many collateral consequences of involvement with the criminal justice system that trans people face.<sup>185</sup> Restricting many trans people with prior interactions with the criminal justice system from participating in federal housing programs only perpetuates the poverty and marginalization that led to those interactions.<sup>186</sup> As the criminal justice system impacts certain groups disproportionately, huge swaths of trans people are essentially barred from access to federally subsidized housing under the One-Strike policy.<sup>187</sup> Categorically denying vulnerable populations federal benefits can raise levels of criminal activity as people turn to other means for survival, working against the goals of the One-Strike policy.<sup>188</sup> Those people deemed deserving of access to scarce federal benefits like housing assistance reflect who society values, respects, and wants to assist.

Part III.A of this Section addresses the drawbacks to the EAR’s individualized method of managing systematic discrimination against trans people. Part III.B discusses the serious gaps in the shelter exception to the EAR’s prohibition on inquiries about a person’s gender identity. Part III.C observes how PHAs can use the statutory discretion they already have to increase, rather than bar, trans access to federal housing

179. *Id.* at 5666, 5669.

180. *Id.* at 5666.

181. *Id.* at 5664. HUD cited the text of the new definition of family to support its response, which begins, “[f]amily includes *but is not limited to* the following, regardless of actual or perceived sexual orientation, gender identity, or marital status.” *Id.* at 5674. (emphasis added).

182. *Id.* at 5666.

183. *Id.* at 5665.

184. *Id.* at 5669–70. HUD did not discount the possibility for such a program in the future and noted that other non-HUD entities could still collect data. *Id.* However, it is difficult to craft solutions for trans housing access without such information.

185. See GRANT ET AL., *supra* note 3, at 119 (finding that nearly half of currently homeless trans respondents to a national survey had been incarcerated before, compared with only fifteen percent of respondents who were not currently homeless).

186. See *id.* at 158 (describing how trans people are disproportionately criminalized because “they are more likely to be victims of violent crime, because they are more likely to be on the street due to homelessness and/or being unwelcome at home, because their circumstances often force them to work in the underground economy, and even because many face harassment and arrest simply because they are out in public while being transgender.”).

187. See *supra* Part II.B.3.a for a discussion of how and why many trans people get caught within a cycle of criminalization.

188. See Carey, *supra* note 12, at 564 (describing how “denying people with criminal records some form of affordable housing may create a greater threat to public safety” than allowing them access to subsidized housing resources).

resources. Part III.D notes the application of the Violence Against Women Act's protections for trans victims of intimate partner violence to the One-Strike policy. Part III.E examines the possibilities for bringing a claim under the FHA or a challenge through the EAR to combat continuing trans discrimination in HUD programs. Finally, Part III.F explores broader solutions that take a holistic view of eliminating trans discrimination in federal housing programs.

*A. The EAR Is an Individualized Solution to a Structural Issue*

HUD has created an important way for trans people to challenge discriminatory actions by individual PHAs or federal housing landlords through the EAR.<sup>189</sup> It is a valuable step forward because it recognizes the difficulties LGBT people have in accessing housing, either public or private,<sup>190</sup> and shows that HUD will not stand for outright discrimination. Nonetheless, an antidiscrimination approach addresses only one part of the problem.

Because of rampant discrimination against trans people by actors like schools, employers, and the police, many trans people are categorically excluded from federal housing programs due to past criminal activity.<sup>191</sup> Disproportionate criminalization, then, is a result not of disproportionate criminal activity but of disproportionate marginalization and surveillance.<sup>192</sup>

When trans people have any history of interaction with the criminal justice system, housing providers that wish to evict or deny admission to trans tenants or applicants because of their gender identity have an alternative reason to deny admission or evict them. PHAs can call this a rejection based on criminal activity, not gender identity, leaving a big gap in the very positive intentions of the EAR because PHAs can use their discretion to mask bias.<sup>193</sup>

Truly "equal" access to federally subsidized housing programs will be difficult to achieve without more action by HUD. The EAR's antidiscrimination approach places the blame for negative housing outcomes on individual housing providers rather than on a larger system of discrimination.<sup>194</sup> PHAs are rarely looking at individual circumstances when they make admission or termination decisions, and such bright-line decision making hurts marginalized communities further.<sup>195</sup> Because a PHA can deny admission for an applicant's single past suspected instance of criminal activity, a denial can appear on its face as a simple One-Strike issue even if discrimination has

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189. 24 C.F.R. § 5.105(a)(2)(i) (2014).

190. Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5662 (Feb. 3, 2012) (codified at 24 C.F.R. §§ 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982).

