

Using HUD's New Guidance about Fair Housing to Keep Victims Safe

Nuisance Abatement and Crime-Free Housing
Ordinances: The Impact on Families that
Experience Domestic Violence

October 20, 2016



U.S. Department of Justice
OVW
Office on Violence Against Women
Working Together to End the Violence

Agenda

- Welcome: **Allison Randall**, Chief of Staff, OVW
- **Sandra Park**, Senior Attorney, ACLU Women's Rights Project
- **Kathleen Pennington**, Assistant General Counsel for Fair Housing Enforcement, HUD
- **Lynn Grosso**, Director of Enforcement, Office of Fair Housing and Equal Opportunity, HUD



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How Local Nuisance Ordinances and Crime Free Leases Undermine Communities

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www.aclu.org/notanuisance

October 2016

Please contact spark@aclu.org prior to any re-use or adaptation



Norristown, Pennsylvania



“If I called the police to get him out of my house, I’d get evicted. If I physically tried to remove him, somebody would call 911 and I’d be evicted.” -Lakisha Briggs

Photo credit: Jessica Kourkounis for New York Times

Typical Nuisance Ordinances

- ❑ Target calls for police service or any criminal activity occurring at property
- ❑ Designate rental property as nuisance – no allowance for crime victims or need for emergency aid
- ❑ Penalties include criminal and civil fines, revocation of rental permit, condemnation unless landlord “abates” or evicts
- ❑ No notice to or process for tenants

Typical Crime-Free Leases

- ❑ Permit eviction upon commission of any one instance of criminal activity
- ❑ No exception for crime victims
- ❑ Do not require conviction
- ❑ Some cities mandate use, others incentivize

Surprise, Arizona ordinance

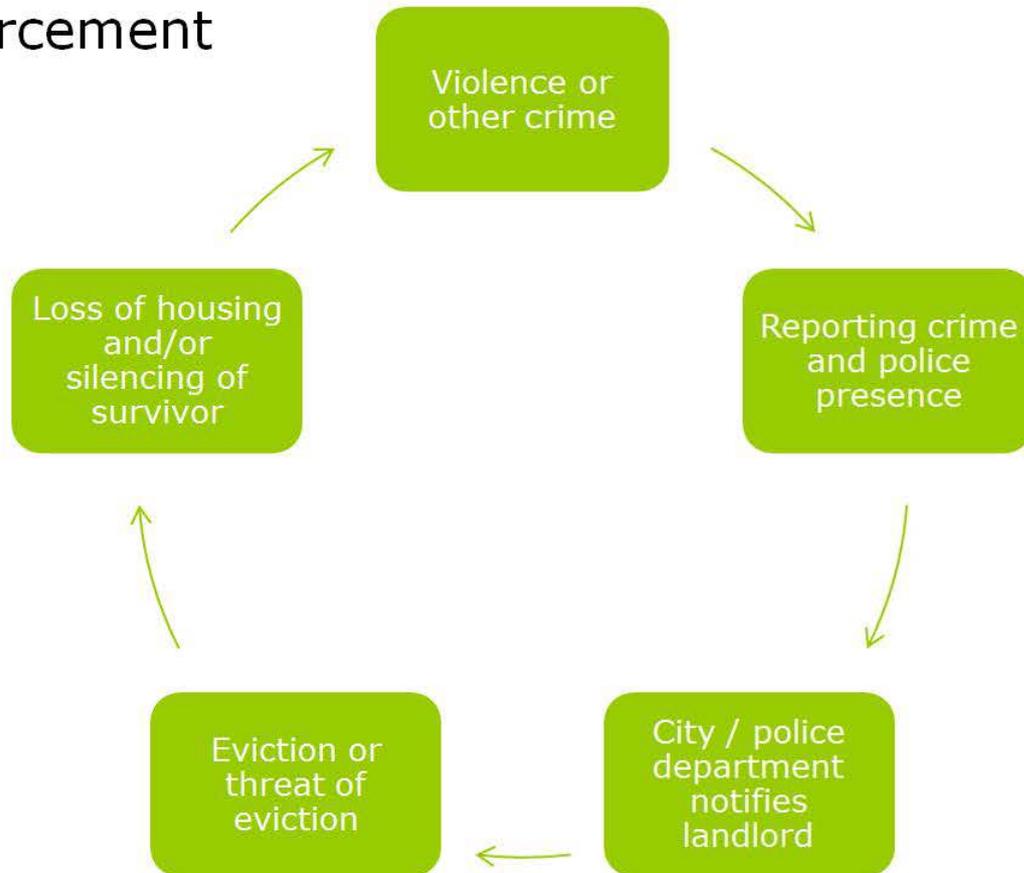
- Prohibited landlords from renting where:
 - Four or more calls for police service to the same address within a 30-day period when calls relate to commission of crime or report criminal activity; or
 - Commission of any two of more crimes

- Required use of crime-free lease:
 - Eviction based on any single criminal activity

