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Life, Liberty, and Rental Property: Oakland's Nuisance Eviction Program

ETHAN SILVERSTEIN*

I. Introduction: The Eviction of Ruben Leal

On October 14, 2008, a team of Oakland Police officers executed a sealed search warrant on a small house in Oakland's Fruitvale neighborhood. During the raid, the officers claimed to have found a Glock model number twenty-two handgun, body armor, eight boxes of ammunition, two boxes of shotgun shells, a city of Oakland street sign, and a picture of Ruben Leal, at the time twenty years old, holding a revolver.¹

More than two months later, on December 22, 2008, Ruben Leal received a letter from Oakland's City Administrator's office.² This letter stated in part,

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1. California Public Records Act responsive documents, Oakland Police, BN 51-58. I will refer to the responsive documents from this public records act request as "California Public Records Act responsive documents, Oakland Police." The bates numbers ('BN') listed in citations refer to the bates numbers that I have assigned to the responsive documents. All documents are on file with the UC Hastings Journal of Crime and Punishment.

2. California Public Records Act responsive documents, Oakland City Attorney, BN 94-96, App. Ex. 1 (on file with *Hastings Journal of Crime and Punishment*). For simplicity, I will refer to the responsive documents from this Public Records Act request, as well as any other responsive documents produced by subsequent requests concerning the Nuisance Abatement Division as "California Public Records Act responsive documents, Oakland City Attorney." The bates numbers ('BN') listed in citations refer to the bates numbers that I have assigned to the responsive documents. All documents are on file with the *Hastings Journal of Crime and Punishment*.

Dear Tenant(s):

Oakland Municipal Code Chapter 8.23, the Nuisance Eviction Ordinance, is intended to expedite the removal of drug dealers and individuals committing narcotic-related, illegal weapons related, gang-related, violent crimes, or threats of violent crimes from residential and commercial property. The Oakland City Administrator's Office Nuisance Abatement Division (NAD) is assigned to pursue these matters. . . This letter is intended to inform you that the City has ordered your landlord to initiate and complete eviction proceedings against you.³

The owners of Leal's property received a similar letter⁴ informing them that they had been fined \$450 for allowing nuisance activity on their property.⁵ The letter further stated that the owners were required to take action to remove Ruben Leal within twenty-five days.⁶ If they failed to do so, the City asserted that it may take legal action against the property owners, who by statute, could be held responsible for the costs of the investigation as well as the City's attorney's legal fees.⁷

The demand to the property owners stated, "Oakland Police officers served and executed a valid search warrant for your tenant, Ruben Leal."⁸ This statement confused the property owners, as Ruben was not their tenant. Rather, he was their son.⁹ Ruben Leal lived with his parents and sister in their Fruitvale home.¹⁰ Both Ruben's notice and his "landlord's" notice were sent to the same address.¹¹ Ruben did not pay rent to his parents, nor did he have a lease.¹²

Ruben sought help from the East Bay Community Law Center, in Berkeley, California.¹³ A law student in the center's Housing Rights Clinic instructed Ruben to request a reconsideration of the City's order.¹⁴ Through a letter, Leal informed the Nuisance Abatement Division that he

3. *Id.*

4. *Id.* at BN 89-93.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Interview with Ruben Leal, in Oakland, Calif. (Mar. 10, 2019).

10. *Id.*

11. Oakland City Attorney, *supra* note 2, at BN 791, 795.

12. Interview with Ruben Leal, *supra* note 9.

13. *Id.*

14. *Id.*

was a dependent of his parents, the property owners.¹⁵ Ruben also informed the City that he was a full-time student who had nowhere else to live.¹⁶ Ruben's letter stated, "If I'm evicted I would most likely stop attending school because I would have no income and no place to stay."¹⁷ The City did not relent. In a letter to Ruben Leal, an assistant to the City Administrator stated,

As you probably know, many innocent people have been injured or killed due to the use of illegal firearms. While I believe that furthering your education is the best way to permanently improve your ability to avoid similar problems in the future, the fact that you are in school does not authorize you to break the law. As a young adult, you must take responsibility for your actions and their consequences. Your prior conviction put you on notice regarding your responsibility to dissociate yourself from firearms . . . Your request for reconsideration provides no information that would absolve you from your illegal possession of a firearm. Therefore, the City may continue to pursue its order to evict you to ensure that the illegal weapons related activity at this property ceases. I hope that you will be able to locate a suitable place to live where you may continue your studies and where you can function without resorting to illegal activity.¹⁸

On January 27, 2008, the City Administrator's office informed the Leal family that Ruben must be evicted, or the City "may declare your property a public nuisance."¹⁹ No criminal charges were ever filed against Leal in relation to the search of his parents' home.²⁰ The accusations against Ruben Leal were never litigated.²¹ Ruben Leal was the subject of

15. Oakland City Attorney, *supra* note 2, at BN 783-85.

16. *Id.*

17. *Id.*

18. Oakland City Attorney, BN 779-80. In Ruben Leal's request for reconsideration, he asserts that he was never arrested in connection with the search. *Id.* at 784. The City's letter states, "I understand the reason you were not arrested is that you were not home at the time of the search and that you were arrested later in the same case." *Id.* at 780. Ruben states that despite this claim, he was never arrested. E-mail from Ruben Leal, to Ethan Silverstein (Apr. 5, 2019, 11:35 PST) (on file with *Hastings Journal of Crime and Punishment*).

19. Oakland City Attorney, BN 777.

20. To this day, Ruben Leal has not seen the warrant that led to this raid, nor does he know what investigation it pertained to. Interview with Ruben Leal, *supra* note 9.

21. *Id.*

one of seventy-nine nuisance eviction orders issued by the city of Oakland's Nuisance Abatement Division between 2008 and 2016.²²

This paper analyzes the city of Oakland's use of evictions as a nuisance abatement and crime prevention tool. I argue that Oakland's use of evictions as a crime prevention tactic presents a dangerous confluence of housing insecurity and overly aggressive policing tactics, both of which are highly racialized. While I contend that these practices are regressive irrespective of their legal implications, I also argue that the city of Oakland violates the constitutional rights of its tenants by weaponizing the eviction process and its associated consequences under the guise of nuisance abatement. In making this argument, I begin with a brief history of state-mandated evictions in California. Then, I go on to summarize Oakland's nuisance eviction process. Following this summary, I contextually place Oakland's actions in a setting of aggressive, racialized policing, and systemic housing insecurity. Next, I present my preliminary findings in regard to Oakland's use of nuisance eviction orders between 2008 and 2016. Finally, I analyze the Fourteenth Amendment implications of Oakland's nuisance eviction actions.

II. Methodology and Limitations

In February of 2017, following rumors in the tenants' rights community concerning abuse of Oakland's Nuisance Eviction Ordinance, I filed a public records request with Oakland's City Administrator and City Attorney.²³ This request sought documentation concerning all nuisance eviction orders issued from the beginning of 2008 through the end of 2016.²⁴ Through the City Attorney's office, The City Administrator's office produced roughly 800 pages of eviction orders, addressed to tenants and landlords.²⁵ All of these eviction orders were for drug or weapon-related crimes.²⁶ According to these records, seventy-nine sets of notices were served on tenants and landlords in the years of 2008, 2009, 2011, 2015, and 2016.²⁷ The City contends that no nuisance eviction notices

22. The Nuisance Abatement Division is a division of the Oakland City Administrator's office. It works closely with the City Attorney's office. Oakland City Attorney, *supra* note 2; Oakland Municipal Code § 8.23.100 (2019).

23. Letter from Ethan Silverstein, to Oakland City Administrator's Office & Oakland City Attorney's Office (Feb. 23, 2017) (on file with *Hastings Journal of Crime and Punishment*).

