

# NOTES

## DENYING ACCESS TO JUSTICE: THE COST OF APPLYING CHRONIC NUISANCE LAWS TO DOMESTIC VIOLENCE

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*Chronic nuisance laws impose fines or other sanctions on property owners based on the number of times police respond to the property. These ordinances aim to recover the cost of what the government considers to be excessive police service, and to encourage property owners to prevent criminal activity from occurring on the premises. This Note argues that domestic violence calls for police service should not trigger liability under chronic nuisance laws. Applying chronic nuisance laws to victims of intimate partner violence exacerbates the barriers that many victims already face in accessing housing, and blames the victim for criminal activity that she cannot control. Imposing sanctions that discourage domestic violence victims from calling the police is also incompatible with other government policies that address domestic violence, including mandatory arrest, evidence-based prosecution, and the housing protections in the Violence Against Women Act. This Note proposes several legal challenges to the application of chronic nuisance laws in domestic violence cases. It also explores legislative reforms that would protect victims' access to the police, while still allowing local governments to target actual nuisance activity.*

### INTRODUCTION

Laurie's ex-boyfriend appeared at her home, uninvited, to retrieve some of his belongings. Once inside, he threw her to the ground and began to strangle her. Laurie's daughter, in fear for her mother's safety, called 911. The police responded and, despite the visible bruising around Laurie's neck, failed to arrest her boyfriend or remove him from the home. After the police left, Laurie's ex-boyfriend punched her in the face and ripped her ear. This time Laurie called the police. During their second response, the police informed Laurie, in front of the assailant, that since this was her second call for police service, a third call to the police would result in eviction from her apartment.<sup>1</sup>

Laurie's landlord did not want to evict her and her children and considered Laurie to be a "desirable" tenant.<sup>2</sup> Nonetheless, the law in East Rochester states that upon the third call for police service, the town

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1. Second Amended Complaint at 7–8, *Grape v. Town/Village of East Rochester*, No. 07 CV 6075 CJS (F) (W.D.N.Y. July 6, 2007).

2. *Id.* at 6.

will revoke the rental dwelling permit and require the tenant to vacate the home.<sup>3</sup>

City councils across the country are passing chronic nuisance laws. These laws authorize the city to fine or otherwise sanction owners of properties that require what the city considers to be excessive police service.<sup>4</sup> The ordinances are aimed at recovering the cost of the government's police response. Chronic nuisance laws have engendered strong reactions, ranging from unanimous support in local governments to vehement opposition, especially among property owners.<sup>5</sup> The governmen-

3. Id. at 9 (citing East Rochester, N.Y., Code of Ordinances § 144-13).

4. See, e.g., Beaverton, Or., Code ch. 5.07 (enacted July 21, 1998), available at <http://www.codepublishing.com/OR/beaverton/> (on file with the *Columbia Law Review*); Cincinnati, Ohio, Municipal Code ch. 761 (effective Nov. 11, 2006), available at <http://www.municode.com/resources/gateway.asp?pid=19996&sid=35> (on file with the *Columbia Law Review*); Clackamas County, Or., Code ch. 6.08 (2002), available at <http://www.co.clackamas.or.us/code.htm> (on file with the *Columbia Law Review*); Coaldale, Pa., Ordinance of the Borough of Coaldale Establishing Reimbursement to the Borough of Coaldale for Costs, Expenses, and Fees Associated with the Coaldale Borough Police Department (Mar. 14, 2006); Freeport, Ill., Code ch. 659 (enacted Dec. 12, 2005), available at [http://www.amlegal.com/nxt/gateway.dll/Illinois/freeport/codifiedordinancesoffreeportillinois?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:freeport\\_il](http://www.amlegal.com/nxt/gateway.dll/Illinois/freeport/codifiedordinancesoffreeportillinois?f=templates$fn=default.htm$3.0$vid=amlegal:freeport_il) (on file with the *Columbia Law Review*); Green Bay, Wis., Code §§ 28.401–.502 (published online 2006), available at [http://www.ci.green-bay.wi.us/geninfo/law/law\\_ordinance.html](http://www.ci.green-bay.wi.us/geninfo/law/law_ordinance.html) (last visited Apr. 6, 2008) (on file with the *Columbia Law Review*); Janesville, Wis., City Ordinance ch. 9.32 (2008), available at <http://www.ci.janesville.wi.us/weblink7/DocView.aspx?id=194040> (on file with the *Columbia Law Review*); Kankakee, Ill., Code §§ 24-30–38 (passed Aug. 19, 1996), available at <http://www.ci.kankakee.il.us/Ordinances/Ch24.htm> (on file with the *Columbia Law Review*); Milwaukee, Wis., Code § 80-10 (2007), available at <http://cctv25.milwaukee.gov/code/volume1/ch80.pdf> (on file with the *Columbia Law Review*); Mundelein, Ill., Municipal Code ch. 9.76 (2004), available at <http://ordlink.com/codes/mundel/> (on file with the *Columbia Law Review*); Phillipsburg, N.J., Code ch. 441 (adopted Mar. 1, 2005), available at [http://www.e-codes.generalcode.com/codebook\\_frameset.asp?t=ws&cb=0098\\_A](http://www.e-codes.generalcode.com/codebook_frameset.asp?t=ws&cb=0098_A) (on file with the *Columbia Law Review*); Pittsburgh, Pa., Code of Ordinances ch. 670 (effective Feb. 15, 2005), available at <http://www.municode.com/resources/gateway.asp?pid=13525&sid=38> (on file with the *Columbia Law Review*); Portland, Or., City Code ch. 14B.60 (2008), available at <http://www.portlandonline.com/auditor/index.cfm?c=28531> (on file with the *Columbia Law Review*); Tigard, Or., Code ch. 7.42 (2003), available at [http://www.ci.tigard.or.us/business/municipal\\_code/title-07.asp](http://www.ci.tigard.or.us/business/municipal_code/title-07.asp) (on file with the *Columbia Law Review*); Village of Wauconda, Ill., Code § 95.27 (2008), available at [http://www.amlegal.com/nxt/gateway.dll/Illinois/wauconda\\_il/villageofwaucondaillinoiscodeofordinance?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:wauconda\\_il](http://www.amlegal.com/nxt/gateway.dll/Illinois/wauconda_il/villageofwaucondaillinoiscodeofordinance?f=templates$fn=default.htm$3.0$vid=amlegal:wauconda_il) (on file with the *Columbia Law Review*); Wilkes-Barre, Pa., Code of Ordinances §§ 7-236(i), 7-237, 7-239 (adopted Feb. 24, 2005), available at <http://www.municode.com/Resources/gateway.asp?pid=14407&sid=38> (on file with the *Columbia Law Review*); York, Pa., Code art. 1751 (2007), available at <http://www.yorkcity.org/webcom/PDF/City%20Council/PDF%202007-2008%20Codified%20Ordinances/Part%2017%20-%20Building%20&%20Housing.pdf> (on file with the *Columbia Law Review*); see also Nev. Rev. Stat. § 268.4124 (2007).

5. See, e.g., Ann Belser, Clairton: Nuisance Tenants Can Cost Landlord, Pittsburgh Post-Gazette, Apr. 20, 2005, at S4 (“After council voted [to approve the chronic nuisance law], City Manager Ralph Imbrogno clapped.”); Greg J. Borowski, Officials Back Fines for Repeat Nuisance Calls, Milwaukee J. Sentinel, Dec. 14, 2000, at 3B [hereinafter Borowski,

tal objectives are described in a pamphlet explaining Milwaukee's chronic nuisance code to the general public: "The Chronic Nuisance Property Code says to property owners, in effect, 'If you do not take action to try to stop these nuisances from recurring, then you and not the taxpayers will pay the cost of the police that must respond . . . .'"<sup>6</sup>

This Note examines the gendered impact of chronic nuisance laws, focusing on the effect of such laws on victims of domestic violence. Part I explains the features of the chronic nuisance codes, using examples from several jurisdictions, and places them in a broader context of laws holding property owners and tenants responsible for criminal activity that occurs on the premises. Part II examines the effect chronic nuisance codes have on victims of intimate partner violence. It uses statistical evidence to show that laws that fine people for crime that occurs in the home will disproportionately burden victims of domestic violence, a group which consists mostly of women. Part II also explains why fining victims of domestic violence for police services is particularly harmful. Part III explores possible statutory and constitutional challenges to chronic nuisance codes. The Note argues that the application of chronic nuisance codes to domestic violence cases is dangerous, contrary to public policies on violence against women, and susceptible to both statutory and federal constitutional challenges. Finally, this Note concludes by offering proposals for legislative reforms that will protect victims of domestic violence from the harsh effects of chronic nuisance laws.

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Officials Back Fines] (describing unanimous support among all seventeen aldermen and mayor); John Diedrich, Program Takes Bite of Chronic Sources of Police Attention, *Milwaukee J. Sentinel*, Feb. 12, 2004, at 1B (noting support for chronic nuisance law among city block captains); Richard W. Funk, Coaldale Ordinance Will Prevent the Wasting of Policeman's Time, *Times News*, Mar. 15, 2006, at 1 ("I'm opposing the ordinance that was published in the paper saying that people will have to pay for police services if they call too many times. . . . I don't see how calling a police officer should have to be covered (financially) by a resident who pays taxes."); Ken O'Brien, Law Aims to Curb Nuisance Homes, *Chi. Trib. (South-Southwest)*, Apr. 22, 2005, at 6 (noting Joliet's chronic nuisance code passed unanimously); Nuisance Ordinance Passed by City Council, *Monzel Rep. (Office of Cincinnati City Councilman Chris Monzel, Cincinnati, Ohio)*, Nov. 2006, at 1 (noting that Cincinnati's law passed unanimously); Telephone Interview with Lieutenant David Fink, Lieutenant in Charge of Planning, Cincinnati Police Dep't, in Cincinnati, Ohio (Jan. 30, 2007) (noting that ordinance was welcomed by city's Citizens on Patrol group). The most vocal opponents of the codes in several jurisdictions were landlords. See, e.g., Greg Borowski, Aldermen Approve Nuisance Ordinance, *Milwaukee J. Sentinel*, Jan. 17, 2001, at 3B (noting opposition to ordinance by landlords arguing that "it unfairly targets landlords for the actions of a third party—the tenant"); Dan Klepal, Rental Owners Protest New Law, *Cincinnati Enquirer*, Oct. 11, 2006, at 1C ("Apartment complex owners showed up [at city council meeting] in droves to express their concern over the law . . ."). In Cincinnati, the Greater Cincinnati-Northern Kentucky Apartment Association filed a legal challenge to prevent the enforcement of the chronic nuisance code. See *Complaint, Greater Cincinnati & No. Ky. Apartment Ass'n v. City of Cincinnati* (Ct. Com. Pl., Hamilton County, Ohio Jan. 8, 2007) (on file with the *Columbia Law Review*).

6. Dep't of Neighborhood Servs., City of Milwaukee, *City of Milwaukee Chronic Nuisance Property Code* (2005) (on file with the *Columbia Law Review*).

## I. CHRONIC NUISANCE CODES

Chronic nuisance laws intertwine public nuisance doctrine and municipal privatization of public services. Part I.A explains how nuisance laws have been applied to property owners in attempts to abate criminal activity occurring on the property. It also provides a description of the privatization of municipal public services in general. It is against this background that Part I.B examines the specific features of chronic nuisance laws.

A. *History of Holding Property Owners and Tenants Responsible for Criminal Activity on the Premises*

Chronic nuisance laws are a recent development in a long history of states and localities using nuisance laws to hold property owners liable for criminal activity on the premises. This tradition includes the common law public nuisance doctrine and state and federal statutes aimed at protecting public morality.

1. *Public Nuisance Doctrine and Property Owners.* — Public nuisance law is a tool wielded by the State to criminalize actions that are considered offensive to the public. The common law tort of public nuisance is broad, encompassing any “unreasonable interference with a right common to the general public.”<sup>7</sup> Public nuisance is a “catch-all criminal offense” that traditionally proscribed perceived threats to public health, safety, or morals.<sup>8</sup> Unlike the law of private nuisances, which is enforced by the individual whose rights have been disturbed, the remedy for a public nuisance lies with state action.<sup>9</sup> The common law of public nuisance has been codified in every state by broad criminal statutes that are interpreted to include anything that would have been a public nuisance at common law.<sup>10</sup> Public nuisance actions were used to control prostitution

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7. Restatement (Second) of Torts § 821B (2000); see also B.A. Glesner, *Landlords as Cops: Tort, Nuisance and Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 Case W. Res. L. Rev. 679, 716 (1992) (“Nuisance doctrines . . . encompass a broad range of activities and have been characterized as ‘the great grab bag, the dust bin, of the law.’”).

8. Keeton et al., *Prosser and Keeton on the Law of Torts* 618 (1984); Glesner, *supra* note 7, at 716.

9. Keeton et al., *supra* note 8, at 618. The remedies available to a state in a public nuisance case have traditionally included criminal prosecution and requests for injunctive relief ordering the abatement of the nuisance. *Id.* at 643.

10. *Id.* at 646. See, e.g., *Mutschler v. City of Phoenix*, 129 P.3d 71, 77 (Ariz. Ct. App. 2006) (holding that “swingers” club was covered by public nuisance statute since activities would have been considered public nuisance at common law); *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 604 (Cal. 1997) (holding that public nuisance statute codified common law public nuisance doctrine and could thus be used to enjoin criminal street gang’s activity). The laws at issue in these cases are broad, general statutes. See, e.g., *Ariz. Rev. Stat. Ann.* § 13-2917 (2006) (codifying as public nuisance anything “injurious to health, indecent, offensive to the senses or an obstruction to the free use of property that interferes with the comfortable enjoyment of life or property by an entire community or neighborhood or by a considerable number of persons”).

and the use and sale of alcohol during the nineteenth century and early twentieth century.<sup>11</sup> Today they are a popular way to restrict the use of property for illegal purposes, especially illegal drug activity.<sup>12</sup>

There are many examples of state public nuisance laws that impose liability on landlords for activity that occurs on their premises. The Rhode Island public nuisance statute imposes criminal liability upon anyone who “knowingly permit[s] any building” to be used for nuisance activity while it is under his control or ownership, or who does not evict a tenant within five days of being informed of the tenant’s illegal activity.<sup>13</sup> The penalty for aiding in the maintenance of a nuisance is a fine ranging from one hundred to one thousand dollars or a jail term of sixty days to one year.<sup>14</sup> In New York, a person is guilty of second degree criminal nuisance if “[h]e knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.”<sup>15</sup> This law has been applied to both owners and tenants who had knowledge that people were engaging in illegal activities on the premises and failed to take action to prevent the nuisance.<sup>16</sup>

There is also federal legislation aimed at holding landlords responsible for specific illegal activities on their property. The federal “crack house statute”<sup>17</sup> was enacted in 1986 as part of “‘wide ranging drug legislation’ aimed at curbing the crack-cocaine abuse of the 1980s.”<sup>18</sup> The current statute makes it illegal to “knowingly open, lease, rent, use, or maintain any place . . . for the purpose of manufacturing, distributing, or using any controlled substance,” and to “knowingly and intentionally rent, lease, profit from, or make available for use . . . [a] place for the purpose of unlawfully manufacturing, storing, distributing or using a controlled substance.”<sup>19</sup>

The law was originally used to prosecute property owners or managers who were involved in the “manufacture, storage, distribution or use of

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11. Glesner, *supra* note 7, at 717.

12. *Id.*

13. R.I. Gen. Laws § 11-30-7 (2002).

14. *Id.*

15. N.Y. Penal Law § 240.45 (2) (McKinney 2000).

16. See, e.g., *People v. Schriber*, 310 N.Y.S.2d 551, 552–53 (N.Y. App. Div. 1970) (upholding criminal nuisance conviction because defendant was aware of and acquiesced to drug use in apartment he rented); cf. *People v. Campbell*, 256 N.Y.S.2d 467, 468–69 (N.Y. Crim. Ct. 1965) (dismissing prosecution against property owners who cooperated with police to address premises where 107 drug arrests occurred in prior six months).

17. 21 U.S.C. § 856 (2000 & Supp. III 2003).

18. Michael V. Sachdev, *The Party’s Over: Why the Illicit Drug Anti-Proliferation Act Abridges Economic Liberties*, 37 *Colum. J.L. & Soc. Probs.* 585, 595 (2004) (internal citation omitted).