191. See *supra* Section II for a discussion of how lifelong discrimination leads many trans people to become involved with the criminal justice system and therefore often ineligible for federal housing under the One-Strike policy.

192. See *supra* Part II.B.3 for examples of why many trans people get involved with the criminal justice system because of bias against them.

193. See *supra* Parts II.A.2–3 for the factors a PHA must and can use for denying admission or evicting tenants based on a past single instance of criminal activity, including arrests or suspicions of such activity.

194. See *supra* Part II.C.2 for a description of the individualized prohibitions under the EAR.

195. See *supra* notes 27–33, 51–54 and accompanying text for an explanation of how PHAs use discretion to deny or evict applicants or tenants.

occurred.<sup>196</sup> If PHAs are not considered by HUD to be directly discriminating based on actual or perceived gender identity—the EAR prohibition—such decisions will perpetuate the large-scale discrimination that likely led a trans applicant or tenant to require housing assistance.<sup>197</sup>

Using a lens of individual discrimination does not address the way policies like the One-Strike policy prevent trans people from accessing federal housing programs.<sup>198</sup> Denials for a housing benefit stemming from the collateral consequences of criminalization are not considered “‘violations’ under the discrimination principle.”<sup>199</sup> Therefore, official policies that result in negative consequences for trans communities like the One-Strike policy can continue to be “affirmed as non-discriminatory.”<sup>200</sup> Because discrimination against trans people is systemic, it is difficult if not impossible to point to individual acts of discrimination in the context of evictions or admission denials.<sup>201</sup>

Focusing on specific, individual acts of trans discrimination by housing providers “creates the false impression that the previously excluded or marginalized group is now equal.”<sup>202</sup> It also puts the burden on the person injured to report instances of discrimination rather than creating system-wide approaches to tackle the problem. If HUD truly means for “its policies and programs [to] serve as models for equal housing opportunity,”<sup>203</sup> it must examine the larger issue that causes instances of discrimination. An antidiscrimination approach narrows the lens to the point that structural problems cannot be addressed, rather than solving the broader issue of trans access to federally subsidized housing.

#### B. *Shelter Access: A Major Gap for Trans Inclusivity in the EAR*

The emergency housing exception to inquiries about sex in the EAR will allow conditions preventing trans access to homeless shelters to continue.<sup>204</sup> While HUD characterizes this exception as narrow, as it is limited to emergency shelters, neither the EAR nor the relevant statutes define “emergency,” “temporary,” or “sex.”<sup>205</sup> This gives

196. See *supra* Parts II.A.2–3 for the factors considered when a PHA is denying admission or evicting a tenant based on a single instance of criminal activity.

197. See *supra* note 163 and accompanying text for the EAR’s mandate that eligibility decisions be made without regard to sexual orientation or gender identity, without mention of underlying discrimination in such determinations.

198. See *supra* Part II.C.2 for the prohibitions of the EAR, which do not mention how it interacts with the One-Strike policy.

199. See SPADE, *supra* note 123, at 83–84. Spade notes how such “anti-discrimination laws provide little relief to the most vulnerable people” in the context of a hyper-militarized police and enforcement-centered state. *Id.* at 83.

200. *Id.* at 85.

201. *Id.*

202. *Id.* at 86.

203. Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5662 (Feb. 3, 2012) (codified at 24 C.F.R. §§ 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982 (2012)).

204. Cf. 24 C.F.R. § 5.105(a)(2)(ii) (2014) (allowing “lawful inquiries of an applicant or occupant’s sex where the housing provided or to be provided to the individual is temporary, emergency shelter that involves the sharing of sleeping areas or bathrooms”).

205. See 24 C.F.R. § 5.100 (2014) (listing definitions used throughout HUD program requirements).

all shelter providers power not just to inquire about a person’s sex—using their own definition of sex—but also to decide what kind of housing matches with that category and what that person’s sex is.<sup>206</sup> Shelter providers may not know or see a difference between sex and gender identity.<sup>207</sup> Trans shelter-seekers may also not know or see a difference in terminology when they are asked to reveal one identity and not the other.<sup>208</sup> Despite the prohibition on inquiries about “actual or perceived gender identity,”<sup>209</sup> a provider must appreciate the distinction between sex and gender identity to understand the prohibition.<sup>210</sup> Unfortunately, this EAR provision continues to leave trans people in the most unstable housing situations—those requiring emergency shelter—in a vulnerable position. While this exception does not worsen the status of shelter access, which remains dismal, it seems unlikely that the “overall purpose” of the EAR will substantially change shelter practices that marginalize homeless trans people.<sup>211</sup>

*C. Utilizing Informed Statutory Discretion to Supplement the Goals of the EAR*

The EAR makes no mention of the disproportionate criminalization that leaves LGBT people vulnerable to rejection from federal housing providers on the basis of past instances of suspected criminal activity.<sup>212</sup> Nevertheless, a discretion-based approach may be a tool for trans people to gain access to or retain federally subsidized housing. Appropriate, nondiscriminatory review of each application is consistent with both the statutory and regulatory language under which PHAs operate and the objectives of the EAR.<sup>213</sup>

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206. See 24 C.F.R. § 5.105(a)(2)(ii) (prohibiting inquiries related to sexual orientation or gender without providing any guidelines as to what constitutes an acceptable inquiry).