24. Oakland City Attorney, *supra* note 2.

25. *Id.*

26. *Id.*

27. *Id.*

were served in 2010, 2012, and 2013.²⁸ This report is limited to examining the seventy-nine drug and gun-related eviction orders that occurred between 2008 and 2016.²⁹

While the City only produced records of gun and drug-related eviction orders, Oakland's use of evictions as a nuisance abatement tool is more widespread and involves more than drug and gun crimes.³⁰ However, it appears that when non-weapon or drug-related issues arose between 2008 and 2016, more generalized nuisance abatement notices were served.³¹ These notices, which are referred to as "notices to abate" did not explicitly demand eviction, only the abatement of nuisance.³² When asked about the lack of nuisance eviction notices in 2010, 2012, and 2013, an assistant to the City Administrator conceded that notices to abate served during these years may have ultimately required or resulted in tenants being evicted.³³ This tactic is authorized by Oakland's Nuisance Eviction Ordinance.³⁴ An internal nuisance abatement spreadsheet from the Nuisance Abatement Division confirms that tenants are sometimes evicted in response to notices to abate.³⁵

Following my public records request to the City Attorney and City

28. E-mail from Gregory Minor, Assistant to the City Administrator, to Ethan Silverstein (Apr 7, 2017, 16:02 PST) (on file with *Hastings Journal of Crime and Punishment*) (Minor states, "if there are no nuisance eviction notices for a particular year, that is most likely because none exist.").

29. For 2015 and 2016, the California Research Bureau reported a slightly different number of eviction orders. This could have been due to differences in accounting methods. See Anne Neville, Tom Negrete, Patrick Rogers, Tonya D. Lindsey, Carley Herron, *A Review of the Unlawful Detainer Program*, CAL. RESEARCH BUREAU (2016). https://www.library.ca.gov/Content/pdf/crb/reports/CRB_Unlawful_Detainer_Report_online.pdf.

30. E-mail from Gregory Minor, Assistant to the City Administrator, to Ethan Silverstein (May 5, 2017, 5:27 PST) (on file with *Hastings Journal of Crime and Punishment*). This e-mail contained an attachment entitled "NEU Matrix.2008 thru 2016.pdf." [hereinafter *NEU Matrix*]. This document consisted of a 77-page spreadsheet summarizing all city nuisance abatement actions between the beginning of 2008 and the end of 2016. This spreadsheet indicates that evictions sometimes occur as a result of generalized nuisance abatement orders.

31. *NEU Matrix*, e-mail attachment from Gregory Minor, Assistant to the City Administrator, to Ethan Silverstein (Apr. 7, 2017, 16:02 PST) (77-page spreadsheet summarizing all Oakland City nuisance abatement actions between the beginning of 2008 and the end of 2016) (on file with *Hastings Journal of Crime and Punishment*).

32. *Id.*

33. Telephone Interview with Gregory Minor, Assistant to the City Administrator (Apr. 7, 2017).

34. Oakland Municipal Code § 8.23.100(D)(2) (2019).

35. *NEU Matrix*, *supra* note 30. This document also supports Minor's claim that no explicit nuisance eviction orders were issued in 2010, 2012, and 2013. *Id.*

Administrator, I sent a second public records request to the Oakland Police.³⁶ Through this request, I sought every police report corresponding with the addresses and dates of the alleged nuisances cited in the Nuisance Abatement Division's eviction orders.³⁷ After failing to produce these documents for over a year, the Oakland Police produced roughly 900 pages of records.³⁸

Any statistics cited refer only to the seventy-nine drug and weapon-related nuisance eviction orders produced by the nuisance abatement division.³⁹ This report does not analyze any nuisance abatement orders that did not explicitly demand eviction in the initial notice. This report is not a professional statistical analysis and should not be relied upon as such.

I have chosen to not release any personally identifiable information concerning tenants without first receiving explicit consent. My hope is that these initial findings will lead to a more comprehensive review of how the city of Oakland, as well as other California cities, are utilizing their nuisance eviction powers.

III. State Mandated Evictions in California: A Brief History

In 1998, the state of California granted the city of Los Angeles a new crime-fighting tool—the Unlawful Detainer Pilot Program.⁴⁰ The program, created by Assembly Bill 1384, allowed Los Angeles' city attorney or city prosecutors, in five judicial districts within Los Angeles, to commence eviction actions in the name of “the people” against tenants accused of drug or weapon-related nuisances.⁴¹ The program was set to expire in three years.⁴² Prior to 1998, unlawful detainer (eviction) actions were available only to property owners.⁴³

Cities around California, inspired by Los Angeles' new crime-fighting

36. Letter from Ethan Silverstein, to Public Records Request Coordinator, Oakland Police Department (July 20, 2017) (on file with *Hastings Journal of Crime and Punishment*).

37. Oakland Police, *supra* note 1.

38. Oakland Police, *supra* note 1, at BN1-924. Following the Oakland Police Department's failure to comply with this request, I received pro-bono legal assistance from Greenfire Law in Berkeley, California.

39. Seventy-nine eviction orders were produced to me through my public records act. It is possible that there were more eviction orders which were not produced to me.

40. Cal. Civ. Code §§ 3485-86 (2019).

41. Rebecca E. Blanton, *Unlawful Detainer Pilot Program: Report to the California Legislature*, CALIFORNIA RESEARCH BUREAU, 7-8 (2009), https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1316&context=caldocs_agencies.

42. *Id.*

43. Cal. Civ. Proc. Code § 1161 *et seq* (2019).

tool, adopted their own local ordinances which mimicked the State's L.A. specific pilot program.⁴⁴ For example, in 1999, the city of Buena Park adopted the Narcotics and Gang-Related Crime Eviction Program.⁴⁵ Other California cities such as San Francisco, San Jose, Sacramento, Fresno, and San Diego have adopted more generalized nuisance property ordinances, that encourage landlords to evict "problem tenants" to avoid large fines.⁴⁶ In 2004, the city of Oakland adopted the Nuisance Eviction Ordinance.⁴⁷ Oakland's ordinance, mirroring the state's pilot program, created a similar process for evicting tenants allegedly engaged in nuisance activity.⁴⁸ However, lacking state approval, the city of Oakland could not bring an eviction action in the name of the people, as by statute, the eviction cause of action was reserved for landlords.⁴⁹ Instead, Oakland relied on threats of nuisance abatement lawsuits if landlords did not take prompt action to remove nuisance tenants.⁵⁰

As the city of Los Angeles continued to utilize the Unlawful Detainer Pilot Program, the state legislature added more cities to the experiment.⁵¹ Oakland became part of the program in 2014.⁵² One day after being added to the Pilot Program, Oakland expanded its local ordinance to include more nuisance activities, such as sex-work and gambling.⁵³ One group who formally opposed the 2014 expansion of the Unlawful Detainer Pilot Program was the National Rifle Association.⁵⁴ In a letter opposing the

44. *City Nuisance Property Ordinances*, The Policy Surveillance Program: A Law Atlas Project, <http://lawatlas.org/datasets/city-nuisance-property-ordinances> (last visited Apr. 1, 2019, 18:02 PST). The Policy Surveillance Program has created a detailed map of cities that have adopted nuisance property ordinances. *Id.*

45. Buena Park Municipal Code § 8.48 (2005); the Fourth Appellate District struck down this ordinance as an unconstitutional violation of procedural due process. *Cook v. City of Buena Park* 126 Cal. App. 4th 1, 9 (2005).

46. Policy Surveillance Program, *supra* note 44.

47. Oakland Municipal Code § 8.23.100 *et seq* (2019); for a timeline of Oakland's nuisance abatement legislation, see Karen Viscia, *Unlawful Detainer Pilot Program: Report To The California Legislature Under Health And Safety Code Section 11571.1 and Civil Code Code 3485*, ADMINISTRATIVE OFFICE OF THE COURTS, 6-8 (2009), https://www.courts.ca.gov/documents/unlawful_detainer_pilot.pdf.