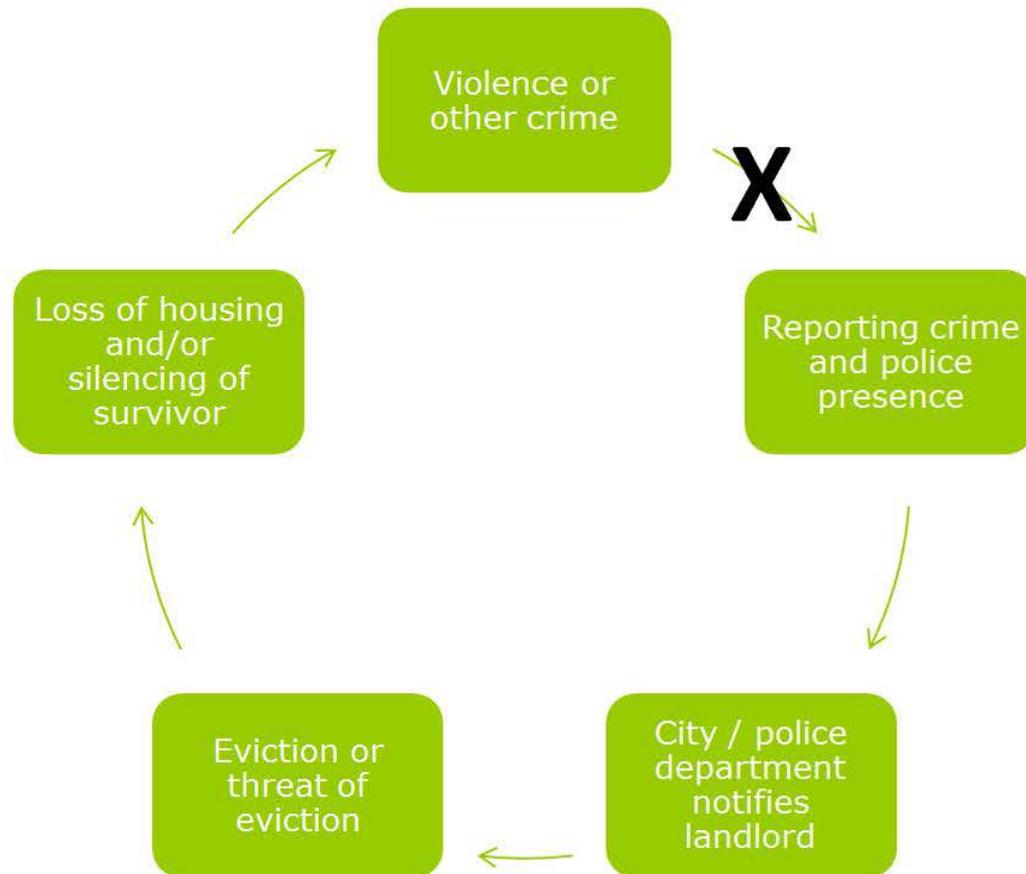
- Enforced by Police Department

Who Is Harmed?

- Tenants who seek or need emergency or police assistance
- Landlords
- Law enforcement



Who Is Harmed?