207. See *supra* note 173 and accompanying text for an articulation of the distinction and its application in the shelter exception of the EAR.

208. The semantic differences between sex and gender are not always common knowledge, and many communities, including trans communities, may combine or differently conceptualize vocabulary referring to sex and gender. See Jody Marksamer & Dylan Vade, *Trans 101*, SYLVIA RIVERA LAW PROJECT, <http://srjp.org/resources/trans-101> (last visited Dec. 12, 2014) (noting, in providing definitions of sex and gender, that trans communities have “many different views about sex and gender, their definition and their interrelation. Some transgender people see themselves as having one sex and a different gender. Some transgender people do not see themselves in this way.”).

209. Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5666 (Feb. 3, 2012) (codified at 24 C.F.R. §§ 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982).

210. Because the prohibition only defines gender and not sex without clarifying the difference, it is left for the provider to discern what they can ask about. See *id.* (“HUD declines to define ‘sex’ or to substitute ‘gender identity’ for ‘sex’ in HUD programs.”).

211. *Id.*

212. See *supra* Part II.C.2 for the prohibitions of the EAR, which do not mention how the EAR interacts with the One-Strike policy.

213. See *supra* Parts II.A.2–3 and II.C.2 for the One-Strike policy’s statutory parameters and the prohibitions of the EAR.

### 1. When Discretion Is Required or Allowed

It is clear from the plain statutory language regulating PHAs that they can consider a variety of factors in admission or eviction decision making.<sup>214</sup> There are only a few specific bars relating to criminal activity that would prevent someone from accessing or remaining in federally subsidized housing.<sup>215</sup> PHAs must look at the “time, nature, and extent of the applicant’s conduct” in evaluating past criminal activity in admissions.<sup>216</sup> Beyond that, PHAs can look at many factors in their housing decisions, including the severity of the activity, signs of rehabilitation, and the effect on the community if the applicant or tenant was denied or evicted.<sup>217</sup> PHAs can “consider all relevant information” in evaluating a tenant’s or applicant’s past criminal activity; the regulatory language provides a list of possible factors for PHAs but prefaces that PHAs are “not limited to” them, indicating that they have wide discretion.<sup>218</sup> Additionally, decisions should be “consistent with fair housing and equal opportunity provisions,”<sup>219</sup> including the EAR as codified.<sup>220</sup> PHAs are meant to consider the antidiscrimination measures of the EAR when they make admission or eviction decisions.<sup>221</sup>

The U.S. Supreme Court’s interpretation of and HUD’s administrative guidance on the statutory language also clarify that PHAs have discretion to consider almost any factor in their administrative determinations.<sup>222</sup> When the Court in *Department of Housing and Urban Development v. Rucker* acknowledged the wide discretion PHAs have to make admission and continued occupancy decisions, it cited the numerous factors a PHA can consider.<sup>223</sup> Additionally, former HUD Secretary Shaun Donovan instructed PHAs to remember that there are only two lifetime bans to accessing federally subsidized housing and to consider the hardships of people with past criminal activity.<sup>224</sup>

Combined, all of these sources should send a message to PHAs that using discretion to *accept* rather than categorically deny is not just allowed but encouraged in keeping with HUD’s broader goal under the EAR of trans inclusion in its administration of affordable housing for low-income Americans.

214. See *supra* Parts II.A.2–3 for an overview of the various factors that PHAs consider when using a single instance of criminal activity as the basis for denying admission or eviction.

215. 24 C.F.R. § 960.204 (2014). See *supra* notes 27–28 and accompanying text for a list of these specific time bars.

216. 24 C.F.R. § 960.203(d) (2014).

217. *Id.* § 960.203(d)(1); 24 C.F.R. § 982.552(c)(2)(i) (2014).

218. 24 C.F.R. § 960.203(c); see 24 C.F.R. § 982.552(c)(2)(i) (stating that PHAs can “consider all relevant circumstances” when making decisions and prefacing a list of possible considerations with “such as”).