19. § 856. The second provision covers owners, lessees, agents, employees, occupants, and mortgagees. *Id.* The authorized penalties for violation of the crack house statute include up to twenty years in prison and/or a fine not to exceed \$500,000 for an individual. *Id.*

drugs.”<sup>20</sup> It was amended in 2003 by the Illicit Drug Anti-Proliferation Act, which added civil penalties and broadened liability to include people who rent, lease, or use the premises as well as managers or owners who profit from the drug activity.<sup>21</sup> These federal and state statutes show a desire on the part of lawmakers to impose liability on landlords who maintain a nuisance on their property, even when the owner is not the perpetrator of the targeted activity.

2. *Charging Citizens for Municipal Services.* — Courts have also firmly established the rights of municipalities to charge individual citizens for consumption of public services. For example, laws imposing costs for firefighting have been upheld against constitutional challenges. In *Ventura County v. Southern California Edison Co.*, an ordinance subjecting property owners to liability for firefighting costs for fires that spread beyond the owners’ property survived an equal protection challenge.<sup>22</sup> The court stated that the classification imposing liability only on property owners who were unable to confine the fire to their own property was reasonable, meant to “stimulate precautionary measures” that would prevent fires from spreading and eliminate destruction of property and danger to the public.<sup>23</sup>

In *State v. Phillips*, the court considered a Minnesota law that imposed liability upon the occupant of a premises in the vicinity of forestland for all expenses incurred in fighting a fire.<sup>24</sup> Only occupants of land adjacent to forest areas were subject to liability.<sup>25</sup> The defendant, in an action to recover the cost of fighting a fire under the state act, alleged that the law violated equal protection.<sup>26</sup> The court rejected the contention, holding that the “provisions apply alike to all occupants of lands within [the vicinity of the forest].”<sup>27</sup>

Laws made to collect other municipal public expenditures have also survived judicial scrutiny. In Pennsylvania, which has numerous chronic

20. Reducing Americans’ Vulnerability to Ecstasy Act of 2002: Hearing on H.R. 5519 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 107th Cong. 21 (2002) (statement of Graham Boyd, Director, Drug Policy Litigation Project, American Civil Liberties Union) (“The majority of cases under the statute specifically involve the operation of a literal crack house . . .”).

21. Illicit Drug Anti-Proliferation Act of 2003, Pub. L. No. 108-21, 117 Stat. 691 (codified as amended at 21 U.S.C. §§ 801, 843, 856 (2000 & Supp. III 2003)); see also Carla Spartos, Party Patrol, *Village Voice*, Apr. 23, 2003, at 50 (reporting commercial property owners’ concerns about scope of 2003 amendment).

22. 193 P.2d 512, 518–19 (Cal. Ct. App. 1948).

23. *Id.*; see also *People v. S. Cal. Edison Co.*, 128 Cal. Rptr. 697, 704–05 (Cal. Ct. App. 1976) (upholding verdict for State in suit against power company for fire suppression costs).

24. 223 N.W. 912, 913 (Minn. 1929).

25. *Id.* (“The occupant of any premises upon which any unauthorized fire is burning in the vicinity of forest lands . . . shall promptly report the said fire . . . . Failure to make such report shall be deemed a violation of this act . . .”).

26. *Id.* at 914.

27. *Id.*

nuisance laws,<sup>28</sup> a court upheld an ordinance imposing the cost of collecting garbage on property owners based on how much trash the property generated.<sup>29</sup> The court held that the ordinance was “reasonably related to the purpose of promoting the health, safety and welfare” of the town’s residents.<sup>30</sup> A Philadelphia ordinance charging citizens for use of emergency medical services (EMS) also survived legal challenge.<sup>31</sup> This was not a constitutional challenge, but rather a ruling on whether the ordinance constituted an unlawful tax under Pennsylvania common law.<sup>32</sup> The court held that the EMS fees were not revenue-raising (and thus an unlawful tax), but rather reimbursed the city for its costs in providing emergency medical services.<sup>33</sup> Since the EMS charges were “reasonable” and authorized by the city’s police power “to adopt regulations necessary to preserve the health, welfare and safety of its residents,” the ordinance was upheld.<sup>34</sup>

### B. *Examples of Chronic Nuisance Jurisdictions*

Chronic nuisance laws authorize a municipality to recover government expenditures on police services from the owner of the property to which the police were dispatched. While the details of the ordinances vary in each jurisdiction,<sup>35</sup> most chronic nuisance laws share certain features. They declare a property a chronic nuisance based on how many service calls are made within a certain time period, and the great majority do not contain a codified exception for victims of domestic violence.<sup>36</sup>

28. See sources cited supra note 4.

29. *Nat’l Props., Inc. v. Borough of Macungie*, 595 A.2d 742, 743 (Pa. Commw. Ct. 1991).

30. *Id.* at 745.

31. *Rizzo v. City of Phila.*, 668 A.2d 236, 238 (Pa. Commw. Ct. 1995).

32. *Id.* at 236 (“The issue presented is whether the EMS fees charged to the public are revenue-producing and thus constitute an unlawful tax . . .”).

33. *Id.* at 238 (finding charges “reasonably proportional” to cost of service since they were based on what it actually costs to operate EMS program, what other cities charged for EMS services, and what insurance companies were willing to pay).

34. *Id.*

35. Chronic nuisance jurisdictions include cities as large as Milwaukee, Wisconsin (population 573,358), midsize cities such as Pittsburgh, Pennsylvania (population 312,819), and small towns such as Coaldale, Pennsylvania (population 139). All population figures can be found on U.S. Census Bureau, Population Finder, at [http://factfinder.census.gov/servlet/SAFFPopulation?\\_submenuId=population\\_0&\\_sse=on](http://factfinder.census.gov/servlet/SAFFPopulation?_submenuId=population_0&_sse=on) (last visited Feb. 10, 2008) (on file with the *Columbia Law Review*).

36. At the time of publication, only Phillipsburg, N.J. had enacted an ordinance that specifically exempted domestic violence calls from the chronic nuisance law. Phillipsburg, N.J., Code ch. 441 (2005), available at [http://www.e-codes.generalcode.com/codebook\\_frameset.asp?t=ws&cb=0098\\_A](http://www.e-codes.generalcode.com/codebook_frameset.asp?t=ws&cb=0098_A) (on file with the *Columbia Law Review*) (“This chapter is not intended and shall not be interpreted to cover police calls related to domestic violence . . .”). This distinction is likely due to the fact that the Phillipsburg ordinance was passed in response to disturbances at bars and other establishments that serve alcohol and was not aimed at reducing calls for service at residences. Telephone Interview with Joseph Hriczak, Chief Fin. Officer, Town of Phillipsburg, N.J., in Phillipsburg, N.J. (Jan. 25,

Most ordinances contain a list of offenses for which, if the police are called, the owner will be fined. In many jurisdictions, these “chronic nuisance offenses” include battery, assault, stalking, sexual assault, and discharge of a firearm.<sup>37</sup> Some of the ordinances authorize a chronic nuisance designation for any activity that violates state criminal law.<sup>38</sup> Many chronic nuisance laws exempt commercial properties,<sup>39</sup> and most exempt crimes committed by strangers (“stranger crime”) from the tally of offenses that will count against the owner and/or occupant.<sup>40</sup>

Important differences in the features of chronic nuisance laws do exist. Some ordinances specifically require a finding of guilt for the underlying offense before the town charges the cost of police services, while

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2007). Several chronic nuisance jurisdictions have policies stating that calls for domestic violence will not be counted as nuisance activities, but these exceptions are not part of the ordinance. Compare City of Cincinnati Police Dep’t, CPD Procedure Governing Chronic Nuisance Premises Ordinance Enforcement 2 (2006), available at [http://www.cincinnati-oh.gov/police/downloads/police\\_pdf15064.pdf](http://www.cincinnati-oh.gov/police/downloads/police_pdf15064.pdf) (on file with the *Columbia Law Review*) (excluding domestic violence calls from chronic nuisance tally), with Cincinnati, Ohio, Municipal Code § 761-7 (2006), available at <http://www.municode.com/resources/gateway.asp?pid=19996&sid=35> (on file with the *Columbia Law Review*) (containing no provisions that exempt such calls, and including assault, battery, and stalking as nuisance activities).

37. See, e.g., Cincinnati, Ohio, Municipal Code § 761-1; Freeport, Ill., Codified Ordinances § 659.02(a) (2005), available at [http://www.amlegal.com/nxt/gateway.dll/Illinois/freeport/codifiedordinancesoffreeportillinois?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:freeport\\_il](http://www.amlegal.com/nxt/gateway.dll/Illinois/freeport/codifiedordinancesoffreeportillinois?f=templates$fn=default.htm$3.0$vid=amlegal:freeport_il) (on file with the *Columbia Law Review*) (premising chronic nuisance liability on weapons offenses, assault or battery, sexual abuse, criminal damage to property, and more); Green Bay, Wis., Code § 28.401 (2006), available at [http://www.ci.green-bay.wi.us/geninfo/law/law\\_ordinance.html](http://www.ci.green-bay.wi.us/geninfo/law/law_ordinance.html) (on file with the *Columbia Law Review*) (including harassment, battery, trespass, and weapons violations in chronic nuisance code); Milwaukee, Wis., Code § 80-10 (2007), available at <http://cctv25.milwaukee.gov/code/volume1/ch80.pdf> (on file with the *Columbia Law Review*) (defining nuisance activity to include harassment, battery, criminal trespass, crimes involving illegal possession of firearm, discharge of firearm, and more).

38. See, e.g., Pittsburgh, Pa., Code of Ordinances § 670.03 (effective Feb. 15, 2005), available at <http://www.municode.com/resources/gateway.asp?pid=13525&sid=38> (on file with the *Columbia Law Review*) (including all felonies and misdemeanors under state law as chronic nuisance offenses); Wilkes-Barre, Pa., Code of Ordinances § 7-237(e) (adopted Feb. 24, 2005), available at <http://www.municode.com/Resources/gateway.asp?pid=14407&sid=38> (on file with the *Columbia Law Review*) (declaring any misdemeanor or felony arrest based on state or federal criminal law “the basis for immediate occupant eviction proceedings”).

39. See, e.g., Pittsburgh, Pa., Code of Ordinances § 670.02 (restricting chronic nuisance code to residentially zoned properties); Wilkes-Barre, Pa., Code of Ordinances §§ 7-236, 7-237 (imposing chronic nuisance abatement duties on owners and occupants of residential properties).

40. See, e.g., Cincinnati, Ohio, Municipal Code § 761-1 (premising chronic nuisance liability on activities of “owners, operators, occupants, or persons associated with a premises”); Milwaukee, Wis., Code § 80-10-2(c) (defining nuisance activity as any of the enumerated criminal activities engaged in by the “owner, operator, manager, resident, occupant guest, visitor, patron or employe [sic] or agent”); Pittsburgh, Pa., Code of Ordinances § 670.03 (restricting infractions to those committed by the “owner(s), operator(s), tenant(s), occupant(s) or their invitee(s)”).

other chronic nuisance laws do not require that the police response result in an arrest or conviction.<sup>41</sup> All chronic nuisance laws impose civil liability for failure to abate the nuisance, but several also include provisions imposing incarceration on owners of chronic nuisance properties, either as a punishment for maintaining a chronic nuisance or as a penalty for defaulting on the police costs.<sup>42</sup> Some chronic nuisance codes charge the property owner a flat fee, while other ordinances impose charges based on the time spent on the call for service.<sup>43</sup>

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41. Compare Clackamas County, Or., Code ch. 6.08.020(F)(2) (2002), available at <http://www.co.clackamas.or.us/code.htm> (on file with the *Columbia Law Review*) (stating that nuisance finding must be observed by “Sheriff or designee” or based on determination by “Sheriff or designee” that the alleged activity did occur), and York, Pa., Code art. 1751.04 (2007), available at <http://www.yorkcity.org/webcom/PDF/City%20Council/PDF%202007-2008%20Codified%20Ordinances/Part%2017%20-%20Building%20&%20Housing.pdf> (on file with the *Columbia Law Review*) (“[A] conviction for an offense in a court of competent jurisdiction shall not be required . . .”), with Coaldale, Pa., Ordinance of the Borough of Coaldale Establishing Reimbursement to the Borough of Coaldale for Costs, Expenses, and Fees Associated with the Coaldale Borough Police Department (Mar. 14, 2006) (requiring judicial determination that ordinance was violated), and Wilkes-Barre, Pa., Code of Ordinances § 7-219 (“In order for such disruptive conduct to constitute an offense under this article, a citation or criminal complaint must be issued by the police and successfully prosecuted or a guilty plea entered before a district justice.”).

42. See, e.g., Cincinnati, Ohio, Municipal Code § 761-7(a) (making first violation of chronic nuisance code a misdemeanor of the fourth degree and subsequent violations third degree misdemeanors); Milwaukee, Wis., Code § 80-10 (allowing for imprisonment upon default of payments); Wilkes-Barre, Pa., Code of Ordinances § 7-240 (imposing fine and/or thirty days imprisonment for first violation); York, Pa., Code art. 1751 (providing for maximum of six months incarceration for defaulting on chronic nuisance code costs); Matthew Leblanc, Proposed City Nuisance Ordinances Taking Shape, *Columbia Daily Trib.* (Columbia, Mo.), Sept. 12, 2006, at 1 (describing proposed chronic nuisance code in Columbia, Missouri, that imposes maximum of three months incarceration for violations).

43. Compare Phillipsburg, N.J., Code ch. 441 (adopted Mar. 1, 2005), available at [http://www.e-codes.generalcode.com/codebook\\_frameset.asp?t=ws&cb=0098\\_A](http://www.e-codes.generalcode.com/codebook_frameset.asp?t=ws&cb=0098_A) (on file with the *Columbia Law Review*) (imposing flat fee), with Coaldale, Pa., Ordinance of the Borough of Coaldale Establishing Reimbursement to the Borough of Coaldale for Costs, Expenses, and Fees Associated with the Coaldale Borough Police Department (imposing fees based on hourly rate plus any incidental costs, fees or expenses in responding to call), and Borowski, Officials Back Fines, *supra* note 5 (“[T]he cost would vary depending on the severity of the reported incident and how many officers would have to respond to it.”). In Phillipsburg, the fee schedule is \$250 for the first call after nuisance designation, \$500 after accumulating another set of three nuisance calls, and \$750 for the next set. Telephone Interview with Joseph Hriczak, *supra* note 36. Cincinnati has a more calibrated and elaborate fine system—an owner is charged for the time the city employees spend responding: 1/10th hour (or six minutes) for the use of the 911 operator (at 911 operator rate of pay), 1/10th hour for dispatcher’s time (at dispatcher’s rate of pay), and when the police arrive on the scene, the City begins to charge for each responding police officer’s time, in six minute increments at the police officer’s rate of pay. Telephone Interview with Lieutenant David Fink, *supra* note 5. In addition, each chronic nuisance fine includes a charge for the administrative costs—the owner is billed for thirty minutes of the district commander’s time. *Id.* In other jurisdictions, the owner is charged for the police time starting the moment the dispatcher puts out the call for service, as opposed to calculating the charges based on when the officer arrives to help. *Id.*

Police departments consider chronic nuisance codes a helpful tool to maintain the quality of life in a community and to provide incentives for preventing criminal activity.<sup>44</sup> Lieutenant David Fink, Lieutenant in Charge of Planning at the Cincinnati Police Department, notes several goals of the Cincinnati Police in enforcing the chronic nuisance code: 1) getting the attention of property owners and letting them know they must be accountable for their property; 2) encouraging more active participation among landlords in managing their property; and 3) improving the quality of life for tenants.<sup>45</sup> He describes it as a win-win situation: Property owners have a new tool in maintaining their rental rates (since the building will presumably be a more pleasant place to live), they have a better quality of tenant, and there will be less damage to the property.<sup>46</sup> Meanwhile, police can expect a reduction in calls for service, a possible reduction in criminal activity, and have an opportunity to build bridges with members of the community, including local property owners and tenants.<sup>47</sup>

1. *Pittsburgh's Chronic Nuisance Ordinance.* — Pittsburgh's chronic nuisance ordinance is fairly representative of these laws. The Pittsburgh ordinance defines a nuisance property as:

[A]ny residentially zoned property with five (5) or fewer units that generates at least a combined three (3) or more citations from police and inspections services for any enumerated infraction on three (3) separate occasions within any sixty-day period or any residentially zoned property with more than five (5) units that generates at least a combined three (3) citations from one (1) unit or five (5) citations from the entire building from police and inspection services for any enumerated infraction on separate occasions within any sixty-day period.<sup>48</sup>

Enumerated infractions include offenses related to noise control, weed and grass maintenance, pets, as well as any offense designated a misdemeanor or felony under state law.<sup>49</sup> The law only authorizes fines when the crime is committed by an owner, tenant, occupant, or an invitee.<sup>50</sup> This has the effect of exempting victims of crimes from the chronic nuisance code when the perpetrator is a stranger, but not when the perpetrator is a spouse, boyfriend, or girlfriend.