48. Oakland Municipal Code § 8.23.100 *et seq* (2019).

49. Cal. Civ. Proc. Code § 1161 *et seq* (2019).

50. Oakland City Attorney, *supra* note 1.

51. Neville, *supra* note 29.

52. *Id.*

53. Kriston Capps, *Oakland Can Now Order Landlords to Evict Sex Workers*, CityLab (Oct. 22, 2014), <https://www.citylab.com/equity/2014/10/oakland-can-now-order-landlords-to-evict-sex-workers/381755/>.

54. *Id.*

program, The NRA's director of state and local affairs stated, "consider the consequences of evicting people for these and other minor firearm-related offenses. Those hit hardest by AB 2310 will undoubtedly be poor and urban residents of California who, out of necessity, tend to rent in disproportionately high numbers. AB 2310 would subject otherwise innocent member of these communities to eviction just for being arrested for a crime relating to firearms."⁵⁵

In September of 2018, the state legislature renewed the Unlawful Detainer Pilot Program, which will sunset in 2024.⁵⁶ In its present iteration, following a landlord's failure to remove a tenant, city attorneys and city prosecutors in Los Angeles, Long Beach, Sacramento, and Oakland may bring an eviction action on behalf of "the people" based on either drug or weapon-related nuisances.⁵⁷ No state assembly member or state senators voted against the renewal.⁵⁸

IV. Oakland's Nuisance Eviction Process

Oakland's nuisance eviction process starts with an alleged nuisance act, which is referred to the Nuisance Abatement Division. The Nuisance Abatement Division then issues a notice to both the tenant involved in the nuisance activity as well as their landlord. Following this notice, either side may request a reconsideration of the Nuisance Abatement Division's demand, or potentially a partial eviction targeting only the "offending tenant." If the tenant(s) or landlord is unable to resolve the matter with a reconsideration or partial eviction, the landlord must begin to take action to remove the tenant(s). Each part of this process raises concerns for tenants in Oakland.⁵⁹

55. *Id.*; Letter from Charles H. Cunningham, Director of State and Local Affairs, National Rifle Association, to Members of the Senate Judiciary Committee (June 19, 2014), available at http://www.calgunlaws.com/wp-content/uploads/2014/08/280001_NRA_s-Opposition-ltr.-re-AB-2310-Ridley-Thomas-and-Dickerson.pdf).

56. Assemb. B. 2930, 2018 Leg., (Cal. 2018).

57. Cal. Civ. Code §§ 3485-86 (2019).

58. *Votes: CA AB2930 2017-2018 Regular Session*, LegiScan, <https://legiscan.com/CA/votes/AB2930/2017> (last visited April 1, 2019).

59. Since 2014, Oakland has had the ability to evict a tenant in the name of "the people" following a landlord's failure to do so. The City did not issue any eviction orders in 2014. In 2015, 2016, and 2017, Oakland did not initiate any eviction actions against tenants in the name of "the people." While this tactic is available to Oakland, it does not appear to be a typical part of Oakland's nuisance eviction process. For this reason, it is not discussed in this section. Benjamin Tang, *A Review of the California Unlawful Detainer Pilot Program: 2018 Update*, CALIFORNIA RESEARCH BUREAU, 4 (Mar. 2018), https://www.library.ca.gov/Content/pdf/crb/reports/Unlawful_Detainer_2018_Report.pdf.

A. Nuisance Incident

The nuisance eviction process begins with a nuisance incident. The tenant need not be cited, arrested, or convicted of a criminal act.⁶⁰ Rather, the City must determine that an “Owner could prevail in an unlawful detainer proceeding against the tenant based on a preponderance of evidence that the Tenant is engaged in the illegal activities and that eviction under such grounds is permissible under the Just Cause for Eviction Ordinance (O.M.C. 8.22.300) and applicable state law.”⁶¹ While the 2004 version of Oakland’s Nuisance Eviction Ordinance only included drug, weapon, and gang-related crimes or threats of violence, Oakland’s ordinance was expanded in 2014 to include a litany of nuisance activities such as gambling and sex-work.⁶² If the City intends to utilize the Unlawful Detainer Pilot Program, an arrest or warrant is required. Crimes associated with sex work and gambling are not sufficient to trigger eviction through the Pilot Program.⁶³ The Unlawful Detainer Pilot Program also requires that weapon-related nuisance evictions be triggered by activities involving firearms or a “tear gas weapon.”⁶⁴ Oakland’s ordinance defines “weapons” as anything “commonly known as a blackjack, slungshot[sic], billy[sic], sandclub, sandbag, metal knuckles, dirk, dagger, pistol, or revolver, or any other firearm, any knife having a blade longer than five(5) inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club.”⁶⁵ In addition to authorizing eviction for possession of metal pipes and razors with unguarded blades, Oakland’s ordinance goes as far as to authorize eviction for “any crime” provided that the crime is alleged to be motivated by “gang membership” and the “perpetrator, victim, or intended victim is a known member of a gang.”⁶⁶

Between 2008 and 2016, roughly forty-six percent of Oakland’s eviction orders involved warrantless probation or parole searches carried out by the Oakland Police.⁶⁷ The percentage of nuisance eviction orders resulting from warrantless probation or parole searches was especially high in 2008, during which fifty-five percent of eviction orders cited

60. Oakland Municipal Code § 8.23.100(F)(1)(b) (2019).

61. *Id.*

62. Oakland Municipal Code § 8.23.100(D)(1) (2019); Capps, *supra* note 53.

63. Cal Civ. Code §§ 3485(a), 86(a) (2019). A warrant is not sufficient for drug crimes. The warrant requirement is vague and unclear what type of warrant is required. *Id.*

64. Cal. Civ. Code § 3485(c) (2019).

65. Oakland Municipal Code § 8.23.100(B)(24) (2019).

66. Oakland Municipal Code § 8.23.100(B)(6), (D)(1) (2019).

67. California Public Records Act responsive documents, Oakland Police, *supra* note 1.

drugs or weapons discovered through warrantless probation or parole searches.⁶⁸ In a statistical analysis of officer-initiated stops by the Oakland Police in 2013 and 2014, 93 percent of individuals who were searched during an officer-initiated stop due to probation or parole status were identified as being either black or Hispanic.⁶⁹

B. Discretionary Nuisance Referral

Following the commission of a nuisance act, news of the act must reach the Nuisance Abatement Division. This process is largely shrouded in mystery. While the City Administrator's website allows anyone to report a nuisance tenant, the city of Oakland has claimed in a document entitled *Public Nuisance Ordinance & Nuisance Eviction Referral Process*, that referrals come from three sources: the Oakland Police, city staff, and Neighborhood Crime Prevention Councils.⁷⁰ According to this document, as part of a referral, the individual referring must include: "1) Police report 2) Name and residence of tenant 3) Location of incident, type of crime, and proximity (distance) from residence 4) Tenant's criminal background, if any."⁷¹ The document also recommends including the name and contact information of an individual with "background/ historical information on the nuisance activity."⁷²

While the *Public Nuisance Ordinance & Nuisance Eviction Referral* document lists characteristics that will lead the Nuisance Abatement Division to prioritize a case, it is not clear from the city of Oakland's written policies, how an organization such as the Oakland Police chooses which individuals to refer to the Nuisance Abatement Division.⁷³ To gain clarity on this process, I requested a "release of oral public information"

68. *Id.*

69. Rebecca C. Hetey, et al., *Data for Change, A Statistical Analysis of Police Stops, Searches, Handcuffings, and Arrests in Oakland, Calif., 2013-2014*, 138-139 (Stanford University, SPARQ) (2016). Of this 93 percent, 82 percent of individuals were identified as black while 11 percent were identified as Hispanic. *Id.*

70. *Report a Nuisance*, City of Oakland (Apr. 27, 2019, 14:02 PST), <https://www.oaklandca.gov/services/report-nuisance>; *Public Nuisance Ordinance & Nuisance Eviction Referral Process* (last visited April 1, 2019).