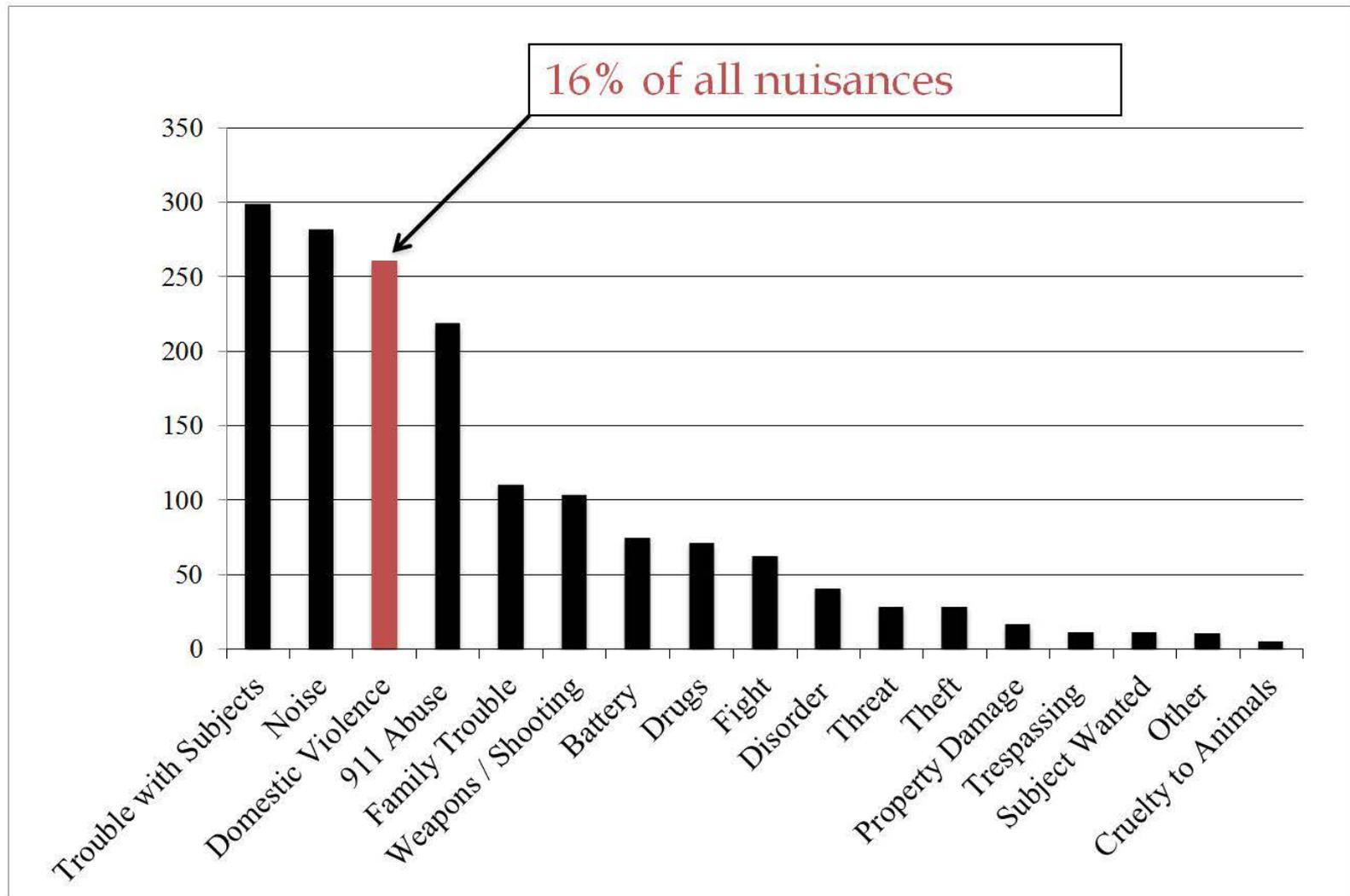
Milwaukee, WI

Matthew Desmond & Nicol Valdez,
Unpolicing the Urban Poor

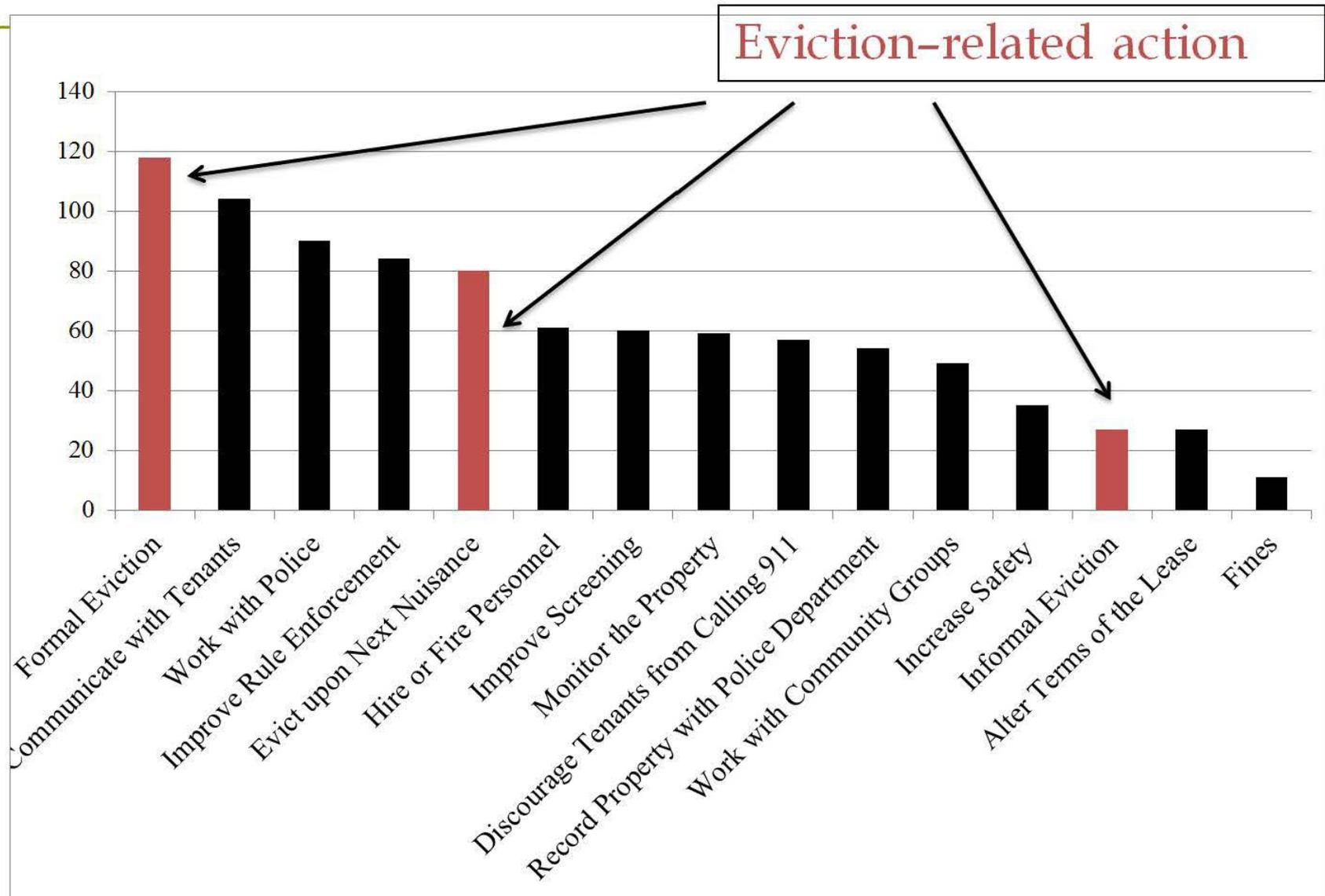
Racial disparity in the proportion of nuisance eligible properties that received citations:

- White neighborhoods: 1 in 41
- Hispanic neighborhoods: 1 in 54
- Black neighborhoods: 1 in 16

Top 20 Nuisance Activities, Milwaukee 2008 - 2009



Property Owners' Abatement Strategies



Domestic violence victims held responsible

In the majority of cases landlords evicted (or threatened with eviction) battered women alone.