After the requisite number of enumerated offenses have occurred, the owner is notified by letter that the property has been designated a

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44. Telephone Interview with Lieutenant David Fink, *supra* note 5.

45. *Id.*

46. *Id.*

47. *Id.*

48. Pittsburgh, Pa., Code of Ordinances § 670.02(d) (effective Feb. 15, 2005), available at <http://www.municode.com/resources/gateway.asp?pid=13525&sid=38> (on file with the *Columbia Law Review*).

49. *Id.* § 670.03.

50. *Id.*

“nuisance.”<sup>51</sup> The letter gives the owner ten days to notify the Director of Public Safety, in writing, of the owner’s intent to appeal or to provide a detailed proposal to abate the activities occurring at the property.<sup>52</sup> The Director of Public Safety has ten days to either approve or deny the proposal.<sup>53</sup>

If another enumerated infraction occurs after the property has been designated a nuisance, and the approved abatement plan has not been completed, the Director of Public Safety will impose the cost of abatement of the enumerated infraction on the property owner.<sup>54</sup> The ordinance authorizes the Director of Public Safety to establish the costs charged for each offense.<sup>55</sup>

The ordinance creates a liability exception if a landlord evicts the tenant using police services:

Any citation issued to a tenant who is already in the process of being evicted, shall not count towards the number of citations necessary to e [sic] deemed a “nuisance property” if the property owner can prove that an eviction action has been commenced in a court of law and if the property owner is actively prosecuting said eviction action against the nuisance tenant.<sup>56</sup>

Therefore, if a landlord has reason to believe that a tenant has used or will need police service, the landlord can protect him or herself from the costs imposed under this ordinance by beginning eviction proceedings against the tenant.

2. *Chronic Nuisance in Coaldale, Pennsylvania.* — In Coaldale, Pennsylvania, the Borough Council unanimously passed a chronic nuisance ordinance on March 14, 2006.<sup>57</sup> The stated purpose of the ordinance is to “place the burden of costs associated with providing police services on those persons who unnecessarily cause increased responses or costs associated with the Police Department.”<sup>58</sup>

In addition to imposing fines based on what the borough considers to be too many calls for service, the Coaldale ordinance allows the government to fine victims who do not assist in the prosecution of the offender:

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51. Id. § 670.04.

52. Id. § 670.04(e) (iv).

53. Id. § 670.04(e) (iv) (b).

54. Id. § 670.04(f).

55. Id. § 670.05.

56. Id. § 670.07(b).

57. Coaldale, Pa., Ordinance of the Borough of Coaldale Establishing Reimbursement to the Borough of Coaldale for Costs, Expenses, and Fees Associated with the Coaldale Borough Police Department (Mar. 14, 2006); see also Funk, *supra* note 5 (noting that Council passed chronic nuisance law unanimously).

58. Coaldale, Pa., Ordinance of the Borough of Coaldale Establishing Reimbursement to the Borough of Coaldale for Costs, Expenses, and Fees Associated with the Coaldale Borough Police Department.

Any Requestor who makes a Request for Response which causes a Response and subsequently results in the withdrawing of charges initiated as a result of the Response or any Requestor who unreasonably makes multiple Requests for Response shall be charged the cost of the Response as set forth in Section 3 of this Ordinance.<sup>59</sup>

The ordinance authorizes a fine plus the costs or expenses associated with that particular police response, including the hourly rate of the police officer.<sup>60</sup>

Of all the ordinances examined in this Note, the Coaldale law seems to be the one most explicitly aimed at victims of domestic violence. The ordinance was “deemed necessary because of a large number of calls that result in the caller dropping or refusing to press charges.”<sup>61</sup> Richard Marek, chairman of the Borough Council’s Police Committee, described how “police officers can invest a lot of time into calls, mostly domestic situations, and the complainant often refuses to press charges or testify in court, thus wasting a police officer’s time.”<sup>62</sup>

The Coaldale ordinance is different from other chronic nuisance codes in that it does not have a set number of calls for service that the property must exceed before the owner is fined. Instead, the law authorizes fines when people “unreasonably” make “multiple” calls.<sup>63</sup> The ordinance does not define “multiple” or “unreasonable.”

The public discussion of the code was framed around the issue of repeat victims who “waste” police resources.<sup>64</sup> One local reporter, in support of the ordinance, noted:

It’s always disheartening for police officers to get calls that a boyfriend is beating up a girlfriend, and then the girlfriend drops the charges within a few days. It’s more frustrating when the offenders repeat the process over and over. . . . In addition, it’s a big waste of taxpayers’ dollars when police have to respond to nuisance calls and then to court without the benefit of cooperation from those who complained in the first place.<sup>65</sup>

In addition, both the Solicitor and the Chair of the Council Police Committee publicly stated that their intent in supporting the chronic nuisance law was to target victims of domestic violence who refuse to “follow through” with the prosecution of their partner.<sup>66</sup>

59. *Id.* § 2(a).

60. *Id.* §§ 3–4; see also Funk, *supra* note 5 (reporting the amount charged will be “the hourly rate of the officer and other costs or expenses”).

61. Funk, *supra* note 5.

62. *Id.*

63. Coaldale, Pa., Ordinance of the Borough of Coaldale Establishing Reimbursement to the Borough of Coaldale for Costs, Expenses, and Fees Associated with the Coaldale Borough Police Department § 2(a).

64. Ron Gower, Police Calls: Responsibility Will Be Required in Coaldale, *Times News*, Mar. 13, 2006, at 1.

65. *Id.*

66. Funk, *supra* note 5.

3. *Milwaukee's Chronic Nuisance Law.* — Milwaukee's chronic nuisance ordinance is structured similarly to Pittsburgh's ordinance. The ordinance states that any property that has generated three or more calls for service in thirty days or two in one year for certain crimes, including crimes involving violence or illegal possession of a firearm, has received "more than the level of general and adequate police service" and is a nuisance.<sup>67</sup> The city sends the owner a notice, upon which the owner can either appeal or submit a plan to abate the nuisance.<sup>68</sup> If another nuisance activity occurs on the property and the plan to abate the nuisance has not been completed, the city will charge the owner for the cost of the police services.<sup>69</sup>

Milwaukee enacted its ordinance in 2001. In 2004, the city conducted a study to evaluate the implementation of the nuisance code.<sup>70</sup> The study revealed that 364 notices were sent between July 5, 2001 and July 19, 2004, and that 81.6% of owners who received a letter abated the nuisance.<sup>71</sup> Those owners were never charged for police services. Of the 18.4% of owners the city did charge, 25% were charged only once, meaning that the nuisance was abated after a total of four calls for service.<sup>72</sup> These numbers show that most owners did abate the nuisance after the city declared the property a nuisance and threatened to charge them for each police call, or after the first charge. Between 2001 and 2004, Milwaukee issued \$22,000 in chronic nuisance fines.<sup>73</sup>

Most of the properties affected by the law were buildings that housed two or more families. Out of the 364 letters that the city sent, 13% went to single family homes, 22% went to two-family homes, 49% were sent to multifamily properties, and 16% went to nonresidential properties (bars, recreational properties, hotels).<sup>74</sup> Of the properties that received ten or more charges under the nuisance ordinance, 93% were multifamily buildings.<sup>75</sup> The numbers illustrate that owners of multifamily properties were the least likely to comply with the chronic nuisance law by abating the nuisance.<sup>76</sup>

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67. Milwaukee, Wis., Code § 80-10(1)-(2) (2007), available at <http://cctv25.milwaukee.gov/code/volume1/ch80.pdf> (on file with the *Columbia Law Review*).

68. *Id.* § 80-10(3)(a)-(c).

69. *Id.* § 80-10(3)(d).

70. Heidi Weed, Milwaukee Police Department & DNS Public Policy Review Chronic Nuisance Code, Final Report (2004) (on file with the *Columbia Law Review*).

71. *Id.* at 1.

72. *Id.*

73. Diedrich, *supra* note 5.

74. Weed, *supra* note 70, at 2.

75. *Id.*

76. There are several possible explanations for this. It could be that the landlords were just unable to control the tenants' behavior despite efforts to do so. The number could also point to another plausible explanation: that paying for the police services to the building was less expensive than evicting the tenant and trying to fill a newly vacant unit. The numbers also fail to show whether the calls were for the same tenants. It could be that

The study then focused on forty-six properties that had received warning letters in March or April of 2004. The calls were commonly for noise, battery, fights, and domestic violence.<sup>77</sup> The data suggested no correlation between the types of calls and the effectiveness of the nuisance ordinance.<sup>78</sup>

The City concluded based on these results that the chronic nuisance ordinance was effective in getting property owners to abate nuisances on their property without further police intervention.<sup>79</sup> These findings raise serious questions about the tactics the landlords had to employ. The study did not reveal the methods landlords used to abate the nuisance. However, it is likely that the most (and probably only) effective way for a landlord to prevent police visits to the property is to evict, or threaten to evict, the tenants who require the police service.

This suspicion is confirmed by official statements of local governments with chronic nuisance laws. The law in Kankakee, Illinois is specifically aimed at the large number of rental properties in the jurisdiction, and the findings published in a report about their ordinance states that compliance with the chronic nuisance code “often translates into the eviction of the troublesome tenant by the owner.”<sup>80</sup> In Lakewood, Ohio, City Councilman Kevin Butler explained that while the “chronic nuisance ordinance does not call for landlords to evict tenants; as a practicality, however, that would be the most likely way a landlord would ‘abate’ the problem of an unruly tenant once the landlord receives a nuisance notice from the city.”<sup>81</sup>

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the landlord attempted to comply with the code by evicting the tenants who required police services and that the new batch of residents still had reasons to call the police.

77. Weed, *supra* note 70, at 1–2.

78. *Id.* at 2.

79. *Id.* at 2–3.

80. Karen S. Levy McCanna, Specialized Unit Takes a Problem-Solving Approach to Crime in Kankakee, On Good Authority (Ill. Crim. Just. Info. Authority, Chi., Ill.), Dec. 2000, at 3; see also Discussion Regarding Specific Departmental Budgets: Special Meeting of the City Council of Peoria, Ill. 27753 (Sept. 26, 2006) (briefing by Randy Ray, Corporations Counsel of Peoria), available at <http://www.ci.peoria.il.us/2006> (follow “2006 SEP 26 SPECIAL CITY COUNCIL MINUTES” hyperlink) (on file with the *Columbia Law Review*) (noting that “property owner[s] should quickly resolve the problem or evict the tenant promptly”); Telephone Interview with Elizabeth Brown, Executive Director of Housing Opportunities Made Equal, in Cincinnati, Ohio (Jan. 30, 2007) (expressing concern over potential evictions resulting from landlords’ perception that to comply they must evict regardless of accuracy of such perceptions). Even victims of abuse who have taken steps to separate from the batterer or use the legal protection of a restraining order may still need police services, since abusers often do not abide by victims’ wishes for no contact. See *infra* notes 119, 126, 127 and accompanying text (describing inability of victim to ensure that further abuse will not occur, despite taking such actions as leaving relationship or getting restraining order).

81. Kevin Butler, Criminal Activity Nuisance Ordinance, The Lakewood Observer Observation Deck, Aug. 28, 2007, at <http://lakewoodobserver.com/forum/viewtopic.php?p=32124&sid=823166435046527fad8cf39fbb44d6bb> (on file with the *Columbia Law Review*).

Chronic nuisance laws do more than provide incentives to evict tenants who require police service. As a result of the potential for civil and criminal liability, chronic nuisance laws encourage landlords to closely screen applicants and reject potential tenants on the basis that they might cause police responses to the property.<sup>82</sup>

## II. THE GENDERED IMPACT OF CHRONIC NUISANCE LAWS

Chronic nuisance laws attempt to recoup police expenses for responses to criminal activity that occurs in the home. Part II examines why this form of legislation particularly affects victims of domestic violence. Part II.A uses statistical data to show that a policy aimed at crimes in the home will cover most domestic violence offenses, while not reaching most stranger crimes. Furthermore, since victims of domestic violence are primarily women, such a policy has a harsher impact on women than men. This Part shows the barriers that victims of violence in the home already face in accessing housing and demonstrates how chronic nuisance laws exacerbate these in a dangerous way. Part II.B looks at other aspects of the government's response to domestic violence and explains why chronic nuisance laws are incompatible with, and in some cases, contradict policies aimed at violence against women.

### A. *Applying Chronic Nuisance Laws to Domestic Violence Has Disproportionate Impact on Women*

Most domestic violence acts occur at home. Compare, for example, rates of nonfatal violent crimes reported between 1998 and 2002. Only 16.9% of violent acts committed by strangers occurred at or near the residence of the victim.<sup>83</sup> By comparison, 78.1% of violent crimes committed by spouses occurred where the victim lived, as did 64% of violent crimes perpetrated by boyfriends or girlfriends.<sup>84</sup> Additionally, only 8.4% of family violence occurred in a public place (including commercial properties such as bars and restaurants), while 66.3% of stranger crime occurred in a public place.<sup>85</sup> Clearly, any policy or legislation that is targeted at criminal activity occurring in the home will affect most, if not all, domestic violence victims.

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82. See, e.g., Spencer Wells, Coal. on Homelessness and Hous. in Ohio, Cities Begin to Hold Landlords Accountable for Tenant Social Behavior, available at [http://www.cohio.org/pdf/wells\\_report\\_citylandlord.pdf](http://www.cohio.org/pdf/wells_report_citylandlord.pdf) (last visited Mar. 30, 2008) (on file with the *Columbia Law Review*) (explaining how chronic nuisance law was used to compel landlords "to use more diligence in screening tenants"); Neighborhood Officers, Madison Police Dep't W. District Newsletter (Madison Police Dep't, Madison, Wis.), Mar. 2007, at 2 (noting chronic nuisance law will impact landlords who use "irresponsible screening").

83. Matthew R. Durose et al., Department of Justice Family Violence Statistics: Including Statistics on Strangers and Acquaintances 9 tbl.2.2 (2005).

84. *Id.*

85. *Id.*

Women constitute the overwhelming majority of domestic violence victims, representing 84.3% of spousal abuse victims and 85.9% of the victims of dating violence.<sup>86</sup> Women are five times more likely than men to be victims of domestic violence.<sup>87</sup> In fact, the “single strongest identifiable risk factor for becoming a victim [of intimate partner violence] is being female.”<sup>88</sup>

Because a great majority of acts of domestic violence occur at home, which is not true of other crimes, and chronic nuisance laws charge only for the police response to crimes at home, these laws have the potential to affect domestic violence crimes more than stranger crimes. In addition, since victims of domestic violence offenses are overwhelmingly women, the application of chronic nuisance laws to domestic violence offenses disproportionately burdens women.<sup>89</sup>

1. *Housing Barriers for Victims of Domestic Violence.* — Physical violence is just one tactic that makes up part of a “larger system of abuse” batterers use to exercise power over their partners.<sup>90</sup> The methods that batterers use to assert control have been compared to the tactics used against hostages, political prisoners, and survivors of concentration camps.<sup>91</sup> In addition to violence and the threat of violence, many batterers use isolation

86. *Id.* at 10. See also Majority Staff of S. Comm. on the Judiciary, 102d Cong., *Violence Against Women: A Week in the Life of America* 3 (Comm. Print 1992) (noting that “experts estimate that a woman has between a 1-in-3 and a 1-in-5 chance of being physically assaulted by a partner or ex-partner during her lifetime” and Surgeon General’s warning that violence was the “No. 1 public health risk to adult women in the United States”); Ass’n of Trial Lawyers of Am. et al., *Preventing Violence to Women: Integrating the Health and Legal Communities* 1 (1993) [hereinafter *Preventing Violence to Women*] (“A woman is at highest risk of attack not from a stranger, but from a man . . . with whom she has an intimate relationship.”).

87. Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 *Am. U. J. Gender Soc. Pol’y & L.* 377, 381 (2003) (citing Department of Justice findings); see also K.J. Wilson, *When Violence Begins at Home: A Comprehensive Guide to Understanding and Ending Domestic Abuse* 8 (1997) (noting that 95% of domestic violence is committed by men against women).

88. Courtney N. Esposito, *Communities Can Help Victims Become Survivors*, *The Times* (Trenton, N.J.), Jan. 6, 2008, at A9.