219. 24 C.F.R. § 5.852(e) (2014).

220. 24 C.F.R. § 5.105(a)(2) (2014).

221. The EAR as codified is federal law and therefore applies to PHAs as federally funded agencies. See *id.* § 5.105(a)(2)(i) (mandating nondiscrimination based on actual or perceived gender identity).

222. See *supra* notes 56–59 and accompanying text for an analysis of the Court’s examination of public housing eviction standards.

223. 535 U.S. 125, 133–34 (2002).

224. Letter from Shaun Donovan, *supra* note 38.

## 2. Applying Discretion for Trans Applicants or Tenants

The discretion granted to PHAs allows and encourages a whole-person approach to admission denials or evictions—thinking about “all relevant information.”<sup>225</sup> PHAs should be able to consider factors like whether a trans person was kicked out of home at a young age, dropped out of school due to harassment, or was homeless.<sup>226</sup> As these are experiences shared by many trans people, they are important to consider when PHAs make housing subsidy determinations, in light of the EAR’s goals.<sup>227</sup> Was an arrest made due to police targeting of a trans woman as a sex worker? Did a juvenile court incident involve a trans youth sent to court for truancy? Was a conviction for loitering based on a police officer’s ideas of how a trans person “should” be dressed? While these are difficult experiences to share with an admissions officer or a court, they are critical considerations for admission or eviction determinations if a trans person is open to reporting that information.

PHAs are required to examine at least some circumstances surrounding past criminal activity.<sup>228</sup> They must look at the time frame, whether it involved minor offenses, and whether it would be of a type that would “threaten the health, safety, or right to peaceful enjoyment of the premises.”<sup>229</sup> A trans applicant should be able to explain that they pled guilty to a crime not because they were guilty but because awaiting trial in a sex-segregated jail facility, unable to afford bail, was an extremely unsafe situation.<sup>230</sup> PHAs may be able to construe a petty theft or similar survival crime as threatening because PHA discretion is so broad. However, once a person is stably housed—such as through a federal housing provider—the necessity for survival crimes typically falls or disappears, a factor that PHAs should consider.<sup>231</sup>

Because PHAs may consider what a denial will mean to the “integrity” of their housing program,<sup>232</sup> they *should* be considering the impact of automatic denials based on minor criminal activity. It both works against the EAR and hurts a PHA’s mission if communities HUD aims to protect from discrimination are being categorically denied assistance because of other discrimination against them. There certainly may be trans people, like any other people, who may create issues of health or safety. However, discretion means using the power a PHA has been endowed with to evaluate applicants or tenants as people and not as their criminal records.

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225. 24 C.F.R. § 960.203(c) (2014).

226. See *supra* Part II.B.1 for examples of discrimination issues unique to trans youth.

227. See *supra* Part II.C.1 for HUD’s goals for the EAR.

228. 24 C.F.R. § 960.203(d).

229. 24 C.F.R. § 960.204(a)(2)(ii) (2014).

230. See Gehi, *supra* note 134, at 375–76 (describing why trans people who cannot afford bail may plead guilty to crimes they did not commit in order to avoid or minimize jail time).

231. Because survival crimes are perpetrated in order to have a means of securing necessities like housing and food, stabilizing the underlying need for housing would also lessen the need for a person to participate in survival crimes. See *supra* notes 125–28 and accompanying text for a discussion of the necessity of survival crimes for some trans people.

232. See 24 C.F.R. § 5.852(a)(7) (2014) (discussing the circumstances under which the law permits discretion in making admission and eviction decisions).

### 3. Utilizing Judicial Review to Support PHA Discretion

A person who did not receive an individualized evaluation by a PHA before a negative decision still has arguments on review.<sup>233</sup> If PHAs did not evaluate the required factors that a PHA “shall” consider—time passed, nature of the incident, and extent of the person’s involvement<sup>234</sup>—an applicant or tenant could have a general abuse of discretion defense. For the other completely discretionary factors, an argument is still possible. For example, if a trans person had several minor survival crimes on their criminal record, or just had an arrest, a PHA could have abused its discretion if its reason for rejection does not meet the required standard.<sup>235</sup>

Trans tenants may be able to argue that a PHA moved to evict them in bad faith if the eviction was based on a minor issue or a suspicion of criminal activity since trans people are frequently suspected of criminal activity just for walking in public.<sup>236</sup> However, trans applicants who are denied subsidized housing would not be able to hold PHAs to a contractual duty of good faith because they have no contract with a PHA.<sup>237</sup>