71. *Id.*

72. *Id.*

73. *Id.* The Nuisance Abatement Division prioritizes cases that "A) represent a danger to the health, safety, and welfare of the residents in the rental property, the neighborhood in which the rental property is located, and the city as a whole. B) Where the offending tenant is convicted; and/or C) The tenant is being held over for trial; and/or D) There exists a specific circumstance that warrant nuisance declaration and/or eviction order." *Id.*

from the Oakland Police pursuant to Oakland's Sunshine Ordinance.⁷⁴ The Oakland police did not respond to this request. As part of a complaint I filed with Oakland's Public Ethics Commission, the commission assessed the legality of my request.⁷⁵ Oakland's Public Ethics Commission consulted with the City Attorney who asserted that Oakland's Sunshine Ordinance does not grant a requester the ability to interview a city official.⁷⁶ Rather, it grants requesters the right to receive existing written public information verbally, as opposed to in the written form.⁷⁷

Following this denial, I made a subsequent public records request to the Oakland Police, which requested any public information regarding "The Oakland Police Department's plans, policies, and positions concerning the referral of Nuisance Eviction Ordinance cases." In response to this request, the Oakland Police produced a training bulletin entitled *Community-Oriented Policing*.⁷⁸ This document states "Community Policing is both an organizational strategy and philosophy that enhances customer satisfaction with police services by promoting police and community partnerships."⁷⁹ It appears from the training bulletin that the Oakland Police deploy Problem Solving Officers or "PSOs" who are

74. E-mail from Jessica Bloome, attorney of Ethan Silverstein, to Amber Fuller, Oakland Police (Sept. 14, 2018, 10:24 PST) (on file with *Hastings Journal of Crime and Punishment*); Oakland's sunshine ordinance, unlike the California Public Records Act, provides that "(A) Every Agency director for the city and Redevelopment Agency, and department head for the Port shall designate a person or persons knowledgeable about the affairs of the respective agency or department, to facilitate the inspection and copying of public records and to provide oral public information about agency or department operations, plans, policies, and positions. The name of every person so designated under this section shall be filed with the City Clerk and posted online. B) It shall be the duty of every designated person or persons to provide information on a timely and responsive basis to those members of the public who are not requesting information from a specific person. It shall also be the duty of the person or persons so designated to assist members of the public in identifying those public records they wish to obtain pursuant to Government Code section 6253.1. This section shall not be interpreted to curtail existing informal contacts between employees and members of the public when these contacts are occasional, acceptable to the employee and the department, not disruptive of his or her operational duties and confined to accurate information not confidential by law." Oakland Municipal Code § 2.20.200 (2019).

75. Compl. from Ethan Silverstein, to Public Ethics Commission (Sept. 14, 2018).

76. E-Mail from Kyle McLean, Mediator/Liaison, City of Oakland Public Ethics Commission, to Ethan Silverstein (Dec. 19, 2018, 16:46 PST) (on file with *Hastings Journal of Crime and Punishment*).

77. *Id.*

78. Memorandum from Oakland Police Department on Community-Oriented Policing (Aug. 20, 2008) (on file *Hastings Journal of Crime and Punishment*).

79. *Id.* at 1.

responsible for resolving neighborhood issues.⁸⁰ The document also specifies that “Officers assigned to patrol function are available for problem-solving assignments, and are minimally required to initiate their own problem-solving projects one (1) to three (3) times per year.”⁸¹ In an attached checklist to this document, both “Eviction” and “Nuisance abatement or Eviction Ordinance” are listed as potential strategies for problem-solving.⁸² Following the production of this document, a representative of the City Attorney’s office informed me that no other documents regarding the OPD’s referral process exist.⁸³

While the City claims that no documents exist detailing how Oakland Police officers determine that individuals should be referred to the Nuisance Abatement Division, the Nuisance Abatement Division’s internal spreadsheet does list the first initial and last name of the individuals who referred.⁸⁴ This spreadsheet appears to demonstrate that in 2008, 2009, and 2011, the vast majority of referrals came from the Oakland Police.⁸⁵ Furthermore, it seems that certain officers are repeat referrers.⁸⁶ For example, in the year of 2008, eighteen out of forty-one cases were referred to the Nuisance Abatement Division by “J. Doolittle.”⁸⁷ Officer J. Doolittle is referred to by name in one of the police reports concerning these incidents.⁸⁸ It is unclear whether the individuals listed in the Nuisance Abatement Division’s spreadsheet were instrumental in determining that an individual should be evicted, or whether they simply forwarded another individual’s determination. It is also unclear what role, if any, citizen complaints played in these referrals. The Oakland Police, even after a request was made by the Oakland Public Ethics Commission, refused to answer any of my questions regarding how or why a tenant would be referred to the Nuisance Abatement Division.⁸⁹

Following 2013, fewer cases listed Oakland Police Officers as the

80. *Id.* at 3.

81. *Id.* at 5.

82. *Id.* at 8.

83. Telephone interview with Mark Forte, Open Government & Legal Services Coordinator (Feb. 4, 2019).

84. *NEU Matrix*, *supra* note 30.

85. *Id.* It is hypothetically possible that the names listed in the NEU Matrix simply match the first initials and last names of Oakland Police officers, however, this is unlikely.

86. *Id.*

87. *Id.*; Oakland Police, *supra*, note 1.

88. Oakland Police, *supra*, note 1; *NEU Matrix*, *supra*, note 30.

89. E-mail from Kyle McLean, Mediator/Liaison, Oakland Public Ethics Commission, to Ethan Silverstein (Dec. 19, 2018, 16:46 PST) (on file with *Hastings Journal of Crime and Punishment*).

referring party. In 2015 and 2016, staff at the Oakland City Attorney's office were usually cited as the referring party.⁹⁰ It is unclear if this represents a shift away from the Oakland Police making nuisance eviction referrals, or simply a change in record-keeping practices. While it is uncertain what leads an individual's police report to end up in the hands of the Nuisance Abatement Division, it appears that individual discretion is substantial.

C. Notice to Tenant and Landlord

Following the determination that an individual should be evicted, two notices are sent through the mail, one to the tenant, and one to the landlord.⁹¹ The notices have evolved through the years to include more information.⁹² In 2008, the notices generally stated what the nuisance activity was, and when it occurred.⁹³ The tenant's notice informed the tenant that their landlord may file an eviction action against them. The landlord's notice informed the landlord that they had been fined \$450 and demand that they demonstrate to the City, within twenty-five days, that they had begun to remove the tenant.⁹⁴ The City Administrator also requested that the landlord return an attached checklist.⁹⁵ The checklist included actions such as: "A 3-day notice was served," "A 30 or 60-day notice was served," "an unlawful detainer action was filed," "the tenant left voluntarily on ___ and the unit is vacant," and "the tenant left voluntarily on ___ and the unit is rented to ___."⁹⁶ Both notices informed the recipient of their right to request a reconsideration or view the documentary evidence which led to the notice.⁹⁷ The landlord's notice also included a statement informing them that if they had a safety concern in bringing an eviction action, they could request an assignment of the eviction action to the City Attorney.⁹⁸

In 2015, the notices began to include new language.⁹⁹ The tenant

90. *NEU Matrix, supra*, note 30.