“First, we are evicting Sheila M, the caller for numerous help from police,” one landlord wrote to the MPD. “She has been beaten by her ‘man’ who kicks in doors and goes to jail for 1 or 2 days. ... We suggested she obtain a gun and kill him in self-defense, but evidently she hasn’t. Therefore, we are evicting her.”

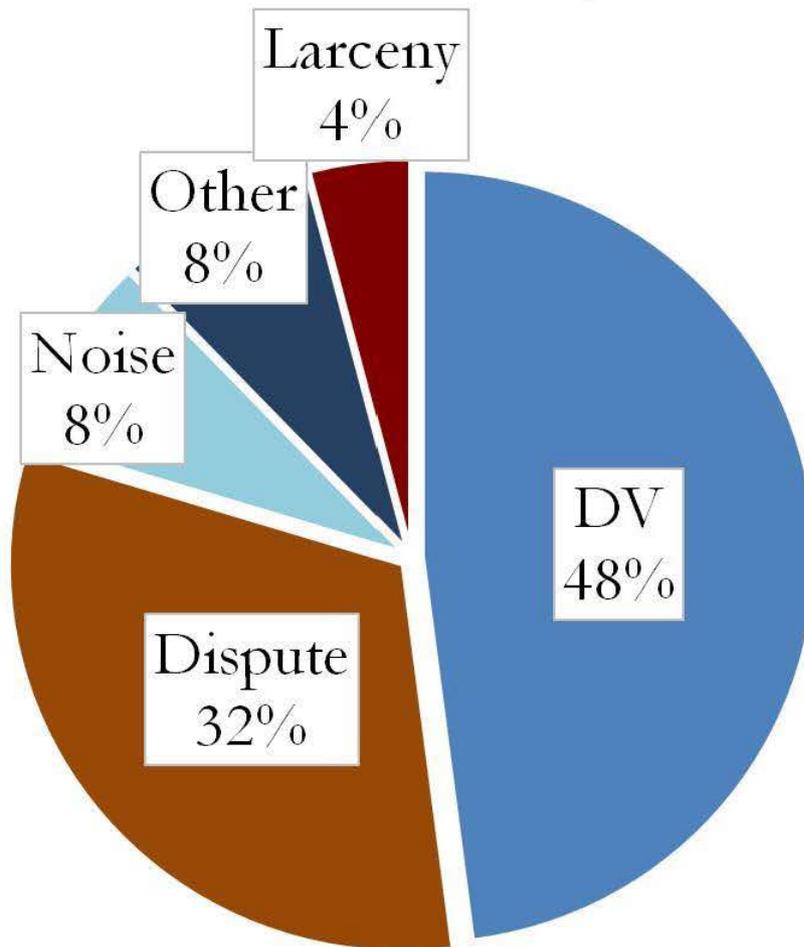
Silenced: How Nuisance Ordinances Punish Crime Victims in New York (ACLU & SSRC 2015)

Binghamton Police Incidents Ranked by Percentage of Points Received

INCIDENT TYPE	NUMBER OF INCIDENTS	PERCENTAGE OF INCIDENTS	PERCENTAGE OF INCIDENTS THAT RECEIVED POINTS	PERCENTAGE OF POINTS
Domestic Violence	71	13%	21%	38%
Dispute	130	24%	24%	22%
Other	208	39%	16%	17%
Noise	77	14%	29%	12%
Drugs	15	3%	6%	7%
Larceny	28	5%	2%	2%
Trash	5	1%	2%	1%
Fire	1	<1%	1%	1%
TOTAL	535	100%	101%*	100%

*Silenced: How Nuisance Ordinances Punish
Crime Victims in New York* (ACLU & SSRC 2015)

Fulton Nuisance Incidents by Incident Type



St. Louis, MO

- ❑ Two studies conducted by Prof. Gretchen Arnold, St. Louis University
- ❑ Both studies conclude ordinance does harm:
 - women's access to housing, current and long-term
 - ability to call 911
 - increases vulnerability to violence
 - triggers physical and mental health problems
 - increases abuser's power over victim
- ❑ Law enforcement personnel don't see these effects.

Impact

- ❑ Silences crime victims and threatens safety
- ❑ Housing insecurity and/or eviction – double victimization
- ❑ Particularly harms domestic violence survivors, people with disabilities
- ❑ Undermines effective law enforcement
- ❑ Empowers perpetrators

Legal Analysis

- Constitution:
 - 1st Amendment right to petition
 - Due process and equal protection
 - Search and seizure
- Fair Housing Act– sex, race, disability, etc.
 - * new HUD guidance
- Violence Against Women Act
- Americans with Disabilities Act

Cases brought by Tenants

- *Grape v. East Rochester, NY* (W.D.N.Y.)
- *Briggs v. Norristown, PA* (E.D. Pa.)
- *Markham v. Surprise, AZ* (D. Az.)
- *Victor Valley Family Resource Center v. Hesperia, CA* (C.D. Cal.) – pending on behalf of transitional housing provider and people on probation; reentry

Local and State Advocacy

- ❑ Local advocacy on proposed or existing ordinances
- ❑ Domestic violence carve-outs are insufficient
- ❑ Use the affirmatively furthering fair housing process to assess impact
- ❑ State laws preempting local ordinances
 - IA, PA, MN: broadly protects right to call for emergency assistance
 - IL and CA: more limited protections
 - Bill pending in NY