### 4. The Limits of Discretion and Barriers to Enforcement

Discretion does not exist in a vacuum; there are several dangers with encouraging a discretion-based approach to increasing access to subsidized housing.<sup>238</sup> Just as stereotypes and assumptions about trans people exist in the broader world, they exist within PHAs and among their staff. The EAR could help with this danger, but if criminal activity is used to cover up those assumptions, it would be difficult for rejected applicants or evicted tenants to prove that they were evicted or rejected because of discrimination rather than their past criminal activity. Cultural competency training could help PHA staff understand the challenges many trans people face throughout their lives while remaining nondiscriminatory in their use of discretion.<sup>239</sup> PHAs should be making informed decisions when they utilize discretion. Because PHAs currently have so much statutory discretion to select or retain tenants under the One-Strike policy, changing the way PHAs use their discretion remains an opportunity to increase trans access to federally subsidized housing.<sup>240</sup>

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233. See *supra* Part II.A.4 for a discussion of legal theories trans tenants may be able to utilize during an eviction hearing or an appeal from an admission denial.

234. 24 C.F.R. § 960.203(d) (2014).

235. That standard states generally that a tenant or applicant can be rejected or evicted if their criminal activity interfered with the health, safety, or peaceful enjoyment of other tenants or PHA employees. See 42 U.S.C. § 13661(c)(2014).

236. See *supra* notes 132–39 and accompanying text for further examples of when trans people are suspected of criminal activity for everyday actions.

237. See *supra* notes 73–76 and accompanying text for details on how an implied duty of good faith theory could be constructed for tenants.

238. See *supra* Part II.B.3.b. for examples of how expansive discretion by the police in enforcing certain offenses leads to the disproportionate targeting of trans people for such crimes.

239. Cultural competency trainings are used in many contexts, such as health care professions, to ensure that service providers understand client needs and perspectives and therefore serve populations more appropriately and professionally. See *Information for Organizations and Programs*, NAT’L CTR. FOR CULTURAL COMPETENCE, <http://nccc.georgetown.edu/information/organizations.html> (describing the goals of cultural competency in a healthcare context) (last visited Dec. 12, 2014).

240. See *supra* Parts II.A.2–3 for a discussion of the discretionary powers granted to PHAs by the One-

Funding is another key barrier. PHAs may choose to implement blanket policies and extra time-bars on criminal activity because they are more cost-effective than an individual, discretion-based approach.<sup>241</sup> It is hard to blame this impulse; PHA staff are constantly managing thousands of cases while facing regular cuts to the federal budget.<sup>242</sup> When PHAs have the option of individual review or a “reject now, ask questions later” approach, they may well choose the latter because of budget constraints, regardless of the impact.

A serious drawback of encouraging informed discretion is that it requires trans people to come out in order for PHA staff to contextualize their circumstances. Under the EAR, PHAs cannot ask people to reveal their gender identities during an application or eviction process,<sup>243</sup> but applicants or tenants can come out if they so choose.<sup>244</sup> PHAs would still be able to evaluate a trans person’s life circumstances if they do not come out. However, the particular discrimination that a trans person has experienced may impact the review of their past criminal activity.<sup>245</sup> Even if they fall into other categories of disproportionately criminalized communities, the likely need for a trans person to come out is a substantial limitation to relying on a discretion-based approach.<sup>246</sup>

*D. The One-Strike Policy’s Exception for Survivors of Family and Intimate Partner Violence and its Application to Trans Tenants and Applicants*

Trans tenants or applicants who have been victims of domestic violence, stalking, dating violence, or sexual assault may be able to use the one exception to the One-Strike policy provided by the Violence Against Women Act.<sup>247</sup> However, due to repeated negative interactions with the police,<sup>248</sup> trans people are likely to severely

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Strike policy during admission and eviction proceedings.

241. See *supra* Part II.A.2–3 for an examination of the range of information that a PHA has the ability to consider in making eviction and admission determinations.

242. See Will Fischer & Barbara Sard, *Chart Book: Federal Housing Spending Is Poorly Matched to Need*, CTR. ON BUDGET AND POLICY PRIORITIES (Dec. 18, 2013), <http://www.cbpp.org/cms/index.cfm?fa=view&id=4067> (noting that “[t]he shortfall in rental assistance has increased significantly over the last decade, as the number of families struggling to afford rental costs has grown, but the number of families receiving rental assistance has not kept pace”).

243. 24 C.F.R. § 5.105(a)(2)(ii) (2014). PHAs can also ask about someone’s sex for the purposes of housing them in an emergency temporary shelter with shared sleeping quarters or bathrooms, or to determine how many bedrooms a family is entitled to receive. *Id.* See *supra* Part III.B for a discussion of the significance of this provision for trans shelter access.