91. Oakland Municipal Code § 8.23(F)(2) (2019).

92. *See* Oakland City Attorney, *supra*, note 2.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* This procedure is distinguishable from the Unlawful Detainer Pilot Program's procedures as it requires the landlord to request the assignment. *See* Oakland Municipal Code 8.23.100(G) (2019); Cal. Civ. Code §§ 3485(a)(1)(F)(2), 6(a)(1)(F)(2) (2019).

99. *Id.*

notices now contain a somewhat detailed explanation of the nuisance eviction process.¹⁰⁰ In all caps and bold text, the notices state “**YOU HAVE THE RIGHT TO APPEAL AND SEEK LEGAL COUNSEL.**”¹⁰¹ The notices also state in bold text, “**This notice is not a notice of eviction,**” as well as providing a list of reasons the city will stop proceeding with the eviction order, and including a list of legal service providers who offer support to low-income tenants facing eviction.¹⁰² This new notice language is required as part of Oakland’s participation in the Unlawful Detainer Pilot Program.¹⁰³

The landlord notices also began to include new language.¹⁰⁴ These notices now include a detailed explanation of the law and potential consequences for failing to evict.¹⁰⁵ For example, a paragraph which was sometimes included in notices in 2015 and 2016 states

“If a court finds that a public nuisance exists, the court must order: (i) that the property be closed and not used for any purpose for one year; (ii) that the fixtures and moveable property on the premises be sold; and (iii) that the premises not be used for any further illegal purpose in the future. The court may also order the owner to pay a civil penalty of up to \$25,000 and to pay the City’s attorney fees and costs.”¹⁰⁶

The notices then go on to discuss additional civil penalties that can be imposed on top of the abovementioned fines and fees.¹⁰⁷ The City also began requesting written nuisance abatement plans from landlords which address nine separate questions about how the nuisance will be abated.¹⁰⁸ The landlord notices close with “If you fail to submit one of the required responses within thirty (30) days, or by _____, the City of Oakland may file and prosecute the action to remove the tenants and join you as a defendant in the action. The City may also seek civil penalties from you and your tenants.”¹⁰⁹ While Oakland has been able to file an eviction in the

100. *Id.*

101. *Id.*

102. *Id.*

103. Cal. Civ. Code §§ 3485(a)(1)(C), 6(a)(1)(C)(2019).

104. Oakland City Attorney, *supra*, note 2.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

name of “The People” since 2014, it did not do so in 2014, 2015, 2016, or 2017.¹¹⁰

D. Request for Reconsideration or Partial Eviction

The tenant or the landlord can request a reconsideration of the City’s determination.¹¹¹ When doing so, the tenant or landlord must present sufficient “facts or mitigating circumstances” within fifteen days of receiving the initial order from the City.¹¹² When a tenant requests a reconsideration they “must state with specificity why the Tenant believes the evidence is insufficient to prevail in an unlawful detainer.”¹¹³ When the tenant requests a reconsideration, there is no hearing.¹¹⁴ Rather, the Nuisance Abatement Division reviews the tenant’s request alongside the City Attorney’s office and the Oakland Police Department.¹¹⁵ If a tenant is successful in attaining a reconsideration, this finding only affects the actions of the City. A landlord is not precluded from evicting the entire rental unit based on the activity cited by Oakland’s Nuisance Abatement Division.

Under Oakland and California law, the tenant or landlord may also request a partial eviction targeting only the offending tenant.¹¹⁶ Under Oakland law, a tenant can request that the City and the landlord agree to cease pursuing the action if the offending tenant moves out of the rental unit.¹¹⁷ The City, landlord, and the offending tenant, must agree to resolve the eviction in this manner.¹¹⁸ Additionally, unless the City “finds good cause for differing terms”, the remaining tenants must agree that an eviction judgment will be entered against them if they permit the offending

110. Benjamin Tang, California Research Bureau, *A Review of the California Unlawful Detainer Pilot Program: 2018 Update*, 4 (Mar. 2018), available at https://www.library.ca.gov/Content/pdf/crb/reports/Unlawful_Detainer_2018_Report.pdf.

111. Oakland Municipal Code § 8.23.100(F)(6)(2019).

112. Oakland City Attorney, *supra* note 2.

113. Oakland Municipal Code § 08.23.100(F)(6)(b)(2019).

114. E-mail from Richard Luna, Assistant to the City Administrator, to Ethan Silverstein (Apr. 1, 2019, 11:27 PST) (on file with *Hastings Journal of Crime and Punishment*); E-mails from Gregory Minor, Assistant to the City Administrator, to Ethan Silverstein (May 3, 2019, 18:39 EST) (May 3, 2019, 19:28 EST) (on file with *Hastings Journal of Crime and Punishment*).

115. E-mail from Richard Luna, Assistant to the City Administrator, to Ethan Silverstein (Apr. 1, 2019, 11:27 PST) (on file with *Hastings Journal of Crime and Punishment*).

116. Cal. Civ. Code §§ 3485(b), 6(b); Oakland Municipal Code § 8.23.100(H) (2019). This request can be made before an eviction is filed or during the lawsuit itself. *Id.*

117. Oakland Municipal Code § 8.23.100(H) (2019).

118. *Id.*

tenant to return.¹¹⁹ The Unlawful Detainer Pilot Program authorizes similar proceedings, but additionally allows the court to authorize a partial eviction “upon showing of good cause.”¹²⁰ The California Research Bureau reported that in 2015, the Unlawful Detainer Pilot Program’s partial eviction protections were utilized in zero of the sixty-four cases filed in Los Angeles, Long Beach, Sacramento, and Oakland.¹²¹

While the Research Bureau reported that no tenants were granted partial evictions in 2015, one tenant in 2015 appears to have persuaded Oakland’s Nuisance Abatement Division to cease its eviction order against her.¹²² The tenant shared an apartment with an individual subjected to an eviction order which named him, as well as “all occupants.”¹²³ The City pursued the eviction based on an arrest for the possession of ammunition as well as unspecified complaints of “firearm activity,” “ongoing nuisance activity,” and “illegal activity.”¹²⁴

While the unnamed tenant was successful in convincing the City to not order her eviction, the City had several conditions.¹²⁵ 1)The tenant who was arrested for possessing ammunition was to vacate within 30 days and take all of his possessions; 2) the arrested tenant would not visit his child on the property; 3)the remaining tenant would allow the Oakland Police to inspect her home in order to verify that the arrested tenant and his belongings were no longer present; 4)The owner would forward all information about the arrest and the City’s actions to the Oakland Housing Authority; and 5) if the arrested tenant was found to be on the property, all tenants would be subject to eviction.¹²⁶ The City Administrator’s office, after proposing this plan to the landlord, stated, “You do not have to take this arrangement. You are still free to seek an eviction.”¹²⁷

119. Oakland Municipal Code §§ 8.23.100(H)(1), (1)(b) (2019).

120. Cal. Civ. Code §§ 3485(b), 6(b) (2019).

121. Neville et al., *supra* note 51, at 11.

122. Oakland City Attorney, *supra* note 2, at 601-04.

123. *Id.* at 595-96.

124. *Id.* at 590-98; in addition to requesting reconsideration, this tenant also requested to see any documentation that led to the eviction order. *Id.* at 603. She was told that the City had already provided a police report and “that report, in the redacted form that you have, is the sole document upon which the City Administrator’s Office based its order. At this time, there is no documentary evidence for you to review.” *Id.* at 603. This was despite the City’s statement in the eviction order that “Oakland Police Department investigations and records indicate on-going nuisance activity.” *Id.* at 595.

125. *Id.* at 601.