89. The legal ramifications of this disproportionate effect will be explored in Part III.

90. Nat’l Ctr. on Domestic & Sexual Violence, *Power and Control Wheel*, available at <http://www.ncdsv.org/images/PowerControlwheelNOSHADING.pdf> (last visited Feb. 10, 2008) (on file with the *Columbia Law Review*) [hereinafter *Power and Control Wheel*]; see also Ann Jones & Susan Schechter, *When Love Goes Wrong* 13 (1992) (defining abuse as “a pattern of coercive control that one person exercises over another in order to dominate and get his way”); James Ptacek, *Battered Women in the Courtroom* 8–10 (1999) (describing controlling techniques beyond physical attack); Wilson, *supra* note 87, at 17–18 (noting that domestic violence encompasses economic abuse, sexual abuse, threats, intimidation, and isolation).

91. Judith Herman, *Trauma and Recovery* 121 (1997) (describing symptoms which can affect those subjected to “totalitarian control over a prolonged period,” and providing as examples “hostages, prisoners of war, concentration-camp survivors, survivors of some religious cults” and “survivors of domestic battering”); Wilson, *supra* note 87, at 17 (noting, with approval, Herman’s work).

and economic abuse to further their control in the relationship.<sup>92</sup> Economic abuse can include sabotaging the victim's efforts to get or keep a job, denying her access to family income, and stealing from the victim.<sup>93</sup> This often leaves victims with few social and economic resources to draw upon when they attempt to leave the abuser. Women fleeing abusers may have "little or no access to money and very few friends or family members . . . ."<sup>94</sup>

It is not only a lack of financial resources and social support that may prevent victims from leaving an abusive home. Leaving may be dangerous: "Strange though it may seem—staying can be safer than leaving, at least until a strong and reliable network is established . . . ."<sup>95</sup>

There is an intimate link between abuse in the home and homelessness in this country. "Fifty percent of all homeless women and children are fleeing domestic violence."<sup>96</sup> Many victims lack the resources required to find alternative housing.<sup>97</sup> The result is that battered women have reported staying in abusive relationships because they had no other housing options.<sup>98</sup>

In addition to the economic realities that make it difficult to get housing, battered women face both individual discrimination by landlords based on their status as victims and policies that serve to deny them housing based on the violence perpetrated against them. A recent national study found that domestic violence victims are frequently denied housing simply because they are victims.<sup>99</sup> The study revealed that denials occurred because a victim's former residence was a domestic violence shelter, a victim had a civil order of protection against an abuser, police had responded to a victim's prior residence, and a landlord discovered from a victim's previous landlord that she had been abused by her part-

92. Power and Control Wheel, *supra* note 90; see also Ptacek, *supra* note 90, at 9 (explaining that "battering is characterized by a web of coercive tactics . . . including physical and sexual violence, threats of violence, psychological abuse, and manipulation of economic resources").

93. Jones & Schechter, *supra* note 90, at 20; Power and Control Wheel, *supra* note 90.

94. ACLU Women's Rights Project, Domestic Violence and Homelessness Fact Sheet 1 (2008), available at [http://www.aclu.org/pdfs/womensrights/factsheet\\_homelessness\\_2008.pdf](http://www.aclu.org/pdfs/womensrights/factsheet_homelessness_2008.pdf) (on file with the *Columbia Law Review*).

95. Esposito, *supra* note 88.

96. Wilson, *supra* note 87, at 204.

97. For a discussion of the economic abuse and social isolation that make it difficult for victims to gain economic independence and access housing, see *supra* notes 90–94 and accompanying text.

98. ACLU Women's Rights Project, *supra* note 94, at 1. In 2003, 46% of homeless women in Minnesota reported that they had stayed in an abusive relationship in the past because they had nowhere else to go. *Id.* In Fargo, North Dakota, 44% of homeless women had stayed with their abuser because they had no other housing options. *Id.*

99. Nat'l L. Ctr. on Homelessness & Poverty & Nat'l Network to End Domestic Violence, *Lost Housing, Lost Safety: Survivors of Domestic Violence Experience Housing Denials and Evictions Across the Country 3* (2007) [hereinafter *Lost Housing, Lost Safety*]. The study analyzed seventy-six surveys from legal and social services providers around the country. *Id.* at 2.

ner.<sup>100</sup> For instance, one landlord in Wichita, Kansas denied a rental application from a survivor of abuse, even though her batterer was incarcerated and she had a restraining order against him.<sup>101</sup> The landlord reasoned that “he did not want domestic violence victims in his apartments because abusers often found them and caused property damage.”<sup>102</sup> Another study reported that 67% of domestic violence service providers listed discrimination by landlords as a “significant obstacle” for victims.<sup>103</sup>

In addition to denying tenancy applications, landlords have evicted victims solely because of the abuse perpetrated against them.<sup>104</sup> One landlord described the rationale for evicting a woman whose abuser broke down her door and sexually assaulted her: Even though she was not responsible for the violence, it was “easier to evict her, since her presence created all the problems.”<sup>105</sup>

Zero-tolerance or one-strike policies are also used to evict victims based on their status as survivors of domestic violence. These are policies or lease provisions that allow a landlord to evict a tenant for any criminal activity or disturbance at the residence.<sup>106</sup> These policies have been wielded by landlords to evict victims after an incident of violence, often relying on the justification that the police presence, noise, or general disturbance that accompanied the attack threatened the “peaceful enjoyment of the neighbors.”<sup>107</sup> These practices were addressed by the 2005 reauthorization of the Violence Against Women Act (VAWA), and it is no longer lawful to apply these policies to domestic violence victims in subsi-

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100. *Id.* at 9.

101. *Id.* at 10.

102. *Id.*

103. Press Release, Office of the N.Y. State Att’y Gen., Attorney General Renews Call for Legislation to Bar Housing Discrimination Against Victims of Domestic Violence (Apr. 29, 2003), available at [http://www.oag.state.ny.us/press/2003/apr/apr29a\\_03.html](http://www.oag.state.ny.us/press/2003/apr/apr29a_03.html) (on file with the *Columbia Law Review*); see also Joe Lamport, *Discrimination in Housing Is Rampant*, *Gotham Gazette* (N.Y.), June 2005, at <http://www.gothamgazette.com/article/20050607/10/1434> (on file with the *Columbia Law Review*) (describing how landlords hold victims responsible for violence or reject applications from prospective tenants because they are victims of domestic violence).

104. *Lost Housing, Lost Safety*, *supra* note 99, at 7–9.

105. *Id.* at 8.

106. For examples of zero-tolerance policies and lease provisions, see, e.g., *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 677 (D. Vt. 2005) (“Tenant will not use or allow said premises to be used for unlawful purposes, in any noisy, boisterous, or any other manner offensive to any other occupant in the building.”); *Charge of Discrimination, Alvera v. C.B.M. Group, Inc.*, HUD ALJ No. 10-99-0538-8 (U.S. Dep’t of Hous. & Urban Dev., Portland, Or., Apr. 16, 2001) (“You, someone in your control, or your pet, has seriously threatened immediately to inflict personal injury, or has inflicted substantial personal injury upon the landlord or other tenants.”).

107. See, e.g., *Bouley*, 394 F. Supp. 2d at 677; *Charge of Discrimination, Alvera*, HUD ALJ No. 10-99-0538-8; *Lost Housing, Lost Safety*, *supra* note 99, at 7–9.

dized housing.<sup>108</sup> However, use of these lease provisions and policies in nonsubsidized (private) housing is not covered by VAWA.

At least one district court has recognized such lease provisions as unlawful sex discrimination when applied to victims of domestic violence. In *Bouley v. Young-Sabourin*, the plaintiff was evicted after her husband assaulted her in their home.<sup>109</sup> Her lease contained a clause mandating that the tenant not allow unlawful activities on the premises.<sup>110</sup> The case was settled after the court recognized Bouley's claim of disparate treatment as a prima facie case of sex discrimination in violation of the Fair Housing Act.<sup>111</sup>

2. *Housing for Victims of Domestic Violence in Chronic Nuisance Jurisdictions.* — Chronic nuisance laws exacerbate the housing dilemma that victims of abuse face. For victims who own their own homes and are fined directly for the cost of the police services, this additional financial strain can intensify the feeling of being trapped by a lack of resources. This is especially true in light of the fact that a Department of Justice study showed that “[w]omen living in households with lower annual household incomes experienced intimate partner violence at significantly higher rates than women in households with higher annual incomes.”<sup>112</sup> The people most likely to be affected by violence in the home are also the least able to afford these fines. An inability to reimburse the city for the police services can have serious consequences. Many of the ordinances state that unpaid balances will become liens on the property,<sup>113</sup> at least

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108. See *infra* Part III.A.

109. *Bouley*, 394 F. Supp. 2d. at 677.

110. *Id.*

111. *Id.*; see also Danielle Pelfrey Duryea, Court Recognizes Domestic Violence Survivor's Fair Housing Challenge to Eviction, 35 Housing L. Bull. 181, 181 (2005) (noting that parties reached settlement after court ruled Bouley's claim could proceed).

112. Callie Marie Rennison & Sarah Welchans, U.S. Dep't of Justice, Intimate Partner Violence 4 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf> (on file with the *Columbia Law Review*); see also Ptacek, *supra* note 90, at 21–25 (noting that while domestic violence occurs at all income levels, “economic deprivation places women at greater risk for battering”).

113. See, e.g., Coaldale, Pa., Ordinance of the Borough of Coaldale Establishing Reimbursement to the Borough of Coaldale for Costs, Expenses, and Fees Associated with the Coaldale Borough Police Department § 4(c) (Mar. 14, 2006) (dictating that failure to pay can result in municipal lien against property); Kankakee, Ill., Code § 24-36(d) (passed Aug. 19, 1996), available at <http://www.ci.kankakee.il.us/Ordinances/Ch24.htm> (on file with the *Columbia Law Review*) (authorizing lien against property under chronic nuisance code); Pittsburgh, Pa., Code of Ordinances § 670.05 (effective Feb. 15, 2005), available at <http://www.municode.com/resources/gateway.asp?pid=13525&sid=38> (on file with the *Columbia Law Review*) (“Any cost imposed upon the Property Owner shall constitute a lien against the property.”).

one city charges interest on unpaid balances,<sup>114</sup> and victims who own their homes face incarceration under chronic nuisance laws.<sup>115</sup>

Even victims fined directly under the chronic nuisance codes who live in households with a higher income may not have the financial resources to pay for police services. A batterer, in furtherance of his control over the victim, may engage in tactics such as not allowing his partner access to the family income, sabotaging her efforts to get or keep a job, limiting her to an allowance, or taking her money.<sup>116</sup>

Chronic nuisance laws also have a devastating effect on victims of domestic violence living in rental housing. The ordinances lead to eviction of domestic violence victims in several ways. Some of the laws explicitly require the landlord to evict the occupant of a unit after the occupant meets the requisite number of police calls.<sup>117</sup> Others just require the landlord to abate the nuisance, without explicitly specifying eviction as the way to abate it.<sup>118</sup> However, the only way for a landlord to completely ensure that the police will not be called back to that home at his or her expense is to evict the victim. Requiring a victim to get an order of protection or separate from the abuser will not ensure that the police will not be needed to respond to persistent and controlling abusers who try to reassert their power over the victim by violating restraining orders or returning after having been told to leave.<sup>119</sup> Therefore, to avoid paying for police services under the chronic nuisance codes, the landlord must evict the victim.

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114. See Coaldale, Pa., Ordinance of the Borough of Coaldale Establishing Reimbursement to the Borough of Coaldale for Costs, Expenses, and Fees Associated with the Coaldale Borough Police Department § 4(d) (charging 6% interest on unpaid balance).

115. See sources cited *supra* note 42.

116. See *supra* notes 92–94 and accompanying text.

117. See, e.g., Wilkes-Barre, Pa., Code of Ordinances § 7-236(i)(1) (adopted Feb. 24, 2005), available at <http://www.municode.com/Resources/gateway.asp?pid=14407&sid=38> (on file with the *Columbia Law Review*) (stating that “code enforcement officer shall direct the owner to evict the occupant who violated the ordinance” after the “third disruptive conduct violation”); M. J. Place, Landlords, County to Fight Rental Fee, *Pittsburgh Post-Gazette*, Apr. 9, 2003, at E5 (describing Wilmerding, Pennsylvania law which requires eviction if police are called to same unit more than once a year).

118. See, e.g., Milwaukee, Wis., Code ch. 80-10-1 (2007), available at <http://cctv25.milwaukee.gov/code/volume1/ch80.pdf> (on file with the *Columbia Law Review*) (providing owners will be charged with “costs associated with abating the violations at premises at which nuisance activities chronically occur”); Pittsburgh, Pa., Code of Ordinances § 670.05(b) (stating that cost of abatement will be charged to owners).

119. See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 751–54 (2005) (describing repeated calls for police service when plaintiff’s husband violated her order of protection before murdering their children and committing suicide); Jones & Schechter, *supra* note 90, at 228 (“Once you have a protection order, your partner may abide by it and leave you alone. Or he may not.”); Preventing Violence to Women, *supra* note 86, at 9–12 (describing one batterer’s repeated violations of restraining orders before eventually murdering his girlfriend who had an active restraining order against him); Wilson, *supra* note 87, at 78 (citing 1991 study of temporary and permanent orders of protection showing that 60% of victims reported at least one violation of restraining order to police).

Another way chronic nuisance laws encourage eviction of victims is by exempting landlords from paying for police services if the landlord has already begun eviction proceedings against the tenant.<sup>120</sup> These provisions, in effect, impose a financial penalty on landlords who do not evict. Because women living in rental housing experience domestic violence at three times the rate of women living in nonrented homes,<sup>121</sup> many of the women affected by the chronic nuisance code will be subject to these provisions having to do with renters.

In addition to the impact such laws have on victims' ability to access and retain housing, chronic nuisance laws create a barrier to police services for victims. Domestic violence is already an underreported crime.<sup>122</sup> Chronic nuisance codes exacerbate the inaccessibility of one tool that victims of abuse could use to help keep themselves safe (police services)<sup>123</sup> by imposing a financial cost-per-use of this tool.

Some statutes also permit criminal penalties for property owners who fail to abate the nuisance.<sup>124</sup> These provisions could be used by a city to

120. See, e.g., Pittsburgh, Pa., Code of Ordinances § 670.07(b).

121. RENNISON & WELCHANS, *supra* note 112, at 5.

122. Zanita Fenton, Silence Compounded: The Conjunction of Race and Gender Violence, 11 *Am. U. J. Gender Soc. Pol'y & L.* 271, 279 (2003) ("[S]cholars generally acknowledge that domestic violence offenses are greatly under-reported."); Ptacek, *supra* note 90, at 13–14 (discussing barriers that prevent abused women from seeking help). See *supra* notes 90–98 and accompanying text for a discussion of some of the reasons victims may not report abuse (including fear of escalating abuse, prior negative experiences with police and/or courts, shame, loyalty to batterer, economic dependence, and concern for children).

123. There is widespread recognition among those who work in the field of domestic violence that the system of coercion involved in abuse implicates institutions as well as the batterer. See, e.g., Ptacek, *supra* note 90, at 10. Ptacek describes intimate partner violence as a form of "social entrapment," which, in addition to relying on the fear and coercion instilled by the batterer, relies on "the indifference of powerful institutions," notably the criminal justice system. *Id.*; see also Preventing Violence to Women, *supra* note 86, at 69 (noting history of nonresponse by police to domestic violence). If a victim encounters indifference when she first tries to enlist the help of the criminal justice system, the result could be devastating:

Sooner or later, and it's often later, the battered woman will have contact with the criminal justice system around one or numerous incidents of abuse. Her experience with the criminal justice system on the first occasion can be a determining factor in her willingness and ability to reach out for help beyond the incident.

Lynn Cugini, The Criminal Justice System's Response to the Battered Woman, *in* Women: Victims of Domestic Violence, Rape, and Criminal Justice 40, 41 (Roslyn Muraskin ed., 1984).

124. See, e.g., Cincinnati, Ohio, Municipal Code § 761-7(a) (effective Nov. 11, 2006), available at <http://www.municode.com/resources/gateway.asp?pid=19996&sid=35> (on file with the *Columbia Law Review*) (making first violation of the chronic nuisance code a misdemeanor of the fourth degree and subsequent violations third degree misdemeanors); Wilkes-Barre, Pa., Code of Ordinances § 7-240 (adopted Feb. 24, 2005), available at <http://www.municode.com/Resourses/gateway.asp?pid=14407&sid=38> (on file with the *Columbia Law Review*) (imposing fine and/or thirty days imprisonment for first violation); Leblanc,

criminally sanction victims of abuse for failing to prevent their own victimization.