244. The EAR “does not prohibit any individual from voluntarily self-identifying sexual orientation or gender identity.” 24 C.F.R. § 5.105(a)(2)(ii).

245. See *supra* Part II.B for the many ways that trans people face discrimination throughout their lives.

246. In order for a PHA to evaluate the factors that impacted a person’s past instances of criminal activity, PHA staff must know about them, and some of those factors will likely only come from trans tenants or applicants themselves. See *supra* notes 134–37 for examples of the criminalization facing many trans people as a result of being trans.

247. 24 C.F.R. § 5.2005(c)(2) (2014). Past criminal activity stemming from having been a victim of dating violence, stalking, or domestic violence cannot be the basis for an admission denial or a public housing eviction. *Id.* § 5.2005(b)–(c).

248. See *supra* Part II.B.3 for a discussion of the negative ways in which many trans people interact with the police.

underreport violence against them.<sup>249</sup> Without a police report, court order or record, or other formal documentation, it can be difficult to prove one's status as a survivor.<sup>250</sup> As already discussed, trans people may also not want to reveal their status—either as trans or as a survivor of violence—to their federal housing provider.<sup>251</sup> However, because family and intimate partner violence impacts the lives of so many trans people, with enough documentation this exception may still provide additional protection if past criminal activity stemmed from such violence.<sup>252</sup>

*E. Claiming Discrimination Under the EAR or the Fair Housing Act*

Building a direct discrimination case under the EAR after an admissions denial or an eviction of a trans tenant with past criminal activity may prove difficult. Because of the One-Strike policy, PHAs can argue that they are acting within their discretion to evict or deny someone because of criminal activity rather than PHA staff biases about trans people.<sup>253</sup> There may often be some kind of proof of this criminal activity, while staff biases would be harder to establish with similar proof. Regardless, the EAR does make direct, individual discrimination claims possible with the right proof because it prohibits discrimination based on gender identity.<sup>254</sup> The recent RV park trans discrimination case shows that HUD recognizes sex-based discrimination for trans tenants under the FHA, which may also be promising for such individualized sex discrimination cases in the federally subsidized housing context.<sup>255</sup>

Another approach to challenging the One-Strike policy's impact on the trans community involves constructing a disparate impact claim under the FHA.<sup>256</sup> While many disparate impact claims have been brought based on race, another approach could be based on sex—another protected class.<sup>257</sup> Such a challenge does not require proving

249. See AMNESTY INT'L USA, *supra* note 2, at 67 (suggesting that LGBT people underreport “because they are reluctant to reveal their sexual orientation or gender identity to responding officers, and because they fear homophobic or transphobic treatment”).

250. See 24 C.F.R. § 5.2007(b) (2014) (providing for forms of acceptable documentation to prove an occurrence of domestic violence, dating violence, or stalking). Survivors have fourteen business days from the date of receipt of a written request to provide such documentation to their housing provider, although providers can extend that time limit. *Id.* § 5.2007(c). PHAs and other federal housing providers also retain discretion to evict or deny access to a tenant if they can show that the person would be an “actual and imminent threat” to other tenants or PHA staff. 24 C.F.R. § 5.2005(d)(2).

251. See *supra* Part III.A for a discussion of a PHA's ability to use their discretion in making tenancy decisions to mask bias towards trans people. See also Kae Greenberg, *Still Hidden in the Closet: Trans Women and Domestic Violence*, 27 BERKELEY J. GENDER L. & JUST. 198, 225–27 (2012) (addressing the complications that arise when trans women in private and public housing face domestic violence).

252. Nineteen percent of trans respondents to a national survey reported having experienced domestic violence. GRANT ET AL., *supra* note 3, at 100.

253. See *supra* Parts II.A.2–3 for a discussion of mandatory and discretionary factors considered by PHAs in making eviction and admission decisions.

254. See 24 C.F.R. § 5.105(a)(2)(i) (2014) (“[H]ousing that is assisted by HUD or subject to a mortgage insured by the Federal Housing Administration . . . shall be made available without regard to actual or perceived sexual orientation, gender identity, or marital status.”).

255. See *supra* note 91 and accompanying text for background information on *United States v. Toone*, No. 6:13 CV 00744, 2013 WL 5548840 (E.D. Tex. Oct. 3, 2013).

256. See *supra* notes 80–85 and accompanying text for a discussion of the burden-shifting framework for FHA disparate impact claims.