126. *Id.*

127. *Id.*

E. The Eviction Process

Landlords in California may not engage in harassment or self-help tactics to evict a tenant.¹²⁸ Tactics such as changing locks or shutting off utilities are explicit violations of state law.¹²⁹ The city of Oakland provides tenants additional protections from eviction and harassment. For most properties in Oakland, a tenant cannot be evicted without one of eleven “just causes.”¹³⁰ An owner selling a house, disliking a tenant, or the tenant’s lease expiring, are not “just causes.”¹³¹ Oakland also passed the Tenant Protection Ordinance in 2014.¹³² The Tenant Protection Ordinance prescribes strong penalties for landlords who engage in harassment tactics such as utilizing “fraud, intimidation, or coercion” to encourage a tenant to vacate a rental unit.¹³³ Landlords in California, and especially in Oakland, must take precaution to abide by city and state law, even when they are subject to a nuisance eviction order. Failure to do so can result in a costly wrongful eviction lawsuit.

A legitimate eviction almost always begins with an eviction notice which is served on the tenant.¹³⁴ This notice is the basis of what may become an eviction lawsuit.¹³⁵ A subsequent eviction lawsuit must be based on the cause of action specified in the notice.¹³⁶ This notice will generally give the tenant three, thirty, sixty, or ninety days to vacate depending on the cause of action, length of tenancy, and the tenant’s subsidized housing status.¹³⁷ Some three-day notices, such as a three-day notice to pay rent, require that the landlord allow the tenant to cure the violation within three days (by paying rent for instance).¹³⁸

128. Cal. Civ. Code §§ 789.3, 1940.2 (2019); Cal. Pen. Code § 418 (2019).

129. Cal. Civ. Code §§ 789.3 (2019), 1940.2; Cal. Pen. Code § 418 (2019).

130. Oakland Municipal Code § 08.22.300 *et seq.* (2019).

131. *Id.*

132. Oakland Municipal Code § 08.22.600 *et seq.*, (2019); the tenant protection ordinance was passed in the same city council meeting where the Nuisance Eviction Ordinance was expanded. Capps, *supra* note 53.

133. Oakland Municipal Code § 08.22.640(A)(6) (2019).

134. Cal. Civ. Proc. Code § 1161 (2019); Cal. Civ. Code §§ 1946-46.1, 1953 (2019); tenants who are not protected by a just cause ordinance, and maintain possession pursuant to a fixed-term lease, may not be entitled to notice prior to the commencement of an unlawful detainer lawsuit at the expiration of their lease. *Earl Orchard Co. v. Fava*, 138 Cal. 76, 79 (1902).

135. Cal. Civ. Proc. Code § 1161 (2019); Cal. Civ. Code §§ 1946-46.1 (2019); Oakland Municipal Code § 08.22.360(B)(3) (2019).

136. *Kwok v. Bergren*, 130 Cal. App. 3d 596, 599 (1982).

137. Cal. Civ. Proc. Code § 1161 (2019); Cal Civ. Code §§ 1946-46.1, 1954.535 (2019).

138. Cal. Civ. Proc. Code § 1161 (2019).

In Oakland, a tenant whose tenancy is subject to the Just Cause Ordinance may be evicted if “[t]he tenant has used the rental unit or the common areas of the premises for an illegal purpose including the manufacture, sale, or use of illegal drugs.”¹³⁹ This allegation must appear on a notice and give the tenant at least three days to vacate.¹⁴⁰ The landlord does not need to give the tenant an opportunity to cease the violation.¹⁴¹

At the expiration of the notice period, the landlord has the option of filing an unlawful detainer lawsuit against the tenant.¹⁴² Once this lawsuit is served, the tenant has five days to respond.¹⁴³ If the tenant does not respond, by providing the court with a proper legal pleading, the landlord may enter a default, which can lead to the sheriff evicting the tenant without a hearing.¹⁴⁴ If the tenant does respond, it may take several months to receive a hearing in Alameda County. Both the tenant and the landlord may conduct discovery, file pre-hearing motions, and either party (though usually the tenant) can demand a trial by jury.¹⁴⁵ At any point in this process, up to and including the trial date, the tenant may move to dismiss the entire lawsuit on the basis that the landlord made a technical error on the initial notice.¹⁴⁶ Even a small error, such as failing to include certain required wording in the notice, may lead to the entire action being dismissed, and the process starting over.¹⁴⁷ If a hearing is held, the landlord will need to prove the City’s (and ostensibly the landlord’s) claims.

While a prosecutor in a criminal proceeding is held to a “beyond a

139. Oakland Municipal Code § 08.22.360(A)(6) (2019).

140. Cal. Civ. Proc. Code § 1161; Oakland Municipal Code § 08.22.360(B)(3) (2019).

141. *Id.*

142. *Id.*

143. Cal. Civ. Proc. Code § 1167 (2019); Assembly Bill 2343, signed into law on September 5, 2018, amended California Code of Civil Procedure section 1167 to exclude weekends and court holidays from the 5 days. The changes went into effect on September 1, 2019.

144. Cal. Civ. Proc. Code §§ 585, 1167 (2019).

145. Cal. Civ. Proc. Code §§ 631, 1170.7 *et seq.*, 2017.010 (2019).

146. “A motion for judgment on the pleadings may be made at any time prior to the trial or at the trial itself.” *Stoops v. Abassi*, 100 Cal. App. 4th 644, 650 (2002) *citing Ion Equipment Corp. v. Nelson*, 110 Cal. App. 3d 868, 867 (1980). Such a motion may be made “on the same grounds as those supporting a general demurrer.” *Id.*; there is no cause of action for eviction if statutory notice procedures are not strictly complied with. *Kwok*, 130 Cal. App. 3d at 599-600. The rule of liberal construction prescribed by California Code of Civil Procedure section 452 is inapplicable in unlawful detainer actions. *See* Cal. Civ. Code § 1442 (2019).

147. *Kwok*, 130 Cal. App. 3d at 600.

reasonable doubt” standard when proving a crime, a landlord evicting a tenant for the same crime is held to a substantially reduced burden of proof—“preponderance of the evidence.”¹⁴⁸ “Preponderance of the evidence” is generally understood to be a “more likely than not” standard.¹⁴⁹ If the tenant loses by default, dispositive motion, bench trial, or jury trial, the judgment will likely become a public record and a significant barrier to obtaining future rental housing.¹⁵⁰ It is unclear how the City would handle a landlord who was subject to an eviction order yet lost the lawsuit either based on the merits or due to a notice defect.

V. Evictions, Power, and Police

The past decade has seen an increase in academic attention given to both evictions and policing. Recently, a data-driven approach has been utilized to substantiate the claims many community organizers and legal service providers have long asserted. For example, in 2018 Tenants Together, a California nonprofit, released *California Evictions Are Fast And Frequent*.¹⁵¹ The report, which analyzes data from courthouses across the state, presents a stark look at the courts’ role in displacement. The data from Alameda County was especially shocking.¹⁵² Roughly 1.6 million people live in Alameda County.¹⁵³ The Tenants Together report found that in 2014, 2015, and 2016, in Alameda County alone, there was an average of 5,467 eviction lawsuits per year filed against tenants.¹⁵⁴ In 2016, twenty-nine percent of these tenants lost their cases by default and were

148. Cal. Evid. Code §§ 115, 1096 (2019).

149. *Sandoval v. Bank of Am.*, 94 Cal. App. 4th 1378, 1387 (2002).

150. Cal. Civ. Proc. Code § 1161.2 (2019); once evictions become public, they are often included as data in tenant screening services which are often used by landlords. For example, for \$19.95, the American Apartment Owners Association will run a state eviction judgment search. For \$34.95, the service claims to provide landlords a means to “Eliminate applicants looking to set up shop for their criminal activities or even commit acts of terrorism”. *California Tenant Screening Background Check*, American Apartment Owners Association (Apr. 8, 2019, 00:07 PST), <https://www.american-apartment-owners-association.org/tenant-screening-background-checks/california/>.