Applying chronic nuisance laws to domestic violence calls for service emboldens batterers, and the law becomes a tool that an abuser can wield against a victim in furtherance of his attempt to dominate and control. Perpetrators can be encouraged that the imposition of fines or eviction under the law will discourage victims from reporting abuse. In addition, batterers can strategically engage in unlawful activity for the express purpose of causing a victim's eviction or liability under the chronic nuisance law. For instance, one victim in a chronic nuisance jurisdiction left her apartment after her landlord received a chronic nuisance warning from the city threatening to revoke his rental dwelling permit based on her domestic violence calls for service and asked her not to call the police anymore. The day she was moving into a new apartment, her ex-husband arrived, uninvited and in violation of her restraining order, and began arguing with her. Because she felt physically threatened, the victim called the police. As the police were responding, her ex-husband taunted her by "wagging his index finger at her, and saying 'That's one! Two more times, . . . and you're out!'"<sup>125</sup>

Finally, to understand the dynamics of intimate partner violence, it is important to recognize that the batterer, and only the batterer, causes the violence. "In reality, a woman has no control over her abusive partner's behavior. No matter what she does or does not do, the batterer *chooses* to hurt her."<sup>126</sup> It is thus impossible to expect a victim to be responsible for, change, or manage her partner's abusive actions.<sup>127</sup> Therefore, chronic nuisance laws burden victims for activities that they cannot control.

These laws are incredibly destructive when they are applied to victims of intimate partner violence. Chronic nuisance ordinances force victims to choose between serious financial penalties (and sometimes homelessness) and calling for help when they are being battered in their homes.

#### B. *Applying Chronic Nuisance Laws to Domestic Violence Is Inconsistent with Other Government Policies*

These laws are also contrary to the development of laws and policies regulating the state response to domestic violence. Many states have implemented mandatory arrest procedures for domestic violence offenses, victims' bills of rights, and evidence-based prosecution of batterers.

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supra note 42 (describing proposed chronic nuisance code in Columbia, Missouri, that imposes maximum of three months incarceration for violations).

125. Second Amended Complaint at 15–16, *Grape v. Town/Village of East Rochester*, No. 07 CV 6075 CJS (F) (W.D.N.Y. July 6, 2007).

126. Wilson, supra note 87, at 19.

127. *Id.* at 15 (explaining that the batterer alone is responsible for his behavior). See also Jones & Schechter, supra note 90, at 92–93 (noting that victim-blaming prevents people from focusing on abuser's choice to continue abusing).

While such tension may not provide a legal challenge, it shows that chronic nuisance localities are acting in opposition to the policy goals of their state legislatures.

1. *Mandatory Arrest Laws.* — Many states, in recognition of the history of discriminatory treatment that victims of domestic violence have faced in attempting to access police services, have instituted mandatory arrest laws.<sup>128</sup> Such laws state that if there is probable cause to believe an incident of domestic violence has occurred, the police officer “shall arrest” the perpetrator.<sup>129</sup>

Victims of domestic violence often have valid reasons for refusing to participate in the prosecution of their perpetrator. These include fear of reprisal or escalating abuse if the victim appears to go against her partner, concern for her partner’s status in the community, economic dependence on the abuser (which is often created by the abuser’s own actions to keep the victim connected to him), concern that arrest and public prosecution would harm her children, disillusionment with a system that has failed to protect her in the past, fear of being deported, resistance in communities of color to inviting police presence, and many more.<sup>130</sup>

Mandatory arrest laws take the pressure of dictating how the police will respond off of the victim and promote formal police involvement in domestic violence cases.<sup>131</sup> Chronic nuisance laws place that pressure back on the victim. Mandatory arrest laws send the message that the state

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128. Mandatory arrest laws vary, but in general, they order a person to be arrested without a warrant if the police find probable cause that the person has committed an act of domestic violence. Preventing Violence to Women, *supra* note 86, at 69–70 (discussing mechanics and benefits of mandatory arrest laws).

129. See, e.g., N.J. Stat. Ann. § 2C:25-21 (West 2005) (stating that law enforcement officer “shall arrest” suspect and sign criminal complaint if there is probable cause to believe act of domestic violence occurred and one of the following factors is present: victim exhibits signs of injury, there is a warrant for suspect, suspect has violated restraining order, or there is probable cause to believe a weapon was used in commission of offense); Ohio Rev. Code Ann. § 2935.032 (West 2006) (requiring arrest when law enforcement officer responds to domestic violence aggravated or felonious assault); Utah Code Ann. § 77-36-2.2 (2003) (“[W]hen a peace officer responds to a domestic violence call and has probable cause to believe that an act of domestic violence has been committed, the peace officer shall arrest without a warrant or issue a citation to any person that he has probable cause to believe has committed an act of domestic violence.”).

130. See *supra* Part II.A (discussing dynamics of abusive relationships).

131. This is not considered by all to be a positive development. Compare Wilson, *supra* note 87, at 196 (describing mandatory arrest policies as one aspect of ideal response of justice system to domestic violence), with Preventing Violence to Women, *supra* note 86, at 18 (noting that arresting batterer in certain circumstances may increase risk to victim safety), and Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 Harv. L. Rev. 550, 565 (1999) (arguing that mandatory policies can make victims less safe). Furthermore, some criticize mandatory arrest laws for disempowering the victim by taking away her ability to make choices that affect her life. Mills, *supra*, at 578 (“[H]elping victims restore power and control and diminishing their helplessness by increasing their choices can contribute significantly to reversing the negative dynamics that dominate the abusive relationship.”).

has an interest in ending violence in the home, while chronic nuisance laws have the effect of putting the burden of that interest on the victim.

In addition, for the laws that fine the victim based on the amount of time police spend on the call or the nature of the police response, mandatory arrest laws, which take away the victim's discretion as to the services she may receive in response to a report of abuse, amplify the burden.

2. *Victims' Bills of Rights.* — Other state policies or laws that are contrary to the spirit of chronic nuisance laws include victims' bill of rights provisions. Many states have passed victims' bills of rights.<sup>132</sup> Such laws outline the rights of the victim in the criminal justice system and often include provisions such as the right to be treated with dignity and compassion by the criminal justice system, the right to be informed of his or her case, and the right to make a victim impact statement.<sup>133</sup> Most state crime victims' bills of rights do not provide a cause of action against the government for failing to abide by the protections guaranteed to victims.<sup>134</sup> Such laws, however, embody a commitment on the part of state legislatures to ensure that victims of crime are protected to a certain extent from being treated unfairly by the criminal justice system. The appli-

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132. See, e.g., Alaska Const. art. I, § 24; Ariz. Const. art. 2, § 2.1; Ill. Const. art. 1, § 8.1; Del. Code Ann. tit. 11, § 9402 (2001); Ga. Code Ann. § 17-7-1 to -16 (2004); N.J. Stat. Ann. § 52:4B-36 (West Supp. 2007); Nat'l Ctr. for Victims of Crimes, *Crime Victims' Rights in America: An Historical Overview* (1999), available at <http://www.ojp.usdoj.gov/ovc/ncvrv/1999/histr.htm> (on file with the *Columbia Law Review*) (describing history of legislation establishing victims' rights and which states have passed victims' bills of rights). For a thorough argument supporting the importance of crime victims' bills of rights, see generally A Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 3 Before the S. Comm. on the Judiciary, 106th Cong. 25-56 (1999) (statement of Paul G. Cassell, Professor of Law, University of Utah College of Law). The federal government has also passed legislation to ensure a victim's right "to be reasonably protected from the accused" and to be "treated with fairness and with respect." 18 U.S.C. § 3771 (Supp. IV 2006).

133. See statutes cited *supra* note 132. New Jersey's Crime Victim's Bill of Rights has a provision that seems particularly pertinent to chronic nuisance codes: "No crime victim shall be required to pay the maintenance, support, rehabilitation or other costs arising from the imprisonment or commitment of a victimizer as a result of the crime." N.J. Stat. Ann. § 52:4B-36(o). Fining a victim for police services under the chronic nuisance codes could be considered such a cost.

134. See, e.g., Alaska Stat. § 12.61.010(b) (2006) ("[A] failure to ensure these rights does not give rise to a separate cause of action against law enforcement agencies, other agencies of the state, or a political subdivision of the state."); Del. Code Ann. tit. 11 § 9402(b) ("Failure to comply with [the Victims' Bill of Rights] does not create a claim for damages against a government employee, official or entity."); Ga. Code Ann. § 17-17-15(a) ("Failure to provide . . . any of the information or notifications required by this chapter shall not subject the person responsible for such notification or that person's employer to any liability for damages."); cf. 18 U.S.C. § 3771(d)(6) (Supp. IV 2006) (stating that crime victims' rights law does not work to "authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages.").

cation of chronic nuisance codes to victims of crimes flies in the face of such a state policy.

3. *Evidence-Based Prosecution.* — Because of the reasons discussed above, some victims do not participate in the prosecution of their partner. However, many jurisdictions practice evidence-based prosecution of domestic violence offenses, in which prosecuting agencies may still pursue the case against the abuser without the victim's cooperation. This is done with other evidence, such as physical evidence of the abuse, 911 tapes, photographs, medical records, testimony from police and other first responders or witnesses, and other evidence gathered by the police.<sup>135</sup> It is contradictory for a locality to commit resources to pursuing domestic violence cases once the perpetrator has been arrested but refuse to expend the resources necessary to investigate the crime itself. Evidence-based prosecution and mandatory arrest takes the burden of state response to domestic violence off of the victim completely, while chronic nuisance codes turn around and place the burden for the detection and investigation of domestic violence back on the victim.

Chronic nuisance laws are one way a local government signals to the community who should be entitled to the expenditure of scarce public resources. Privatizing police services for victims of intimate partner abuse but not victims of stranger crimes sends the message that women's safety inside the home is their own responsibility, and that victims of domestic violence do not merit police protection on the government's dime.

### III. LEGAL CHALLENGES TO CHRONIC NUISANCE CODES

Chronic nuisance codes are susceptible to several legal challenges. It is not within the scope of this Note to examine all potential claims against chronic nuisance laws. Rather, Part III.A investigates two statutory provisions, the Violence Against Women Act and the Fair Housing Act, that provide a strong basis for claims that these ordinances discriminate unlawfully on the basis of sex. Part III.B discusses federal constitutional claims, focusing on the First Amendment right to petition the government. Finally, this Note recognizes that legal challenges are not the only

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135. Evidence-based prosecution may be state law, an official policy set forth by the prosecutor, or the unofficial practice of a prosecuting agency. See, e.g., Ohio Rev. Code Ann. § 2935.03(B)(3)(e)(ii) (West 2006) (stating that if domestic violence victim does not wish to cooperate with law enforcement or prosecuting agency, prosecutor should evaluate whether to proceed with case based on other evidence "notwithstanding the victim's failure to cooperate"); Peter Zuckerman, With or Without You: Domestic-Violence Prosecution No Longer Needs Victim's Testimony, *Idaho Falls Post Reg.*, May 22, 2005, at A1 (describing the practice of evidence-based prosecution by Bonneville County prosecutors); Press Release, Mercer County Prosecutor's Office, Mercer County, N.J., Prosecutor Supplies Cameras to Municipal Police Departments for Use in Domestic Violence Cases (Dec. 18, 2003), available at <http://www.mercerpros-nj.com/Press/December-03/pr12-18-03.htm> (on file with the *Columbia Law Review*) (noting purchase of cameras for police departments as prosecutor implemented evidence-based prosecution policy in Mercer County).

possible solution to harsh application of chronic nuisance laws to victims of domestic violence. Part III.C examines legislative actions that a state legislature or town council could take to protect victims of abuse from the dangerous effect of these laws.

### A. Statutory Challenges

1. *The Violence Against Women Act.* — The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA) contains provisions to protect victims of domestic violence living in federally funded housing. Congress recognized that the protections were necessary, because “[w]omen and families across the country are being discriminated against, denied access to, and even evicted from public and subsidized housing because of their status as victims of domestic violence.”<sup>136</sup> In particular, landlords and housing authorities were evicting victims of domestic violence because criminal activity (the abuse perpetrated by their partners) was occurring in their apartments, or because the battering and police response were considered a disturbance to other tenants.<sup>137</sup> One of Congress’s purposes in creating these provisions was to “prevent homelessness by . . . protecting the safety of victims of domestic violence . . . and ensuring that such victims have meaningful access to the criminal justice system without jeopardizing [their federally funded] housing.”<sup>138</sup>

The relevant substantive provisions amend 42 U.S.C. § 1437f, which authorizes low-income housing assistance. VAWA provided that intimate partner violence or stalking “shall not be good cause for terminating the assistance, tenancy, or occupancy rights of the victim of such violence.”<sup>139</sup> The law also provided protection for victims that share a household with the abuser: “Criminal activity directly relating to domestic violence, dating violence, or stalking . . . shall not be cause for termination of assistance, tenancy, or occupancy rights if the tenant or an immediate member of the tenant’s family is the victim or threatened victim of that domestic violence, dating violence, or stalking.”<sup>140</sup> The law provides a narrow exception when the landlord can show that not evicting the ten-

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136. 42 U.S.C. § 14043e(3) (Supp. V 2005).

137. Legal Momentum, VAWA 2005—New Housing Protections for Victims of Domestic Violence, Dating Violence, or Stalking, available at <http://www.legalmomentum.org/site/DocServer/vawa1994stories.pdf?docID=591> (last visited Mar. 11, 2008) (on file with the *Columbia Law Review*) (“These provisions respond to a widespread problem of individuals being evicted because ‘criminal activity’—the abuse committed against them—has occurred in their apartments, or because noises—such as a scream for help, a police siren, or shots being fired—have ‘disturbed the peaceful enjoyment of the property.’”).

138. 42 U.S.C. § 14043e-1(1) (2000 & Supp. V 2005).

139. *Id.* § 1437f(c)(9)(B).

140. *Id.* § 1437f(c)(9)(C)(i).

ant creates an “actual and imminent threat” to other tenants or employees of housing provider.<sup>141</sup>

These provisions of VAWA are incompatible with chronic nuisance ordinances, which encourage or mandate landlords to evict tenants based on their status as victims of domestic violence.<sup>142</sup> Because of that, VAWA prevents the use of the chronic nuisance law in federally funded housing, including public housing projects and the Housing Choice Vouchers (formerly Section 8) Program.<sup>143</sup> If landlords of federally funded housing evict a tenant because her unit is a chronic nuisance as a result of the police responses, the landlord is violating the sections of VAWA that protect victims from having their tenancy terminated because of domestic violence or stalking.<sup>144</sup>

Since a landlord who is unable to evict under the chronic nuisance code because of VAWA is left with no choice but to hope that the violence subsides and pay for the police service if it continues, the interaction of VAWA and the chronic nuisance codes creates a financial penalty for landlords of federally assisted housing. This provides a disincentive for property owners to accept Section 8 vouchers or to create any low-income housing opportunity that is funded under 42 U.S.C. § 1437f.<sup>145</sup>

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141. Id. § 1437f (c)(9)(C)(v) (allowing landlord to evict, notwithstanding protections for victims, if landlord can demonstrate “an actual and imminent threat to other tenants or those employed at or providing service to the property if that tenant is not evicted or terminated from assistance.”).

142. See *supra* text accompanying notes 117–118. It is important to note in this discussion that not one of the chronic nuisance codes discussed in this Note excludes recipients of federal housing funds from complying with orders to abate nuisances.

143. Section 8, or Housing Choice Vouchers, are federally funded housing vouchers that are tied to the recipient, not the unit. See U.S. Dep’t of Hous. & Urban Dev., Housing Choice Vouchers Fact Sheet, at [http://www.hud.gov/offices/pih/programs/hcv/about/fact\\_sheet.cfm](http://www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm) (last visited Feb. 10, 2008) (on file with the *Columbia Law Review*) (“A family that is issued a housing voucher is responsible for finding a suitable housing unit of the family’s choice where the owner agrees to rent under the program.”). The recipient is responsible for finding housing where the owner agrees to participate in the program. The Public Housing Agency for that locality administers the federal subsidy to the landlord, and the recipient pays the difference between the actual market rent of the unit and the amount subsidized by the voucher. *Id.* Contrast this with public housing, which is federally-funded housing managed by local public housing agencies. See U.S. Dep’t of Hous. & Urban Dev., HUD’s Public Housing Program, at <http://www.hud.gov/renting/phprog.cfm> (last updated Nov. 28, 2007) (on file with the *Columbia Law Review*). Approximately 1.2 million families in America live in public housing. *Id.* For a list of all federal housing programs covered under 42 U.S.C. § 1437f, and therefore subject to VAWA’s antidiscrimination provisions, see U.S. Dep’t of Hous. & Urban Dev., Programs of HUD: Major Mortgage, Grant, Assistance, and Regulatory Programs 72–77 (2005), available at [www.huduser.org/whatsnew/ProgramsHUD05.pdf](http://www.huduser.org/whatsnew/ProgramsHUD05.pdf) (on file with the *Columbia Law Review*).