Kathleen Pennington
Assistant General Counsel for Fair
Housing Enforcement, HUD

Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances

**Against Victims of
Domestic Violence, Other Crime Victims, and
Others Who Require Police or Emergency Services**

Kathleen Pennington
Assistant General Counsel for Fair Housing Enforcement, HUD

Discussion of HUD's Fair Housing Act Administrative Complaint Process

Gordon Patterson, Senior Advisor
Office of Fair Housing and Equal Opportunity, HUD

Fair Housing Act Standards and Nuisance Ordinances

- Overview

- OGC Guidance issued on September 13, 2016

<http://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf>

- The Fair Housing Act prohibits discrimination in housing and housing-related transactions because of race, color, religion, sex, disability, familial status or national origin.
- The Guidance explains how the **discriminatory effects** and **disparate treatment** methods of proof apply in Fair Housing Act cases alleging that nuisance or crime-free housing ordinances discriminate because of a protected characteristic.

Fair Housing Act Standards and Nuisance Ordinances

- **Overview**

- The Guidance **does not create new standards** or impose new requirements that do not already exist under the Act.
- The Act **does not prohibit** state or local governments from **addressing nuisances** that occur on residential properties.
- The Act does prohibit them from addressing nuisances in a manner that discriminates because of a protected characteristic.
- The Guidance focuses on victims of domestic violence, but the principles apply equally to other crime victims and others who require police or emergency services.

Fair Housing Act Standards and Nuisance Ordinances

- **Coverage:**

- **Enactment or enforcement** of nuisance or crime-free housing ordinances and related policies or practices.
- State and local governments, public and private housing providers, public housing agencies and other government-assisted housing.
 - Guidance focuses on **government actions**, but the principles apply to housing providers too.
- **Applies to rental and owner-occupied housing.**
 - Guidance focuses **on rental housing**.

Fair Housing Act Standards and Nuisance Ordinances

- **Nuisance Ordinances**

- Label conduct associated with a property—whether by resident, guest, other person—a “nuisance” and **require or incentivize the landlord &/or homeowner to abate the nuisance** under threat of various penalties.
- State and local governments use a variety of terms to describe the types of ordinances addressed by the guidance, including: **“nuisance,” “chronic nuisance,” “crime-free,” or “disorderly behavior.”**
- **Unknown number nationwide:** At least hundreds of nuisance ordinances across states and localities.

Fair Housing Act Standards and Nuisance Ordinances

- **Crime-free Ordinances and Lease Addenda**
 - **Ordinances require or encourage housing providers to evict tenants because of alleged criminal activity**
 - Regardless of whether tenant was victim of criminal activity, including domestic violence.
 - Regardless of where the alleged criminal activity occurred.
 - Government policies or practices may also encourage or incentivize housing providers to **use lease addenda/provisions that permit eviction** based on an arrest or even on assertions of criminal activity.

Fair Housing Act Standards and Nuisance Ordinances

- **Guidance focuses on Domestic Violence Victims**
 - Domestic Violence is **not a protected class** under the Act
 - But domestic violence victims **may be protected because of their sex or another protected characteristic.**
 - Some ordinances define domestic violence incidents as nuisances **regardless of whether resident is victim or perpetrator.**
 - In others, domestic violence incidents not specifically defined as nuisances, but may still be categorized as such because the **ordinances broadly define nuisance activity** as violation of any federal, state or local law, or conduct such as:
 - **disturbing the peace, excessive noise, disorderly conduct, or calls for emergency services** that exceed a specified number within a given timeframe.

Fair Housing Act Standards and Nuisance Ordinances

- **Two Methods of Proof**

- **Discriminatory Effects**

- Locality violates the Act if nuisance or crime-free housing ordinance or related policies or practices have an unjustified discriminatory effect, even when the locality had no intent to discriminate.
 - Assessed under a three-step, burden-shifting standard requiring a fact-specific analysis.

- **Disparate Treatment**

- Locality intentionally violates the Act when it:
 - Enacts a nuisance ordinance or crime-free housing ordinance directed at protected class(es).
 - Selectively enforces a nuisance or crime-free housing ordinance against protected class(es).

Fair Housing Act Standards and Nuisance Ordinances

- **Discriminatory Effects Liability: Burden-Shifting Analysis**

24 C.F.R. § 100.500

- **Step 1: Disparate Impact**

Plaintiff must show that challenged practice causes or will cause a disparate impact on a group of persons because of a protected characteristic.

- **Step 2: Local Government's Justification**

Defendant must show that challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the defendant.

- **Step 3: Less Discriminatory Alternative**

Plaintiff may still prevail by showing defendant's interest(s) could be served by another practice that has a less discriminatory effect.

Fair Housing Act Standards and Nuisance Ordinances

- **Discriminatory Effects Liability: Step 1**

- Plaintiff must show that the ordinance or related policy or practice caused or predictably will cause a disparate impact on members of protected class(es).
- **State or local statistics** should be used to greatest extent feasible.
- National statistics may be relevant and appropriate.
 - **On average, women comprise 80% of all domestic violence victims each year, which may provide grounds for HUD to investigate allegations that the **adverse effects of a nuisance ordinance fall more heavily on women.****
- **Other evidence:** resident data and files, demographic data, city and police records including data on enforcement of nuisance or crime-free ordinances, citations, correspondence between housing providers and city officials, and court records regarding nuisance abatement.