151. Aimee Inglin and Dean Preston, *California Evictions Are Fast and Frequent* (May 2018), https://static1.squarespace.com/static/52b7d7a6e4b0b3e376ac8ea2/t/5b1273ca0e2e72ec53ab0655/1527935949227/CA_Evictions_are_Fast_and_Frequent.pdf.

152. *Id.* Alameda County is comprised of fifteen cities including, Oakland, Berkeley, Alameda, Emeryville, and Hayward. *Id.*

153. *Quick Facts - Alameda County, California*, United States Census Bureau (Apr. 1, 2019, 00:47 PST), <https://www.census.gov/quickfacts/fact/table/alamedacountycalifornia/PST045217>.

154. Inglin & Preston, *supra* note 151, at 6.; the average number of eviction lawsuits filed per year in California for this time period was 166,337. *Id.* at 7.

evicted without a hearing.¹⁵⁵

While the fact that many tenants fail to respond to eviction lawsuits influences statistics surrounding the speed of eviction proceedings, the pace at which tenants move through the court system is noteworthy nonetheless. In 2017, the Judicial Council reported that nearly seventy-five percent of eviction lawsuits in California were resolved within forty-five days of the landlord filing and sixty percent were resolved within one month.¹⁵⁶ While this data is shocking, it is likely just the tip of the iceberg. Many tenants vacate after receiving the initial eviction notice, which is not filed with the courts absent an unlawful detainer lawsuit.¹⁵⁷ There is no state requirement to record an eviction notice, and most cities do not have any sort of filing requirement.¹⁵⁸ Many other tenants leave their units due to self-help and harassment tactics, however, this too is difficult to quantify.

A data-driven approach has also been utilized to analyze racial disparities in policing in Oakland. In *Data for Change A Statistical Analysis of Police Stops, Searches, Handcuffings, and Arrests in Oakland, Calif., 2013-2014*, the authors, Stanford Ph.D.s who were contracted by the city of Oakland, looked at the self-generated reports of 510 of Oakland's police officers during a thirteen-month period.¹⁵⁹ This report, as well as the underlying data, was generated pursuant to a federal court's order.¹⁶⁰ The report found that when these officers initiated traffic or pedestrian stops, significant racial disparities were present.¹⁶¹ The data submitted by the

155. *Id.* at 9.

156. *Id.* at 8.

157. *Id.* at 5.

158. *Id.*; the city of Oakland does require landlords to file eviction notices. Oakland Municipal Code § 08.22.360(B)(7) (2019). Many landlords do not abide by this requirement. The data is also not well organized and is difficult to access. In a recent telephone call or trip to Oakland's Rent Adjustment Program, I was told that several years of eviction notices were organized only by the date that the landlord dropped off the notice. The notices which had been filed were organized only by property address. Tenants who are interested in seeing all eviction notices filed by one landlord need to first obtain a list of all the properties owned by the landlord from the Alameda County Assessor.

159. Hetey et al., *supra* note 69.

160. *Id.*; the city of Oakland agreed to implement substantial reforms to its police department in the settlement of Delphine Allen et al. v. City of Oakland in 2003. The City has yet to fully comply with the negotiated settlement agreement. Kimberley Veklerov, *Could Oakland Be Held In Contempt For Not Reforming Its Police?*, S.F. CHRON. (July 5, 2017), https://www.sfchronicle.com/bayarea/article/Could-Oakland-be-held-in-contempt-for-not-11268726.php?utm_campaign=sfgate&utm_source=article&utm_medium=https%253A%252F%252F. Kimberley Veklerov, *Judge Slams Oakland Leaders In Police Sex Scandal*, S.F. GATE (July 10, 2017), www.sfgate.com%252Fbayarea%252Farticle%252Fjudge-criticizes-Oakland-leaders-in-police-sex-11279027.php.

161. Hetey et al., *supra* note 69, at 82.

Oakland Police officers showed that 16,818 African Americans were subjected to officer initiated stops, while during the same period, only 3,661 whites were stopped.¹⁶² This is despite the fact that the US Census’ most recent estimates of Oakland’s population show that Oakland’s black population is roughly twenty-four percent, while its “white alone not Hispanic or Latino” population is 27.3 percent. The report found racial disparities not only in who was stopped, but how individuals were stopped.¹⁶⁴ Of those who were stopped, yet not arrested or cited, one in four African Americans were handcuffed, while only one in fifteen whites were handcuffed.¹⁶⁵ The 291-page report concluded by stating that,

These findings are not evidence of a few or even many bad apples, but of *pervasive cultural norms*—the unwritten rules of how to behave—about how to police people of different races. Focusing on individual officers, rather than on the culture as a whole, will likely allow racial disparities in policing to persist” (emphasis added).¹⁶⁶

In its report *Development Without Displacement, Causa Justa :: Just Cause* asserts that the issues discussed in the *Data for Change Report* are not merely an issue of “pervasive social norms,” but a standard component of “urban development under neo-liberalism.”¹⁶⁷ When discussing the key features of a “neo-liberal city”, the report cites increasing militarization and increased funding of law enforcement. The report states,

Both Oakland and San Francisco have followed national trends to enact more aggressive law enforcement policies under the guise of controlling crime and violence. Examples include “sit and lie” policies that criminalize the homeless, making it a crime to utilize public space, and “gang injunctions,” which give police sweeping powers in areas under injunction, redefining gangs so broadly that any group of young people in public space is assumed to be gang affiliated. . . As urban centers are transformed by neoliberalism there is a pitched contest for public space, sending a clear message to low-income and working-class communities of color that they have no right to occupy that space at all. Aggressive

162. *Id.*

164. Hetey et al., *supra* note 69, at 90.

165. *Id.*

166. *Id.* at 179.

167. Causa Justa :: Just Cause and Alameda County Public Health Department, Place Matters Team, *Development Without Displacement: Resisting Gentrification In The Bay Area*, 30-37 (2014), <https://cjjc.org/wp-content/uploads/2015/11/development-without-displacement.pdf>.

policing measures and policies are part of the strategy for pushing those determined to be undesirable out of urban public space, clearing the way for wealthier newcomers.¹⁶⁸

In effect, certain populations are simultaneously pressured out of rental housing and criminalized in public space.

While *Development Without Displacement* looks at the sociopolitical context of racialized policing and gentrification in the Bay Area, others have examined the issue through a more legalistic lens. *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, by B. A. Glesner, tracks the expansion of landlord tort liability.¹⁶⁹ Glesner asserts that this expansion began with a landlord's duty to prevent injury to tenants by property defects, was expanded by findings of liability for failing to protect tenants from both strangers and other tenants, and eventually, was expanded in many cities and states, to include liability for crimes committed by the landlord's own tenants.¹⁷⁰ Glesner's article concludes with a common-sense statement, "At best, forfeiture and nuisance actions simply relocate crime . . . Moreover, forfeiture of residential buildings poses a significant risk of displacement of innocent tenants."¹⁷¹ Glesner asserts that "More important than the failure of laws aimed at landlords is the existence of a better alternative approach. Indeed, some of the most effective crime fighting tactics involve increasing home ownership by increasing the availability of affordable housing."¹⁷²

VI. Race, Discretion, and Oversight: Preliminary Findings

While Oakland's Nuisance Eviction Ordinance was created in 2004 and Oakland joined the Unlawful Detainer Pilot Program in 2014, this paper primarily analyzes Oakland's nuisance evictions between 2008 and 2016.¹⁷³ An analysis of eviction orders and police reports from this period brings to light concerning issues regarding race, discretion, oversight, and the general statutory shortcomings that allow these issues to flourish.

168. *Id.* at 34.

169. B. A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises* (1992), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1925&context=caselrev>.

170. *Id.* at 684-729.

171. *Id.* at 788.

172. *Id.* at 788-89.