144. 42 U.S.C. § 1437f(c)(9).

145. Cincinnati, where a chronic nuisance code went into effect January 1, 2007, has a “huge rental market” and relatively low homeownership rate. Telephone Interview with Elizabeth Brown, *supra* note 80. The rental market is soft, with low rents and a high vacancy rate. Under these conditions, the Housing Choice Voucher Program has

2. *Fair Housing Act Challenges.* — The Fair Housing Act (FHA) likely provides a remedy for victims of domestic violence who face housing discrimination as a result of chronic nuisance ordinances. The FHA makes it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person” based on sex.<sup>146</sup> The FHA also prohibits discrimination in “the terms, conditions, or privileges of sale or rental” because of sex.<sup>147</sup> Certain features of the FHA make it extremely promising in this situation: liberal standing requirements and a disparate impact standard. After examining these plaintiff-friendly features of the FHA, this section explains how the FHA applies to chronic nuisance laws.

a. *Standing.* — The FHA authorizes suits by any “aggrieved person”<sup>148</sup> and defines the term broadly, to include any person who “claims to have been injured by a discriminatory housing practice” or believes that they “will be injured by a discriminatory housing practice that is about to occur.”<sup>149</sup> Supreme Court precedent makes it clear that standing under the FHA is to be interpreted broadly. Federal prudential limitations on standing do not apply, and so proper plaintiffs are “not only the direct victims of housing discrimination, but virtually anyone who is injured in any way by conduct that violates this statute.”<sup>150</sup> FHA plaintiffs are only required to meet the Article III elements for standing: injury, causation, and redressability.<sup>151</sup>

There is strong precedent that plaintiffs who assert an economic injury arising from a violation of others’ fair housing rights have standing to bring a FHA claim, as long they meet the Article III standing requirements. Some of the situations in which courts have held that “indirect” plaintiffs have standing include proposed actions that would lower their property values, interfere with the sale of their property, or diminish rental profits.<sup>152</sup>

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flourished, and landlords are receptive to accepting subsidized tenants, since it avoids vacancies and creates a steady flow of rental income. *Id.* Fair housing advocates are concerned that the chronic nuisance code will have a negative effect on the subsidized housing programs in the area. *Id.* One way to avoid the incongruity with federal law and the harmful effects on low income families’ ability to access housing would be to encourage localities to exempt landlords of subsidized housing from chronic nuisance codes.

146. 42 U.S.C. § 3604(a).

147. *Id.* § 3604(b).

148. *Id.* § 3613.

149. *Id.* § 3602(i).

150. Robert G. Schwemm, *Housing Discrimination: Law and Litigation* § 12A:2, at 12A-5 (2006) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 102–03 (1979)).

151. See *id.* § 12A:3, at 12A-7 to -9.

152. See, e.g., *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 190–91 (3d Cir. 2006) (property values); *San Pedro Hotel Co. v. City of L.A.*, 159 F.3d 470, 475 (9th Cir.

Three groups of plaintiffs could bring a FHA claim that the chronic nuisance codes discriminate on the basis of sex. Domestic violence victims who face eviction (from any rental housing) likely meet the Article III requirements. Their injury includes losing their housing, economic damage, and emotional harm. This injury is caused by the ordinances, and would be redressable by a favorable court decision holding that the chronic nuisance codes as applied to victims of domestic violence violate the FHA.

Domestic violence victims who are fined directly and forced to pay for their police service would also meet Article III requirements. They too face economic and emotional injury. The causation and redressability analyses are the same for these victims as for the victims living in rental housing.

Landlords could also challenge chronic nuisance laws under the FHA's liberal standing requirements. As discussed above, VAWA makes it unlawful for a landlord of federally funded housing to evict a tenant because they are a domestic violence victim.<sup>153</sup> Private landlords face a similar choice of having to choose between adhering to the chronic nuisance law or abiding by the FHA's prohibitions on sex discrimination.<sup>154</sup> This creates a situation where a landlord is obliged to either pay for the police services of a tenant because he cannot lawfully evict her, or expose himself to liability for violating the FHA. In addition to the financial injury, noncompliance with a chronic nuisance code also exposes the landlord to criminal liability or forfeiture of his license to operate a rental property.<sup>155</sup> Even though the landlord is not a member of the protected class against whom the ordinances discriminate, these harms constitute a constitutionally cognizable injury under Article III. Landlords forced to choose between obeying a chronic nuisance law and obeying VAWA or the FHA clearly meet the causation and redressability prongs as well.

A comprehensive challenge would involve plaintiffs from both rental and owned housing. Otherwise, a decision (and any remedies) might only apply to victims of domestic violence in certain types of housing and still leave other victims of violence subject to the chronic nuisance laws.

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1998) (interfering with sale); *Hispanics United of Dupage County v. Village of Addison*, 958 F. Supp. 1320, 1327–28 (N.D. Ill. 1997) (diminution of rental profits).

153. See *supra* notes 136–141 and accompanying text.

154. See *infra* Part III.A.2.b–e for an explanation of why applying chronic nuisance codes to domestic violence victims likely violates the FHA.

155. See, e.g., Milwaukee, Wis., Code § 80-10-6-b (2007), available at <http://cctv25.milwaukee.gov/code/volume1/ch80.pdf> (on file with the *Columbia Law Review*) (allowing for imprisonment upon default of payments); Wilkes-Barre, Pa., Code of Ordinances § 7-239 (adopted Feb. 24, 2005), available at <http://www.municode.com/Resources/gateway.asp?pid=14407&sid=38> (on file with the *Columbia Law Review*) (providing for both fines and imprisonment); York, Pa., Code art. 1751.05(b) (2007), available at <http://www.yorkcity.org/webcom/PDF/City%20Council/PDF%202007-2008%20Codified%20Ordinances/Part%2017%20-%20Building%20&%20Housing.pdf> (on file with the *Columbia Law Review*) (authorizing suspension or revocation of rental license).

The FHA standing provisions allow a plaintiff to file a complaint if she believes that she “will be injured by a discriminatory housing practice that is about to occur.”<sup>156</sup> Thus, “the law does not require [potential complainants] ‘to expose themselves to the injury involved with the actual act of discrimination before filing a complaint.’”<sup>157</sup> A homeowner or tenant does not have to wait until civil liability has been imposed under the chronic nuisance laws to file a complaint under the FHA. This makes the FHA especially valuable since it may be used not only to redress, but to prevent, evictions and other consequences for domestic violence victims under chronic nuisance laws.

b. *FHA Disparate Impact Claim.* — Although the Supreme Court has never ruled on whether the FHA includes a discriminatory impact standard, there is a strong consensus among lower courts that Title VIII covers practices that produce a disparate impact on a protected class.<sup>158</sup> This is helpful in the context of chronic nuisance codes, since it relieves plaintiffs of the burden of proving that these laws were passed with a discriminatory intent.

For a disparate impact claim under the FHA, plaintiffs must make a prima facie showing that a “specific policy caused a significant disparate effect on a protected group.”<sup>159</sup> This is done with statistical evidence that illustrates the discriminatory effect. In rare cases, national statistical evidence suffices, but plaintiffs must generally use local statistics.<sup>160</sup>

In evaluating the prima facie case of disparate impact under the FHA, different circuits rely to varying extents on the four factors set forth in *Metropolitan Housing Development Corp. v. Arlington Heights*, in which the Seventh Circuit held that the FHA covered zoning decisions that had a discriminatory impact.<sup>161</sup> The factors are: 1) the strength of the plaintiff’s showing of discriminatory effect; 2) any evidence of discriminatory intent;<sup>162</sup> 3) the defendant’s interest in the challenged action; and 4) whether the plaintiff seeks to compel the defendant to affirmatively provide housing for the protected class, or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.<sup>163</sup> In some circuits, these factors are requirements for a prima facie case, while other circuits use them when considering a final

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156. 42 U.S.C. § 3602(i)(2) (2000).

157. Schwemm, *supra* note 150, § 12A:1, at 12A-3.

158. See *id.* § 10:4, 10:5, at 10-35 to -38 (“Not a single court of appeals currently espouses the view that the effect theory is inappropriate for Title VIII cases”).

159. *Mountain Side Mobile Estates v. Sec’y of Hous. & Urban Dev.*, 56 F.3d 1243, 1251 (10th Cir. 1995); see also *NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988).

160. *Mountain Side Mobile Estates*, 56 F.3d at 1253 (“The farther removed from local statistics evidence the plaintiffs venture, the weaker their evidence becomes.”).

161. 558 F.2d 1283, 1285 (7th Cir. 1977).

162. This factor does not set as high a bar as the constitutional standard under *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that facially neutral law that burdens one group more than another is valid absent intent to discriminate).

163. *Metropolitan*, 558 F.2d at 1290.

determination on the merits.<sup>164</sup> Some courts do not consider them at all when evaluating disparate impact claims.<sup>165</sup>

After a plaintiff has made a *prima facie* showing of disparate impact, the burden shifts to the defendant to justify the practice. Again, the standard varies depending on the circuit. For instance, the Second Circuit uses a two prong test: 1) whether the reasons for the action are bona fide and legitimate, and 2) whether any less discriminatory alternative can serve those ends.<sup>166</sup> The Eighth Circuit asks whether the public defendant's actions were "necessary to promote a compelling government interest."<sup>167</sup> No matter which formulation of justification a circuit uses, justification is a difficult showing to make. "Most Title VIII impact cases have held that the defendant failed to satisfy its burden of justification . . . ."<sup>168</sup>

c. § 3604(a) *Challenges*. — The FHA provision making it unlawful to "otherwise make unavailable or deny" housing based on discriminatory grounds, § 3604(a), could be used to challenge chronic nuisance laws. To state a valid claim under this provision, the challenged practice must "deny housing or otherwise negatively affect its availability."<sup>169</sup>

Section 3604(a) covers a wide array of housing practices. Courts have construed the "otherwise make unavailable or deny" provision to encompass mortgage redlining,<sup>170</sup> insurance redlining,<sup>171</sup> racial steering,<sup>172</sup> exclusionary zoning,<sup>173</sup> and other actions by both private individu-

164. Compare *Hispanics United of Dupage County v. Village of Addison*, 988 F. Supp. 1130, 1154–57 (N.D. Ill. 1997) (factors should be considered in final determination on merits, not as requirement for *prima facie* case), and *Town of Huntington*, 844 F.2d at 935 (same), with *Snyder v. Barry Realty, Inc.*, 953 F. Supp. 217, 220 (N.D. Ill. 1996) (analyzing four factors as part of *prima facie* case).

165. See, e.g., *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 746 (9th Cir. 1996).

166. *Town of Huntington*, 844 F.2d at 939.

167. *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974).

168. Schwemm, *supra* note 150, § 10.6, at 10-51.

169. *Id.* § 13.4, at 13-11.

170. "Redlining is the practice of denying the extension of credit to specific geographic areas due to the income, race, or ethnicity of its residents. The term was derived from the actual practice of drawing a red line around [the neighborhoods that would be denied credit]." *United Cos. Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 203 n.5 (D. Mass. 1998).

171. Insurance redlining is the denial or "restriction of insurance based on the racial composition of the neighborhood, apart from any consideration of risk." *Dunn v. Midwestern Indem. Mid-American Fire & Cas. Co.*, 472 F. Supp. 1106, 1107 n.3 (S.D. Ohio 1979).

172. Racial steering is when real estate brokers or agents "preserve or encourage patterns of racial segregation" by "steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 366 n.1 (1982).

173. Exclusionary zoning involves the "use of the zoning power by municipalities to maintain themselves as enclaves of affluence or of social homogeneity." *S. Burlington County NAACP v. Mt. Laurel*, 336 A.2d 713, 736 (N.J. 1975).

als and governments which affect the availability of housing for a protected class.<sup>174</sup> Predatory lending, or reverse redlining, is prohibited by both § 3604(a) and § 3604(b) of the Fair Housing Act.<sup>175</sup> Eviction policies that have a discriminatory effect on protected classes of tenants also violate § 3604(a).<sup>176</sup> HUD regulations list eviction of tenants because of their sex as an example of unlawful activity under § 3604(a).<sup>177</sup> HUD regulations also state that § 3604(a) prohibits “refusing to provide municipal services” or providing municipal services “differently” on the basis of race, sex, or other protected characteristic.<sup>178</sup> The rationale for prohibiting discriminatory provision of municipal services under the “otherwise make unavailable or deny” clause is that use of certain public services are a prerequisite to a person’s ability to access housing.<sup>179</sup>

To challenge the chronic nuisance codes under § 3604(a) a plaintiff would need to prove a policy or practice that affected the availability of housing for a protected class.<sup>180</sup> Since the touchstone of this claim is unavailability of housing, this provision would be most likely to afford a remedy to women who face eviction or foreclosure as a result of the application of chronic nuisance laws to domestic violence. For homeowners charged directly for their police services, there is a potential claim similar to the claims successfully made in the predatory lending context. If a city charges the homeowner such a high fee, or if the number of calls that trigger the charges is so low that the fees add up to a large sum it could interfere with an owner’s ability to meet their mortgage obligations. If the chronic nuisance laws imposed such a burden on owners that they could not pay the fees in addition to their mortgage and property tax

174. *Jackson v. Okaloosa County*, 21 F.3d 1531, 1542 n.17 (11th Cir. 1994); *Southend Neighborhood Improvement Ass’n v. County of St. Clair*, 743 F.2d 1207, 1209 (7th Cir. 1984).

175. See, e.g., *Barkley v. Olympia Mortgage Co.*, No. 04 CV 875 (RJD) (KAM) 2007 U.S. Dist. LEXIS 61940, at \*47–\*49 (E.D.N.Y. Aug. 22, 2007); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 20–21 (D.D.C. 2000); *Honorable v. Easy Life Real Estate System*, 100 F. Supp. 2d 885, 892 (N.D. Ill. 2000). “Reverse redlining is the practice of extending credit on unfair terms” to a protected class. *Hargraves*, 140 F. Supp. 2d at 20. To make a successful claim based on reverse redlining, a plaintiff must show 1) that the lending practices were “unfair” and “predatory,” and 2) either discriminatory intent or disparate impact. *Id.*

176. *Harris v. Itzhaki*, 183 F.3d 1043, 1052 (9th Cir. 1999).

177. 24 C.F.R. §§ 100.50(b)(3), 100.60(b)(5) (2007). See also Schwemm, *supra* note 150, § 13.16, at 13-66 to -68.

178. 24 C.F.R. § 100.70(d)(4).

179. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3240 (Jan. 23, 1989).

180. See, e.g., *Jackson*, 21 F.3d at 1531. In that case, the Eleventh Circuit reversed the district court’s dismissal of the plaintiffs’ complaint for failure to state a claim. Plaintiffs alleged that the County and the Housing Authority excluded African Americans from a white neighborhood by adopting a policy that no public housing could be built in that neighborhood unless approved by a majority of the Board of County Commissioners. The court held that since the complaint alleged race-based discrimination affecting the availability of housing, it was an adequate cause of action under § 3604(a). *Id.*

obligations, it would trigger foreclosure and loss of the home.<sup>181</sup> In the rental context, § 3604(a)'s prohibition on eviction policies that have a disparate burden based on sex would apply to victims of domestic violence who face eviction as a result of the application of chronic nuisance laws to domestic violence.

The plaintiff would need to show that the evictions or excessive fees caused by applying the chronic nuisance code to domestic violence had a disparate impact on women. For plaintiffs who could gather state or local data on the rate of domestic violence that occurs in the home and the percentage of victims that are women, § 3604(a) would support a challenge to the chronic nuisance laws.

d. *§ 3604(b) Challenges.* — Section 3604(b) of the FHA makes it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith” on the basis of sex. Despite a recent case that narrows the applicability of this provision, plaintiffs could use this provision to challenge chronic nuisance laws.

Until recently, it was widely assumed that this provision guaranteed the right to nondiscriminatory treatment once an individual has become a resident of the housing.<sup>182</sup> However, a 2004 Seventh Circuit decision questioned whether § 3604(b) protects residents beyond the acquisition stage. In *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, the court held that § 3604(b) only applies to activities that prevent people from acquiring property, not harassment that occurs after a person has acquired housing.<sup>183</sup> Therefore, the plaintiff homeowners had no § 3604(b) claim against a defendant homeowner association for discrimination on the basis of religion. The complaint alleged that the president of the association wrote anti-Semitic slurs on their wall, vandalized their property, and in conjunction with the rest of the association, thwarted plaintiffs' attempts to investigate the incidents. Since none of these activities interfered with plaintiffs' access to housing, § 3604(b) did not apply.