Fair Housing Act Standards and Nuisance Ordinances

- **Discriminatory Effects Liability: Step 2**
 - Defendant must show the challenged practice is **necessary to achieve one or more substantial, legitimate, nondiscriminatory interests**.
 - “Substantial”
 - a **core interest** of the organization that has a **direct relationship** to the function of that organization.
 - “Legitimate”
 - local government’s **justification must be genuine** and not false or fabricated.
 - Justification cannot be based on stereotypes or speculation; must be based on evidence.

Fair Housing Act Standards and Nuisance Ordinances

- **Discriminatory Effects Liability: Step 2**
 - Local government has difficult burden meeting step 2 if it:
 - **Cuts off access to emergency services** for those in grave need of such services, including victims of domestic violence or other crimes, potentially endangering their lives, safety and security.
 - Requires or encourages housing providers to **evict victims** of domestic violence or other crimes or others in need of emergency services.

Fair Housing Act Standards and Nuisance Ordinances

- **Discriminatory Effects Liability: Step 3**
 - Plaintiff may still prevail by showing defendant's interest(s) could be **served by another practice that has a less discriminatory effect.**
 - Repeal or amend ordinance, policy, or practice.
 - Exempting domestic violence victims from ordinance's coverage is likely insufficient because police and other emergency service providers **may incorrectly categorize the call** as property damage, disturbing the peace or another type of nuisance conduct.

Fair Housing Act Standards and Nuisance Ordinances

- **Disparate Treatment Liability**

- Local government **intentionally** discriminates when it enacts a nuisance ordinance for **discriminatory reasons** or **selectively enforces** a nuisance ordinance based on a protected characteristic.
- Establish using **direct** or **circumstantial** evidence
 - **Circumstantial evidence**
 - Factors in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)
 - Shifting burdens in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

Fair Housing Act Standards and Nuisance Ordinances

- **Disparate Treatment Liability**

- Using *Arlington Heights* factors to determine whether a **facially neutral ordinance** was enacted for discriminatory reasons:
 1. Impact of the ordinance at issue
 2. Historical background of the ordinance
 3. Specific sequence of events
 4. Departures from the normal procedural sequence
 5. Substantive departures
 6. Legislative or administrative record

Fair Housing Act Standards and Nuisance Ordinances

Disparate Treatment Liability

- Using *McDonnell Douglas* burden shifting to determine whether a **facially neutral ordinance** was **selectively enforced**. **Three steps:**
- **Step 1 – Plaintiff’s prima facie showing:**
 1. Plaintiff is member of a protected class;
 2. Defendant took action to **enforce nuisance ordinance against plaintiff** because of alleged nuisance conduct;
 3. Defendant **did not take action** to enforce nuisance ordinance **against a similarly-situated resident** not of plaintiff’s protected class for comparable conduct;
 4. Defendant **subjected plaintiff to adverse housing action as a result of the enforcement** of the nuisance ordinance.

Fair Housing Act Standards and Nuisance Ordinances

Disparate Treatment Liability

- Step 2
 - Defendant proffers **legitimate, non-discriminatory reason** for the adverse housing action.
- Step 3
 - Plaintiff may still prevail by showing proffered reason was **pretext** for unlawful discrimination.

Fair Housing Act Standards and Nuisance Ordinances

- **Crime-free Ordinances and Lease Addenda**

- HUD’s **Guidance on Application of Fair Housing Act Standards to Use of Criminal Records** may apply:

https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf

- Addresses how the discriminatory effects and disparate treatment methods of proof apply where a **housing provider justifies an adverse housing action** – such as a refusal to rent or renew a lease – **on an individual’s criminal history.**
- Arrest record is not proof of prior criminal conduct.
- Denying housing to persons on the basis of **arrests not resulting in conviction cannot be justified under step 2** (substantial, legitimate, nondiscriminatory interest”).

Fair Housing Act Standards and Nuisance Ordinances

- **Crime-free Ordinances and Lease Addenda**
 - **Blanket bans** on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – also **cannot meet step 2**.
 - Policy or practice that fails to consider the **nature, severity, and recency of criminal conduct** is unlikely to be proven necessary to serve a “substantial, legitimate, nondiscriminatory interest” of the provider.
 - Note – **exception** from discriminatory effects liability:
 - The Act does not prohibit conduct against a person because he has been convicted of the **illegal manufacture or distribution of a controlled substance** as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).

Fair Housing Act Standards and Nuisance Ordinances

- **Affirmatively Furthering Fair Housing**

42 U.S.C. § 3608(d), (e)(5); 80 Fed. Reg. 42271

- State and local governments receiving federal funds:
 - Must take meaningful action to overcome fair housing barriers and disparities in access to opportunity for protected classes.
 - Must certify they will affh as a condition of receiving federal funds.
 - Should assess their nuisance ordinances and **consider how these ordinances may affect access to housing and emergency services based on protected characteristics.**

Fair Housing Act Standards and Nuisance Ordinances

- **Affirmatively Furthering Fair Housing**

- One step a local government may take toward meeting its duty to affirmatively further fair housing is to **eliminate disparities by repealing a nuisance ordinance that requires or encourages evictions for use of emergency services**, including 911 calls, by domestic violence or other crime victims.
- For more information:
- <https://www.hudexchange.info/programs/affh/>.