257. See *supra* notes 87–88, 97–99 and accompanying text for an examination of sex- and race-based

direct discrimination, just a showing of a policy's disparate impact.<sup>258</sup> Because a claimant must be within a protected class,<sup>259</sup> a trans person or group of trans people could challenge the One-Strike policy on the basis of disparate impact by sex.<sup>260</sup> First, a plaintiff could demonstrate the discriminatory effect on trans people by showing how disproportionately criminalized the trans community is and why this would prevent many otherwise eligible trans people from being able to access federal housing programs.<sup>261</sup>

Next, a PHA would have the burden of proving that the One-Strike policy achieves one of the PHA's "substantial, legitimate, nondiscriminatory interests."<sup>262</sup> It may be able to establish this by arguing that the goal of the One-Strike policy is to reduce crime or drug use in federal housing.<sup>263</sup> However, a trans plaintiff could still hold a PHA liable if they can prove that such a policy can be served through practices that have a "less discriminatory effect."<sup>264</sup> At this stage, a plaintiff would be able to point to the wide discretion that a PHA has to consider all the circumstances. Therefore, a practice of regular individualized review for tenants and applicants would serve the same interest of decreasing crime by providing housing resources to people who would otherwise need to turn to survival work.<sup>265</sup> Such a policy may decrease crime more than the existing practice because people with stable, affordable housing are less likely to need to turn to survival crimes.<sup>266</sup> Because statutes have already laid out factors a PHA can consider, requiring individualized review would be fully within a PHA's statutory mandate.<sup>267</sup> If a trans plaintiff were able to carry this burden, then a claim could be successful. Mandating review of more factors than the three

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FHA claims brought by trans people in the employment context.

258. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. § 100).

259. *Id.* at 11,463. A challenge would have to be brought based on sex because gender identity is not a protected class, although gender identity may be a more direct fit for a trans plaintiff. *See id.* at 11,460 (stating that the Fair Housing Act prohibits discrimination "on the basis of race, color, religion, sex, disability, familial status, or national origin").

260. Such a claim would realistically only have a chance of success in a jurisdiction that has not rejected trans people's sex-based discrimination claims in other contexts such as employment. *See supra* Part II.A.4.c. for a discussion of such claims. However, HUD takes the position that discrimination based in gender identity "may still be covered by the Fair Housing Act" through an existing protected class, like sex. *Fair Housing LGBT Page, supra* note 92.

261. This is another reason why HUD data collection on trans access to federal housing programs would be helpful, as there is no comprehensive, national statistical data on which to rely.

262. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,460.

263. *See* 42 U.S.C. § 11901(6) (2014) ("[T]he Federal Government should provide support for effective safety and security measures to combat drug-related and violent crime, primarily in and around public housing projects with severe crime problems.").

264. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,460.

265. *See supra* notes 125–28 and accompanying text for an analysis of the cycle of survival crimes.

266. *See supra* notes 125–27 and accompanying text for an examination of survival crimes in connection to housing and employment issues.

267. *See supra* Parts II.A.2–3 for the factors a PHA must and can use for denying admission or evicting tenants based on a past single instance of criminal activity.

required<sup>268</sup>—or even just more thorough, meaningful review of them—would utilize the existing statutory language and HUD’s broader ambitions to reconfigure the application of PHA discretion.

While trans people as a whole face unique risks, for low-income trans people of color, multiple marginalizations only increase vulnerability and decrease access to services.<sup>269</sup> If a disparate impact claim for another community succeeded—such as for people of color in public housing—such success would likely require a similar restructuring of the One-Strike policy for PHAs to achieve their objectives in a less discriminatory manner.<sup>270</sup> This, in turn, would help trans people to meaningfully access or remain in subsidized housing because it would change the way PHAs evaluate past criminal activity.

*F. Thinking Beyond the EAR and FHA*

There is a serious conflict between the goals of the EAR and the One-Strike policy in meeting the needs of low-income trans people. If “equal opportunity” for trans people to access subsidized housing is HUD’s goal, there must be a parallel conversation about the way PHAs treat tenants’ and applicants’ past criminal activity.<sup>271</sup> Realistically, unless the One-Strike policy is reformed or eliminated entirely, the EAR is unlikely to substantially increase access to federal housing for many trans people. Overhauling the One-Strike policy to prevent PHAs from categorically barring people with nonviolent or non-drug-related criminal histories and fairly evaluating other past criminal activity would begin to equalize access to federally subsidized housing programs.