This interpretation of § 3604(b) has been used in some recent decisions, mostly in cases involving property owners.<sup>184</sup> However, other courts have held that § 3604(b) covers property owners' suits regarding

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181. For further discussion of the applicability of the discriminatory provision of municipal services theory to chronic nuisance codes, see *infra* Part III.A.2.d.

182. Schwemm, *supra* note 150, § 14.3, at 14-9.

183. 388 F.3d 327, 328–29 (7th Cir. 2004).

184. See, e.g., *Cox v. City of Dallas*, 430 F.3d 734, 745–46 (5th Cir. 2005) (holding African American homeowners had no § 3604(b) claim against government for persistent failure to police illegal dumping in their neighborhood, since the actions affected habitability and home values, not availability); *Lawrence v. Courtyards at Deerwood Ass'n*, 318 F. Supp. 2d 1133, 1141–43 (S.D. Fla. 2004) (holding that § 3604(b) is limited to conduct that impacts sale or rental of unit, not race discrimination that plaintiffs experienced after they bought their home).

activities that took place after the purchase was complete. These include reverse redlining and predatory lending cases.<sup>185</sup>

The “not-after-acquisition” view in *Halprin* is followed less in § 3604(b) cases involving tenants. While the word “sale” in § 3604(b) may imply a time period that ends after the transaction is complete (i.e. at closing), “rental” in § 3604(b) can be read either to include only the initial decision to rent, or the entire tenancy.<sup>186</sup> The latter interpretation of “rental” is more common. Claims under § 3604(b) adhering to that use of “rental” include, but are not limited to, sexual harassment claims,<sup>187</sup> discriminatory enforcement of building policies,<sup>188</sup> and claims by white tenants who are prevented from having African American visitors.<sup>189</sup> Additionally, many cases have held that § 3604(b) protects apartment residents from being evicted or threatened with eviction on the basis of race, sex, or other grounds prohibited by the FHA.<sup>190</sup>

The “term and conditions” clause seems best suited to a challenge of chronic nuisance codes as applied to renters. Even jurisdictions that follow *Halprin* acknowledge that if a practice affects access to housing, it is likely to be covered by § 3604(b). Since the ordinances result in eviction, they clearly affect the availability of housing. This is not the case with victims in owned housing. However, while those victims might not have a remedy under the “terms and conditions” provision, § 3604(b) may still cover their FHA claims.

Section 3604(b) also includes a provision making it unlawful to discriminate in “the provisions of services or facilities,” which has been used

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185. See, e.g., *Beard v. Worldwide Mortgage Corp.*, 354 F. Supp. 2d 789, 808–09 (W.D. Tenn. 2005); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 20–22 (D.D.C. 2001).

186. Schwemm, *supra* note 150, § 14.3, at 14-16 (describing ambiguities of term “rental”).

187. See, e.g., *United States v. Koch*, 352 F. Supp. 2d 970, 980–81 (D. Neb. 2004) (finding claim of post-occupancy sexual harassment could proceed under Fair Housing Act).

188. See, e.g., *N.D. Fair Hous. Council, Inc. v. Allen*, 319 F. Supp. 2d 972, 974 (D.N.D. 2004) (singling out minority tenants for rent increase and selectively applying no-pet policy may violate 3604(b)); *United States v. Sea Winds of Marco, Inc.*, 893 F. Supp. 1051, 1055 (M.D. Fla. 1995) (applying § 3604(b) to race discrimination in application of renter-identification policy).

189. See, e.g., *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982) (“[T]he imposition upon white tenants of a rule that they may not receive black guests violates the Fair Housing Act.”); *Lane v. Cole*, 88 F. Supp. 2d 402, 405–06 (E.D. Pa. 2000) (concluding that under FHA, both tenant and visitor who was discriminated against have standing to sue).

190. See, e.g., *Harris v. Itzhaki*, 183 F.3d 1043, 1052 (9th Cir. 1999) (examining racially motivated eviction claim under § 3604(a) and (b)); *Allen*, 319 F. Supp. 2d at 974, 979 (holding threatened eviction on racial grounds covered under “terms and conditions”); *Khalil v. Farash Corp.*, 260 F. Supp. 2d 582, 589–90 (W.D.N.Y. 2003) (applying § 3604(a) and (b) to lease-renewal policy that discriminated against families with children).

to challenge discriminatory provisions of municipal services.<sup>191</sup> Most discriminatory municipal provision claims have been litigated on constitutional and statutory grounds other than the FHA.<sup>192</sup> Whether the FHA applies to these claims is important because equal protection challenges to discriminatory municipal services must be based on intentional discrimination.<sup>193</sup> If the FHA applies, this type of discrimination could be established simply by showing a discriminatory effect. Courts are split on whether § 3604(b) covers discriminatory provision of municipal services. The majority of opinions state that discriminatory provisions of municipal services are actionable under § 3604(b), however, a significant minority of courts have concluded that § 3604(b) does not apply to this situation.<sup>194</sup>

HUD regulations support the argument that discriminatory provisions of municipal services violate the FHA. The regulations include “[l]imiting the use of privileges, services or facilities associated with a dwelling” because of the sex of the owner or tenant as an example of activity prohibited by § 3604(b).<sup>195</sup> HUD regulations also list refusal to provide municipal services or providing municipal services differently because of sex as prohibited under § 3604(a).<sup>196</sup> While this is an underdeveloped theory of liability under the FHA, the regulations and what little case law that exists support a plausible FHA claim for discriminatory provisions of municipal services.

A nonrenting victim who is forced to pay for her own police service in response to a domestic violence incident could bring a claim alleging discrimination in provisions of services or facilities in violation of § 3604(b). The theory for liability would be that applying the ordinance to domestic violence calls for services has a disparate impact on the provision of police services to women. The plaintiff would need to rely on local statistics to show the discriminatory effect. While a victim might also allege discriminatory provision of municipal services under § 3604(a), different arguments are needed to support each claim. The focus of the inquiry under § 3604(a) is whether the discriminatory provision of ser-

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191. See, e.g., *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804, at \*1–\*2 (N.D. Tex. Sept. 9, 2004) (claiming discriminatory receipt of municipal services); *Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 950, 958 (W.D. Tenn. 2003), *aff'd*, 103 F. App'x 560 (6th Cir. 2004) (asserting § 3604(b) violation based on failure to approve water service connection and sewer permits, thus preventing acquisition of building permits).

192. Schwemm, *supra* note 150, § 14.3 at 14-19.

193. The equal protection clause of the Fourteenth Amendment states that “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV. To make a successful equal protection claim a plaintiff must show discriminatory intent. See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“[O]fficial action will not be held unconstitutional solely because it results in a . . . disproportionate impact . . . discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”).

194. Schwemm, *supra* note 150, § 14.3 at 14-19 to 14-20.

195. 24 CFR § 100.65(b)(4) (2007).

196. *Id.* § 100.70(d)(4). See *supra* notes 180–181.

vices affected the availability of housing,<sup>197</sup> while an analysis under § 3604(b) would examine whether the policy or practice limited access to services based on sex.<sup>198</sup>

There is a counterargument that charging for service beyond a certain number of visits is not a “provision” of police services. Under the ordinance, the police will still respond to victims on the same basis and provide the same service regardless of whether she would be billed afterward. The service providers might not even know that the victim will be charged. All of the municipal discriminatory provision cases involve charges of inferior service or a refusal to provide service. None are based on the imposition of financial charges for municipal services.

One response would be that by charging victims, the ordinance effectively denies service by forcing victims of domestic violence to make a choice between financial loss or risk to their safety. In addition, there is a punitive aspect to some of these laws (including the threat of criminal liability and the fines that go beyond reimbursement for the cost of police services), which makes it difficult to successfully argue that these laws do not affect the provision of services.

*e. FHA and Domestic Violence Cases.* — There is precedential support for the argument that discrimination against victims of domestic violence is sex discrimination under the FHA. In *Bouley v. Young-Sabourin*, a district court judge denied the defendant’s motion for summary judgment in a FHA sex discrimination claim based on plaintiff’s eviction due to her status as a victim of domestic violence.<sup>199</sup> Bouley’s husband assaulted her in their apartment.<sup>200</sup> She called the police and obtained a restraining order. Three days after the assault, Bouley received a letter from her landlord, stating that the landlord believed the “violence that has been happening in your unit would continue” and that she had thirty days to vacate. The landlord relied on a one-strike lease provision.

The court held that Bouley made a prima facie case under § 3604(a), the provision making it unlawful to “otherwise make unavailable or deny” housing based on sex.<sup>201</sup> Bouley’s disparate impact claim stated that because women represent the great majority of domestic violence victims, discriminating against tenants based on their domestic violence victim status has a discriminatory impact on women in violation of the FHA.<sup>202</sup>

Another case involving discrimination against victims of domestic violence under the FHA found a violation of both § 3604(a) and § 3604(b). Tiffani Alvera was assaulted by her husband and then given twenty-four hours to vacate her apartment because of a zero-tolerance

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197. See *supra* Part III.A.2.c.

198. See *supra* note 190 and accompanying text.

199. 394 F. Supp. 2d 675, 678 (D. Vt. 2005).

200. *Id.* at 677.

201. *Id.* at 678.

202. Danielle Pelfrey Duryea, Court Recognizes Domestic Violence Survivor’s Fair Housing Challenge to Eviction, 35 Housing L. Bull. 181, 182 (2005).

policy for violence in the complex.<sup>203</sup> HUD issued a Charge of Discrimination finding that the owner, C.B.M. Group, “otherwise made a dwelling unavailable” to Alvera because of her sex in violation of § 3604(a).<sup>204</sup> HUD also found that the eviction violated the terms and conditions provision of § 3604(b).<sup>205</sup>

The Fair Housing Act provides an effective tool in the struggle to obtain justice and fairness for victims of intimate partner violence. While an FHA claim is not the only strategy that could be helpful in challenging chronic nuisance laws, there are certain features that make it extremely promising. The liberal standing requirements would allow not only battered women, but also other members of the community, to get involved in the challenge against these ordinances. In addition, the ability to prove discrimination by disparate impact (unavailable in equal protection challenges) would be extremely helpful in litigating these cases.<sup>206</sup> It appears that the substantive provisions would be especially effective in challenges to the law as applied to tenants. While the FHA may not provide as strong or obvious a remedy for victims who do not rent, the discriminatory provision of municipal services claim, when combined with the ability to prove a claim based on disparate impact, is one approach that could provide relief for nonrenters. Advocates hoping to challenge the application of chronic nuisance laws to victims of abuse should include the Fair Housing Act in their strategy.

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203. See Charge of Discrimination, *Alvera v. C.B.M. Group, Inc.*, HUD ALJ No. 10-99-0538-8 (U.S. Dep’t of Hous. & Urban Dev., Portland, Or., Apr. 16, 2001) (explaining that two days after assault, when she went to give resident manager a copy of her restraining order, she was served with 24-hour notice to vacate). The conditions that trigger eviction under the zero-tolerance policy are described in the HUD Charge of Discrimination: “You, someone in your control, or your pet, has seriously threatened immediately to inflict personal injury, or has inflicted substantial personal injury upon the landlord or other tenants.” *Id.* at 4. In this particular case, Alvera was the evictee, her husband was the person in her control who inflicted the injury, and she was the tenant the policy was purporting to protect.

204. See *id.* at 6.

205. *Id.* The parties entered into a consent decree on November 5, 2001, which includes a provision prohibiting future discrimination against victims of domestic violence in any form, including eviction based on their status. Consent Decree at 5, *Alvera v. The CBM Group, Inc.*, No. CV 01-857-PA (U.S. Dep’t of Hous. & Urban Dev., Portland, Or. Nov. 5, 2001) (enjoining defendants from discriminating against or evicting any person on basis of being victim of violence).

206. Further support for such claims lies in Title VII employment claims allowing plaintiffs to prove employment discrimination based on disparate impact. See, e.g., *Garcia v. Woman’s Hosp. of Tex.*, 97 F.3d 810, 813 (5th Cir. 1996) (holding that pregnant woman made prima facie case of employment discrimination, based on job requirement that nurses be able to lift 150 pounds, simply by showing that “all or substantially all” pregnant women would be advised against lifting 150 pounds). Employment law doctrine is often imported into fair housing law. *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir. 1990) (citing as example use of *McDonnell Douglas* test in housing discrimination cases). Since “all or substantially all” domestic violence victims impacted by this law would be women, such cases lend additional support to the sex discrimination claim under the FHA.

## B. *Constitutional Challenges*

There are several potential constitutional challenges to chronic nuisance laws. These include claims based on equal protection,<sup>207</sup> procedural due process,<sup>208</sup> and vagueness.<sup>209</sup> Rather than investigate the merits

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207. The equal protection clause of the Fourteenth Amendment states that “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV. The Constitution does not provide an individual right to police protection. See, e.g., *Gonzales v. Town of Castle Rock*, 545 U.S. 748, 768 (2005) (holding victim of domestic violence had no substantive due process right to police protection); cf. *Deshaney v. Winnebago County Dep’t of Soc. Servs.* 489 U.S. 189, 202 (1989) (finding no due process violation for failure of social services to remove son from abusive father). However, once a government accepts the responsibility of providing police services to its citizens, it may not discriminate in providing such protection. See, e.g., *Fajardo v. County of L.A.*, 179 F.3d 698, 699–700 (9th Cir. 1999) (reversing summary judgment for defendants where county treated domestic violence 911 calls differently than non-domestic violence 911 calls); *Bartalone v. County of Berrien*, 643 F. Supp. 574, 576 (W.D. Mich. 1986) (holding that police must act without irrationally discriminating against classes of victims); *Lowers v. Streater*, 627 F. Supp. 244, 246 (N.D. Ill. 1985) (denying motion to dismiss rape victim’s equal protection claim alleging that police discriminated in providing protection); *Hawk v. Perillo*, 642 F. Supp. 380, 384 (N.D. Ill. 1985) (finding plaintiffs alleging police withheld protection because of plaintiffs’ race stated equal protection claim). Potential hurdles in an equal protection claim include the requirement of showing discriminatory intent and the likelihood that chronic nuisance laws would be reviewed under a permissive rational basis test. See *supra* note 104 (explaining discriminatory intent requirement); see also *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 277–78 (1979) (holding that classification based on veteran status, which consisted of 98% men, was gender neutral and did not discriminate based on sex); *Fajardo*, 179 F.3d at 699 (using rational basis to review police practice that treated domestic violence calls different than stranger-crime calls); *Watson v. City of Kan. City*, 857 F.2d 690, 696–97 (10th Cir. 1988) (rejecting sex-based discrimination, since classification based on domestic violence status is not the same as gender classification).

208. The due process clause of the Fifth Amendment states that “No person shall be . . . deprived of life, liberty, or property without due process of law . . . .” U.S. Const. amend. V. The Supreme Court has held that when an individual’s property interests are at stake he or she is entitled to “notice and an opportunity to be heard.” *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). Such notice must be “reasonably calculated” to “apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 168 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Chronic nuisance procedures do not provide a tenant with notice that the property is being designated a chronic nuisance, even when the tenant faces eviction and is being deprived of her right to continue contracting with her landlord. Rather the notice, and opportunity to object, belongs only to the property owner. See, e.g., *Second Amended Complaint at 20, Grape v. Town/Village of East Rochester*, No. 07 CV 6075 CJS (F) (W.D.N.Y. July 6, 2007) (alleging violation of procedural due process); *Laura Marini Davis, Has Big Brother Moved off Campus? An Examination of College Communities’ Responses to Unruly Student Behavior*, 35 *J.L. & Educ.* 153, 164 (2006) (arguing that chronic nuisance ordinance fails to comport with procedural due process requirements).

209. The void for vagueness doctrine is rooted in Due Process requirements. *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999) (“[A] law fails to meet the requirements of Due Process if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . .”) (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966)). This doctrine imposes two requirements on a criminal law. First, it must provide the “kind of notice that will enable ordinary people to understand what conduct it prohibits.” *Id.*

of every potential constitutional claim, this Part explores the possibility of a novel challenge based on the right to petition the government.

1. *Right to Petition Challenge.* — Battered women subjected to chronic nuisance laws may also be able to challenge the laws as a violation of the First Amendment. The First Amendment guarantees “the right of the people . . . to petition the government for a redress of grievances.”<sup>210</sup> The right to petition is often overlooked as less significant in contemporary legal analysis than other First Amendment guarantees;<sup>211</sup> however, the Supreme Court has recognized it in two general contexts: 1) as a defense to violations of other laws, and 2) in employee and prisoner claims of retaliation for petitioning activity.