Fair Housing Act Standards and Nuisance Ordinances

- **Violence Against Women Act (VAWA)**

42 U.S.C. § 14043e-11 (b)(3)(A)

- Housing providers who receive federal funding may also violate VAWA, which **prohibits them from denying “assistance, tenancy, or occupancy” to any person because of a domestic violence-related activity** committed by a household member, guest or “other person in control” of the tenant if the tenant or an “affiliated individual” is the victim.

Fair Housing Act Standards and Nuisance Ordinances

HUD's Fair Housing Administrative Complaint Process and Investigation Authority

- HUD's Office of Fair Housing and Equal Opportunity
- Accepts and investigates complaints of fair housing discrimination
- Broad authority to
 - collect documentary evidence (subpoena authority)
 - interview parties and witnesses
 - conciliate complaints
 - take enforcement action where discrimination is found.
- HUD shares authority under the Fair Housing Act with the Department of Justice to investigate potential pattern or practice discrimination

Fair Housing Act Standards and Nuisance Ordinances

What are the elements of a jurisdictional complaint?

- An injured Complainant and other aggrieved parties, if any
- A “covered” Respondent
- Timeliness
- Subject Matter

HUD’s intake personnel will work with a potential complainant to help develop a jurisdictional complaint.

Fair Housing Act Standards and Nuisance Ordinances

Who Can File a Complaint?

- The Act provides protection for “any aggrieved person”
 - An individual, including family members, who have been or will be injured
 - An organization that represents aggrieved persons
 - An organization that has been injured by an ordinance:
 - By diverting resources to combat the discriminatory conduct
 - By a frustration of its mission
 - An organization representing a membership which has been or will be injured

Can include a corporation, like a management or real estate company, **compelled** by a mandatory discriminatory policy or ordinance.

Fair Housing Act Standards and Nuisance Ordinances

Identifying Respondents

- The Act permits a complainant to file against a person or other entity:
 - An individual alleged to be engaged in discriminatory conduct
 - Corporation, Partnership, Association, etc.
 - Property owners, managers, etc. that implement discriminatory policies
 - Other entities can include state or local governments

Fair Housing Act Standards and Nuisance Ordinances

Subject Matter Jurisdiction

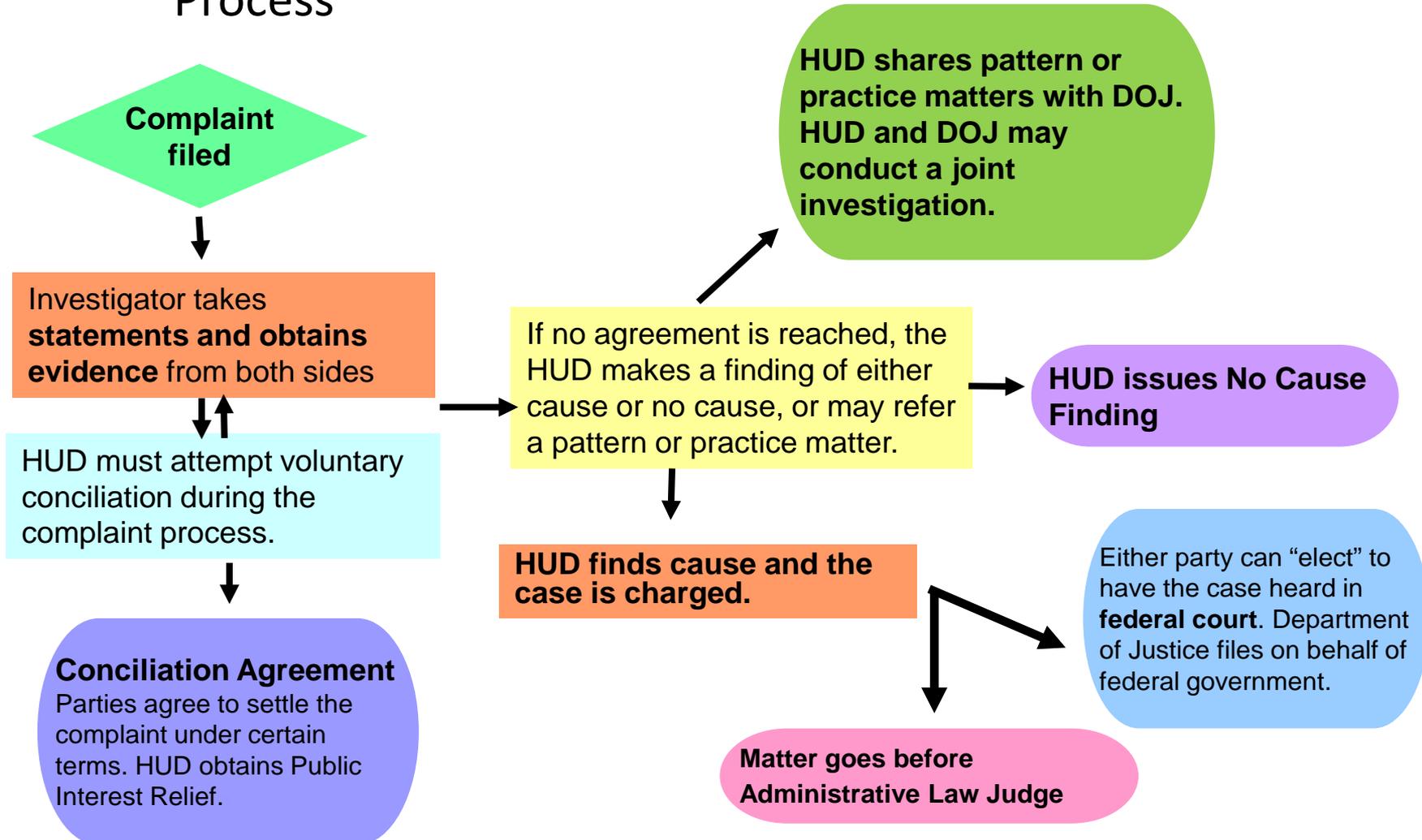
- A complaint must include a statement of fact which, if true, constitute a violation of the Act.
- If the complaint concerns a nuisance ordinance, it should describe how the local jurisdiction has violated the law by:
 - Enacting an ordinance which is discriminatory on its face,
 - Selectively enforcing an ordinance in a discriminatory manner against a protected class
 - Enacting or enforcing a “neutral” ordinance which has a discriminatory effect, even when consistently applied and regardless of intent
- Helpful information to include: identify witnesses, identify key dates of conduct, present data supporting a discriminatory effect, etc.