However, in the absence of major changes to the One-Strike policy, mandating a clearer look at applicants’ and tenants’ histories rather than automatic denials is necessary to adequately protect access to this resource for trans people. Replacing label-based, unconditional bans with informed review by culturally competent staff would increase access for all disproportionately criminalized communities.<sup>272</sup>

Though a discretion-based approach carries the risk of discretion being used to continue a process of automatically denying applicants or evicting tenants, added resources and support to PHAs for review would create a chance to say yes rather than a categorical no. Discretion would not be as dangerous if PHAs were a safe space for trans people who chose to come out, and if PHA staff members were sensitive to issues facing trans people. Because PHAs are too swamped with their existing caseloads to carefully utilize individual discretion every time and new funding is unlikely to

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268. See 24 C.F.R. § 960.203(d) (2014) (“[C]onsideration shall be given to the time, nature, and extent of the applicant’s conduct (including the seriousness of the offense).”).

269. See GRANT ET AL., *supra* note 3, at 51, 107, 124.

270. See *supra* Part II.A.4.c. for an analysis of disparate impact claims based on sex and race (through criminal convictions).

271. See Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5662 (Feb. 3, 2012) (codified at 24 C.F.R. §§ 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982) (stating HUD’s hope that the EAR would “ensure that HUD’s rental housing and homeownership programs remain open to all eligible persons regardless of sexual orientation, gender identity, or marital status”).

272. See, for example, Burke, *supra* note 62, at 184–86 for an exploration of how the label-based approach of the One-Strike policy has a substantial impact on black public housing tenants.

materialize, such changes would be substantially more effective if the One-Strike policy fundamentally changed. As is, the EAR will largely remain symbolic for any trans people whose lives have been touched by a biased criminal justice system.<sup>273</sup>

An individualized solution like the EAR decouples the issue of criminalization away from a process that systemically disqualifies trans people and transposes it onto the actions of individual PHAs or PHA staff.<sup>274</sup> Guidance or HUD rulemaking should encourage PHAs to use their discretion differently than many do now—using it to broadly deny or evict people on often minor, nonmandatory grounds and set up years-long time bars to categorically limit access.<sup>275</sup> Adequate federal funding for PHAs would allow them to handle both their existing caseloads and individualized evaluations.<sup>276</sup> More federal housing resources overall would make PHA decisions easier, serving the trans community.<sup>277</sup> Finally, if private market controls more robustly protected affordable housing, the need for subsidized federal housing would not result in such a large disconnect between supply and demand.<sup>278</sup>

#### IV. CONCLUSION

The EAR and One-Strike policy leave trans people who seek to access federally subsidized housing programs at a crossroads when systematic marginalization must be located within individual acts of discrimination. The EAR does not ease the untenable burden to prove discrimination by PHAs for low-income trans people who have interacted with the criminal justice system due to discrimination against them. Because of the One-Strike policy, PHAs can rely on a past single instance of criminal activity to mask bias against a trans applicant or tenant.

The tension between the EAR and the One-Strike policy demonstrates which communities society deems worthy of assistance and how we provide for those communities. Because the EAR places the blame of discrimination on individual PHAs, it can sidestep the issues of disproportionate criminalization that poverty produces. The EAR is an effort to make change based on only one identity factor, even though marginalized communities are often marginalized in more than one way. Not all low-income trans people want to or are otherwise eligible to live in subsidized housing, and other strategies to improve the extreme poverty of many trans people would be extremely valuable. But in the enormous shadow left by the One-Strike policy, the EAR is just the first step in making an important resource realistically available for

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273. See *supra* Part II.B.3 for examples of how trans people face disproportionate criminalization.

274. See 24 C.F.R. § 5.105(a)(2)(i) (2014) (prohibiting *individual* PHAs or PHA staff from discriminating against a trans person based on their actual or perceived gender identity).

275. See Carey, *supra* note 12, at 572–74 (describing the way PHAs typically use their discretion to categorically deny prospective tenants admission).

276. See *Public Housing*, NAT'L LOW INCOME HOUS. COAL., <http://nlihc.org/issues/public-housing> (last visited Dec. 12, 2014) (describing the “significant federal funding shortfalls” for “generally well-run” PHAs as a major issue in advocating for public housing).

277. See *Federal Budget and Appropriations*, NAT'L LOW INCOME HOUS. COAL., <http://nlihc.org/issues/budget> (last visited Dec. 12, 2014) (emphasizing that “[t]he ability of housing programs to serve low income people in need depends on federal appropriations”).

278. See *WORST CASE HOUSING NEEDS*, *supra* note 15, at 2 (explaining that although the amount of affordable housing units increased between 2009 and 2011, “[t]he sum total of affordable housing units and assisted units fell further behind the need . . . resulting in a new surge in worst case housing needs”).

trans people. Proponents of true equal access cannot declare the EAR a victory and take a step back. The underlying purpose of ending discrimination against trans people must be furthered by supporting changes that materially protect the most vulnerable trans people's access to subsidized housing while considering the realities of their lives.