The First Amendment right to petition has been invoked in tort suits by defendants attempting to show that the Constitution protects the complained-of activities. The Supreme Court established the *Noerr-Pennington* doctrine in two cases which held that bona fide petitioning, in the form of efforts to influence the legislature and executive officers, is a protected activity and not a violation of antitrust laws. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the defendants (railroads, a railroad association, and a public relations firm) were charged with conducting a publicity campaign against the plaintiffs (members of the trucking industry).<sup>212</sup> The campaign was designed to promote the adoption of laws and law enforcement practices detrimental to the trucking industry, create a culture of distaste for truckers among the general public, and impair the relationships between truckers and existing customers.<sup>213</sup> Members of the trucking industry alleged that this constituted a conspiracy to restrain trade and monopolize long-distance freight business in violation of the Sherman Act.<sup>214</sup>

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Second, it must not authorize or encourage arbitrary and discriminatory enforcement. Id. Only chronic nuisance laws that impose criminal liability would be susceptible to a vagueness challenge. See Complaint at 6, Greater Cincinnati & No. Ky. Apartment Ass’n v. City of Cincinnati, (Ct. Com. Pl., Hamilton County, Ohio Jan. 8, 2007) (on file with the *Columbia Law Review*) (stating void for vagueness claim in legal challenge to Cincinnati’s chronic nuisance code).

210. U.S. Const. amend. I. For an exploration of the history of the Petition Clause, see generally Stephen A. Higginson, A Short History of the Right to Petition Government for the Redress of Grievances, 96 Yale L.J. 142 (1986); Gregory A. Mark, The Vestigial Constitution: The History and Significance of the Right to Petition, 66 Fordham L. Rev. 2153 (1998).

211. See Mark, *supra* note 210, at 2158 (“Other constitutional guarantees, because of their contemporary significance, today occupy center stage for scholars and advocates seeking to chronicle or explain their development.”).

212. 365 U.S. 127, 129 (1961).

213. See *id.* at 129 (“The gist of the conspiracy alleged was that the railroads had engaged [a public relations firm] to conduct a publicity campaign against the truckers . . . .”)

214. *Id.*

The Court held that the law was not violated by “mere attempts to influence the passage or enforcement of laws.”<sup>215</sup> “To hold that the government retains the power to act in [a] representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity . . .” and would invade the right to petition protected by the Bill of Rights.<sup>216</sup>

The Court again considered the defense of right to petition in *United Mine Workers of America v. Pennington*.<sup>217</sup> This case reaffirmed that petitioning activity is protected by the right to petition, regardless of the anticompetitive purpose or intent of the defendant.<sup>218</sup> The plaintiffs sued United Mine Workers and large coal operators for successfully lobbying the Secretary of Labor to establish a minimum wage in the industry that made it difficult for smaller companies to compete.<sup>219</sup> The Court stated that even if the sole purpose of this petitioning activity was to eliminate the competition, “efforts to influence public officials do not violate the antitrust laws.”<sup>220</sup> This case reaffirmed that petitioning activity aimed at executive branches of the government (as opposed to the legislative focus of *Noerr*) is protected by the First Amendment.

The right to petition has been used to escape liability in contexts other than antitrust suits. Black residents who boycotted white merchants in an effort to focus the attention of elected officials on issues of racial equality relied on their First Amendment right to petition. The white merchants sued to recover economic losses and obtain an injunction to end the boycott. The Court held that the activity was protected by the First Amendment, including the Right to Petition Clause.<sup>221</sup>

The right to petition protects individuals seeking access to the courts and access to the aid of law enforcement officers.<sup>222</sup> In *California Motor Transport Co. v. Trucking Unlimited*, the Court stated that “the right to peti-

215. *Id.* at 135.

216. *Id.* at 137–38. However, the *Noerr-Pennington* doctrine protection for petitioning activity has a “sham exception” for activity that is a “mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.” *Id.* at 144.

217. 381 U.S. 657 (1965).

218. See *id.* at 669 (“Nothing could be clearer from the Court’s opinion that the anticompetitive purpose did not illegalize the conduct there involved.”).

219. *Id.* at 660.

220. *Id.* at 670.

221. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (“Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protections under the First and Fourteenth Amendments.”). In another case that invoked the *Noerr-Pennington* doctrine outside the antitrust context, the Sixth Circuit held that an individual’s petition to the school board for removal of the school principal was protected by the First Amendment right to free speech and freedom to petition the government. *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292, 297 (6th Cir. 1992).

222. See Lapidus, *supra* note 87, at 383 (“Further, where a woman has sought police assistance or obtained an order of protection and these actions led to the eviction, she may

tion extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.”<sup>223</sup> This case expanded the *Noerr-Pennington* doctrine to administrative and adjudicative proceedings. Two lower court decisions applied the right to petition the government to accessing assistance from law enforcement agencies. The Fourth Circuit, in *Ottensmeyer v. Chesapeake & Potomac Telephone Co. of Maryland*, held that the right to petition included defendants’ activities of reporting suspicious or illegal activity to law enforcement officials.<sup>224</sup> In *Forro Precision, Inc. v. International Business Machines Corp.*, the Ninth Circuit articulated the important policies behind their holding that the right to petition must include access to the aid of law enforcement officials.<sup>225</sup> While acknowledging that an approach to police for aid is not similar to the political activity protected in other right to petition cases, the right was necessary to protect the “free flow of information to the police.”<sup>226</sup> The court recognized that, in order for the police to be effective, citizens must not be discouraged from providing information regarding criminal activities.<sup>227</sup> The courts in both cases were concerned that exposing people to financial penalties based solely on reporting activities to law enforcement would have a “chilling effect” on other people’s willingness to report criminal activity to the police.

Plaintiffs could argue that chronic nuisance laws restrict battered women’s First Amendment right to petition the government. The theory would be that chronic nuisance laws expose victims to financial liability for petitioning activity, in violation of the *Noerr-Pennington* doctrine as applied to law enforcement activities. The right-to-petition argument would apply not only to battered women who are actually cited under the chronic nuisance laws. Because of the courts’ concern with a chilling effect on petitioning activity, the argument would also apply to women who become wary of seeking police service for fear of liability under chronic nuisance laws. In addition to penalizing victims financially, either by forcing them to reimburse the city for police service themselves or subjecting them to eviction, the chronic nuisance laws have a chilling effect that could prevent victims from reporting domestic violence, which usually occurs in their homes.<sup>228</sup> This is the exact policy concern behind the decisions holding that the First Amendment protects access to law enforcement agencies.

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be able to raise a First Amendment claim under the right to petition the government clause.”).

223. 404 U.S. 508, 510 (1972).

224. 756 F.2d 986, 994 (4th Cir. 1985).

225. 673 F.2d 1045, 1060 (9th Cir. 1982) (“However, we think that the public policies served by ensuring the free flow of information to the police, although somewhat different than those served by *Noerr-Pennington*, are equally strong.”).

226. *Id.*

227. *Id.*

228. See *supra* Part II.

A potential problem with this theory is the argument that mere payment for police services might not abridge the right to petition the government in the required sense. Those defending against a right to petition theory might say that the burden is slight compared with the governmental objectives of conserving resources to make sure that police services are available to all people in need and creating incentives for people to minimize nuisance activities on their property.

However, the plain meaning of the word abridge is “to reduce in scope” or “diminish.”<sup>229</sup> This does not require that the police not respond at all, only that the police diminish a victim’s ability to report her victimization to the police. Even though a victim may still have access to the police in chronic nuisance jurisdictions, the devastating consequences the ordinances impose severely diminish her ability to report crime in the home.

### C. *Legislative Reform Proposals*

One potentially effective way to prevent these laws from being applied to domestic violence offenses and therefore discriminatorily impacting women is through legislative reform. One way cities attempted to create a sense of fairness among property owners subject to chronic nuisance laws was to decide not to fine the owner for police activity based on the owners’ or residents’ calls for service.<sup>230</sup> This solution has proven insufficient, since it fails to protect victims from being charged or evicted based on other people’s calls to report her victimization (such as neighbors and family). In addition, in Milwaukee, the jurisdiction that widely publicized this rule, the chronic nuisance codes were still applied to victims of domestic violence.<sup>231</sup>

Several states have antidiscrimination laws that would protect the rights of battered women against discrimination under certain applications of the chronic nuisance codes. However, most of it is not comprehensive enough to cover all applications of chronic nuisance codes to victims of domestic violence in all types of housing. For example, Washington has a state law that provides substantive protections similar to the housing protections in VAWA. In Washington, a landlord may not “terminate a tenancy, fail to renew a tenancy, or refuse to enter into a rental agreement based on a tenant’s or household member’s status as a

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229. Miriam-Webster’s Collegiate Dictionary: Deluxe Edition 5 (1998).

230. See, e.g., Green Bay, Wis., Code § 28.402 (2006), available at [http://www.ci.green-bay.wi.us/geninfo/law/law\\_ordinance.html](http://www.ci.green-bay.wi.us/geninfo/law/law_ordinance.html) (on file with the *Columbia Law Review*) (stating that chronic nuisance tally “shall never count nuisance activities that were reported by the owner of the premises”); City of Cincinnati Police Dep’t, CPD Procedure Governing Chronic Nuisance Premises Ordinance Enforcement, *supra* note 36, at 2 (explaining that “calls for service made by the owners or operators of multi-family premises demonstrate their commitment to abate nuisance activities on their premises and will not be included as nuisance activity”).

231. See Weed, *supra* note 70, at 2 (stating that “battery, . . . family trouble, and fights” were among common calls that triggered nuisance liability).

victim of domestic violence.”<sup>232</sup> Unlike VAWA, Washington’s statute covers all tenants, not just those living in assisted housing. Other state laws focus on the housing rights of battered women facing eviction based on their status as victims. In New Mexico and Colorado, intimate partner violence is recognized as a defense in eviction proceedings based on criminal or dangerous activity on the premises.<sup>233</sup> Both Rhode Island and Wisconsin state laws prohibit termination of tenancy based on the tenant’s domestic violence status.<sup>234</sup> These types of laws would protect victims of domestic violence in rented housing from eviction or denials to rent motivated by the chronic nuisance codes, but would not prevent a city from imposing chronic nuisance liability on a woman who lived in nonrental housing. In addition, laws that protect only against eviction without also covering refusal to rent do not protect victims of violence who are denied tenancies in chronic nuisance jurisdictions by landlords who are weary of having to pay for police services. These antidiscrimination laws, however, do illustrate a public policy on the part of the state legislature to protect battered women’s right to access housing that is contravened if chronic nuisance laws are applied to domestic violence calls in those states.

Some states have codified a tenant’s right to access police services. Arizona law invalidates any lease provision waiving or limiting a tenant’s right to summon a police officer.<sup>235</sup> Texas law states that a “landlord may not prohibit or limit a residential tenant’s right to summon police or other emergency assistance in response to family violence; or impose monetary or other penalties on a tenant who summons” such assistance.<sup>236</sup> Colorado and Minnesota have similar provisions.<sup>237</sup> Like the antidiscrimination laws, these state laws protect victims in rented housing

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232. H.B. 1645m, 58th Leg., 2004 Reg. Sess. (Wash. 2004) (stating that tenant’s status as domestic violence victim is not relevant to deciding whether to rent to tenant, and that landlord cannot terminate, refuse to renew, or refuse to enter rental agreement with tenant or applicant based on status as victim).

233. N.M. Stat. § 47-8-33(J) (2007); see also Col. Rev. Stat. Ann. § 13-40-107.5(5)(b)(I) (2004). The New Mexico law allows a landlord to evict a tenant “[i]f the resident knowingly commits or consents to any other person . . . knowingly committing a substantial violation.” N.M. Stat. § 47-8-33(I). However, the law creates a defense in such eviction cases for victims facing eviction for acts of domestic violence on the premises. This provision also allows the court discretion to evict the batterer while allowing the rest of the family to remain. *Id.* § 47-8-33(J).

234. See R.I. Gen. Laws §§ 34-37-1, -2, -2.4, -3, -4 (protecting tenants from housing discrimination based on status as victim of intimate partner violence); Wis. Stat. Ann. § 106.50 (5m)(d) (West 2007) (stating that although housing is not required to be made available to people whose tenancy poses a threat to others, that claim cannot be based on tenant being domestic abuse victim).

235. See Ariz. Rev. Stat. Ann. § 33-1315 (2007) (including agreements to waive or limit right of tenant or any other person to summon police officer as prohibited provisions in rental agreements).

236. Tex. Prop. Code Ann. § 92.015 (2006).

237. Col. Rev. Stat. Ann. § 38-12-402 (providing that landlords may not include rental provisions authorizing eviction or penalties on “residential tenant” for calling police in

from application of the chronic nuisance law, but not victims in nonrental housing. Localities in states with these types of laws should take note of the state legislature's determination that there is value in protecting a person's unfettered ability to summon the police to their home in times of danger.

Both the antidiscrimination model and the right to summon police service model could provide the bases for similar challenges as under VAWA, where a landlord cannot comply with chronic nuisance laws without violating these state laws. This dichotomy would subject landlords to automatic payment of police services for their tenants. Such an effect could lead to landlords screening potential tenants for domestic violence status and rejecting applications from women who have been victimized in the past.

While state legislation protecting victims of domestic violence from housing discrimination and codifying tenants' rights to call police are important since they provide protection in contexts other than chronic nuisance codes, the most effective legislative reform protecting victims of abuse from liability specific to chronic nuisance codes was passed in Phillipsburg, New Jersey. Phillipsburg passed a chronic nuisance law on March 1, 2005. On May 17, 2005, the law was amended to include the following provision:

This chapter is intended to address chronic police calls arising from public disturbances and nuisances recurring in the same location, including, but in no way limited to, excessively loud music or parties, public alcohol consumption, late night noise, chronic dog barking, etc. This chapter is not intended and shall not be interpreted to cover police calls related to domestic violence, child abuse or any other significant form of criminal activity.<sup>238</sup>

Inserting language that provides exemptions from chronic nuisance codes for victims of domestic violence still allows localities to recover the cost of police services to homes based on complaints of loud parties, drug dealing, and other nuisance activities without endangering women and their children. This reform protects victims in all types of housing, not just rental housing or federally assisted housing.

#### CONCLUSION

Chronic nuisance codes, when applied to victims of intimate partner abuse, constitute a huge regression in the fight to remove the stigma and

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response to domestic violence); Minn. Stat. Ann. § 504B.205 (2001) (protecting tenant's "right to call for police or emergency assistance in response to domestic abuse").

238. Phillipsburg, N.J., Code ch. 441-1(B) (adopted Mar. 1, 2005) available at [http://www.e-codes.generalcode.com/codebook\\_frameset.asp?t=ws&cb=0098\\_A](http://www.e-codes.generalcode.com/codebook_frameset.asp?t=ws&cb=0098_A) (on file with the *Columbia Law Review*). Since its passage, the Phillipsburg ordinance has been used once, to fine a commercial "liquor establishment" in December, 2005. Telephone Interview with Joseph Hriczak, *supra* note 36.

shame from being a victim of domestic violence. These laws institutionalize victim-blaming in the face of increasingly progressive state and federal legislation protecting victims of abuse.

This Note has attempted to review potential statutory and constitutional challenges to the use of chronic nuisance codes in intimate partner abuse and identify the standards that would be applied and issues that could arise with each potential challenge. Certain features of the Fair Housing Act (most notably the liberal standing requirements and the ability to prove discrimination based on disparate impact) make it more likely to support a successful challenge than other potential claims.

There are two more innovative claims available in chronic nuisance suits of this nature. First, the discriminatory provision of municipal services claim using a disparate impact analysis under the Fair Housing Act would be fairly novel. Second, the First Amendment Right to Petition guarantees also provide a fresh take on chronic nuisance claims. It is difficult to identify the potential rulings that would result from such claims since the rights afforded under each are not well established or clearly defined.

Legislative reforms also present a significant opportunity to protect the rights of victims of abuse in chronic nuisance jurisdictions. Amendments to chronic nuisance laws ensuring that they will not be applied to domestic violence cases would allow cities to use the laws to address issues such as loud parties and drug dealing while preventing the chronic nuisance codes from re-victimizing people in need of police services.

It is easy to empathize with cities' concerns over the rising costs of administration and ever increasing burdens on their resources. The frustration of sending police officers to the same properties time and time again is understandable. Chronic nuisance codes are a creative way for the cities to recoup some of their expenses and discourage certain nuisance activity, which would further reduce their response costs. However, cities go too far in applying these laws to serious crimes such as domestic violence. Victims of abuse are unable to control the violence perpetrated against them, and so the system of incentives these laws attempt to provide simply breaks down. The government, and police departments in particular, have made a serious effort in recent years to provide a better, more effective response to acts of domestic violence. Applying chronic nuisance laws to victims threatens to undo all the good work that has been done and has yet to be done to empower victims and prevent violence in the home.