Fair Housing Act Standards and Nuisance Ordinances

- **Timeliness**

- A complaint must be filed within one year of the last discriminatory act
 - What about “continuing violations”?
 - What about multiple violations?
 - What if an ordinance has been in place for more than a year?

Fair Housing Complaint Process



Fair Housing Act Standards and Nuisance Ordinances

- **File HUD complaint**

- Toll-free call to 1-800-669-9777 or TTY 1-800-927-9275
- Complete the online complaint form available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/online-complaint
- Mail a completed complaint form or letter to:
 - Office of Fair Housing and Equal Opportunity
 - Department of Housing & Urban Development
 - 451 Seventh Street, S.W., Room 5204
 - Washington, DC 20410-2000

**United States Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section**

United States Department of Justice

Civil Rights Division

Housing and Civil Enforcement Section

- The Housing and Civil Enforcement Section of the Department of Justice's Civil Rights Division enforces the Fair Housing Act (FHA).
- The Department has jurisdiction to investigate claims and file suit when there is reason to believe that a defendant has engaged in a "pattern or practice" of discrimination or has engaged in discrimination against a group of persons that raises an issue of "general public importance" in violation of the FHA. Often, the Department's lawsuits allege that a defendant has done both.
- There is a different standard and procedure for bringing individual claims of discrimination under the FHA.

Pattern or Practice and/or Denial of Rights

Cases

- The courts have found a “pattern or practice” when the evidence establishes that the discriminatory actions were the defendant's regular practice, rather than an isolated instance. This does not mean that the Department has to prove that a defendant always discriminates or that a large number of people have been affected.
- A “**pattern or practice**” means that the defendant has a policy of discriminating, even if the policy is not always followed.
- Courts have held that the Attorney General has discretion to decide what constitutes an issue of “**general public importance**,” and the courts will not second-guess that decision. Thus, the Department can bring suit even when a discriminatory act has occurred only once, if it affects a group of persons and the Department believes that the discrimination raises an issue of general public importance.
- Cases involving **discriminatory land use and/or zoning ordinances** are often brought by the Department as pattern or practice cases.
- For more information, visit “A Pattern or Practice of Discrimination,” <https://www.justice.gov/crt/pattern-or-practice-discrimination>

Individual Claims of Housing Discrimination: What to do if you or someone you know is a victim of discrimination

- An individual who believes that he or she may have been the victim of housing discrimination on account of race, color, religion, sex, national origin, familial status, or disability may file a complaint with the Department of Housing and Urban Development (HUD).
 - HUD investigates each complaint, and if the complaint cannot be resolved through a conciliation process, HUD will determine whether there is reasonable cause to believe that the Act has been violated. When HUD makes this determination, it issues a written Determination of Reasonable Cause or No Reasonable Cause. If reasonable cause is found, HUD also prepares a Charge of Discrimination.
 - Within 30 days of the issuance of the charge, the complainant or the respondent (the party alleged to have discriminated) may choose to have the charge tried in federal court, otherwise the charge is tried in a HUD administrative law court.
 - If federal court is chosen, the case is filed by Department of Justice attorneys on the complainant's behalf.
- **Statute of limitations:** an individual must file the complaint with HUD or an equivalent state agency within one year of the incident believed to be housing discrimination.

Individual Claims of Housing Discrimination: What to do if you or someone you know is a victim of discrimination

- An individual may also file his or her own lawsuit in federal or state court.
 - **Statue of limitations:** an individually-filed lawsuit must be filed within two years of the incident believed to be housing discrimination.
- If there is possible criminal conduct, call local law enforcement.
- If there is information that suggests a “pattern or practice” of discrimination, an individual may call, email, or write DOJ directly:
 - Call: 1-800-896-7743
 - Email: fairhousing@usdoj.gov
 - U.S. Mail:
 - **U.S. Department of Justice**
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Housing and Civil Enforcement Section, NWB
Washington, D.C. 20530
(202) 514-4713
- For more information, visit:
 - “Individual Claims of Discrimination in Housing,” <https://www.justice.gov/crt/individual-claims-discrimination-housing>
 - “How to File a Complaint,” <https://www.justice.gov/crt/how-file-complaint#six>