173. Oakland Municipal Code § 08.23.100 *et seq.* (2019); Neville et al., *supra* note 51, at 2.

A. Oakland's Nuisance Eviction Actions Disproportionately Target Black Tenants

A review of the documents produced by the Oakland City Attorney and Oakland Police brought to light several concerning trends. Most immediately apparent were the racial markers police used to identify individuals in their reports.¹⁷⁴ One hundred and thirty-nine individuals were named in the seventy-nine nuisance eviction orders.¹⁷⁵ Of these 139 individuals, fifty-nine were identified as black, fifteen were identified as Hispanic, one was identified as white, and one was identified using only an S (possibly Samoan).¹⁷⁶ The remaining sixty-three individuals were not identified by race, either due to officers not listing the individual's race, or the Oakland police not producing records which included racial identifiers.¹⁷⁷ For sixteen of the seventy-nine cases, Oakland Police produced no records.¹⁷⁸ In some cases, valid public records act exemptions were cited, in others, the documents could not be located.¹⁷⁹ In addition to the sixty-four tenants of which no racial data was provided, this data does not account for individuals who were displaced by eviction orders, yet were not named in a city notice. For instance, a tenant's children or family members are not necessarily named in the City's notices, but still may be displaced by an eviction.¹⁸⁰

Despite the limitations of this data set, the racial makeup of those cited is alarming. This data is especially shocking when compared to the racial demographics of Oakland. While the 2010 census listed Oakland's "White alone, not Hispanic or Latino" population as 27.3 percent, in the eviction orders between 2008 and 2016, there was evidence of only one white individual being cited.¹⁸¹ The 2010 census listed Oakland's "Black or

174. Subjects may have been racially misidentified by police officers. Further, race is a social construct without clear genetic markers. See W. Carson Byrd and Matthew W. Hughey, *Biological Determinism and Racial Essentialism: The Ideological Double Helix of Racial Inequality*, 661 ANNALS APSS 7-22 (2015).

175. Oakland Police, *supra*, note 1.

176. *Id.*

177. *Id.*

178. *Id.*

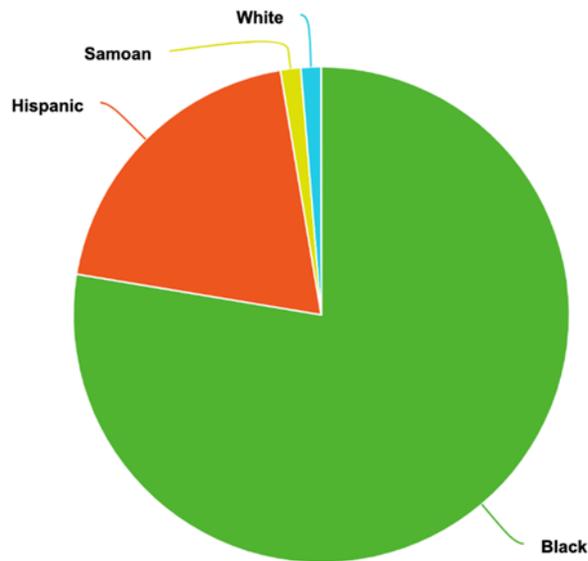
179. *Id.*

180. Oakland City Attorney, *supra* note 2. Some notices named "all occupants" while other housing units were likely evicted in their entirety despite only one tenant being named. Data on the total number of tenants who were eventually displaced as a result of nuisance eviction orders are unavailable. Even when cases proceeded to a formal lawsuit, these lawsuits are often sealed and many landlords do not name every tenant and instead, name does 1-X. *Id.*

181. Oakland's "White alone" population is 36.7 percent, there is no way to tell how

African American alone” population as 24.3 percent yet fifty-nine black tenants were named in this data set.¹⁸² Based exclusively on this limited data set, when compared against the 2010 Census, an African American in Oakland is roughly sixty-six times more likely to be named in a nuisance eviction order than a white person.¹⁸³

Racial
identification of
tenants named in
Oakland’s
Eviction Orders
2008-2016



This form of data analysis is crude and limited in making determinations of implicit or explicit bias.¹⁸⁴ However, the data raises concern nonetheless.¹⁸⁵ While to what extent is a task best left to professional

Oakland Police would identify a Hispanic or Latino white person in a police report. *Quick Facts – Oakland City, California; Alameda County*, United States Census Bureau (Apr. 2, 2019, 2:10 PST), <https://www.census.gov/quickfacts/fact/table/oaklandcitycalifornia,alamedacountycalifornia/PST040218>; Oakland Police, *supra*, note 1.

182. *Quick Facts – Oakland City, California; Alameda County*, United States Census Bureau (Apr. 2, 2019, 2:10 PST), <https://www.census.gov/quickfacts/fact/table/oaklandcitycalifornia,alamedacountycalifornia/PST040218>; Oakland Police, *supra*, note 1. Once again, an individual may have been identified as police as black, white, or Hispanic, yet fallen into different census categories such as “two or more races” or “white Hispanic.”

183. This is a crude calculation, 27.3 (percent of White residents of Oakland)/24.3 (percent of Black residents of Oakland)=1.12 times as many white (“non-Latino or Hispanic”) people as black (“Black or African American alone”) people in Oakland. 1.12 X 59 (fifty-nine times as many Black tenants cited compared to white tenants cited) = 66.08.

184. Hetey et al., *supra* note 69, at 27-61.

185. In 2017, Oakland reports that it cited no white people, two black people, and two

statisticians, it is clear that African Americans are overrepresented in Oakland's nuisance eviction orders while whites are rarely targeted.

B. There is an Excess of Discretion Involved in Oakland's Nuisance Eviction Actions, Some of Which May be Pretextual

The data also makes clear that the issuance of nuisance eviction orders involves an excess of discretion. For example, six of the seventy-nine nuisance eviction orders concerned only the alleged possession or sale of marijuana (four of these cases involved individuals on probation or parole).¹⁸⁶ One eviction order (not counted in the six above) was issued after Oakland Police stopped a black man for speeding and not wearing a seat belt.¹⁸⁷ When the driver claimed that he left his license at his house, the Oakland Police conducted a probation search on his home.¹⁸⁸ During this search, in addition to finding a bag of marijuana, officers found two pills of Ativan.¹⁸⁹ It is unclear what led these seven individuals to be targeted over the many others presumably arrested for similar crimes.

One possibility is that these individuals were targeted by the City of Oakland for other reasons, and the crimes cited in the nuisance eviction orders were pretextual.

Oakland's City Attorney has asserted that, in many cases our office has received pleas from tenants who are trapped and victimized in their homes because of a violent criminal or drug dealer and asking the City to address the problem. A number of the tenants who live in these properties are people of color and/or non-English speaking with few resources or alternatives. The purpose of the NEO is to provide them the protection they deserve.¹⁹⁰

While this statement may very well be accurate, the vast majority of

people whose race was identified as "Asian/other." One person's racial identity was unknown. Tang, *supra* note 110, at 5.

186. Oakland City Attorney, *supra* note 2.

187. Oakland Police, *supra* note 1, at 175-176; Oakland City Attorney, *supra* note 2, at 193-195.

188. Oakland Police, *supra* note 1, at 175-176; Oakland City Attorney, *supra* note 2, at 193-195.

189. Oakland Police, *supra* note 1, at 175-176; Oakland City Attorney, *supra* note 2, at 193-195.

190. Letter from Barbra J. Parker, City Attorney, Oakland City Attorney's Office to Kate Conger, Journalist, SFWEEKLY (Oct. 30, 2014) (on file with *Hastings Journal of Crime and Punishment*).

tenants cited in nuisance eviction orders are cited for non-violent crimes.¹⁹¹ To gain clarity on the possibility of tenants being cited for activity that is not the true concern of the City, I met with an anonymous community member who I will refer to as “Casey.” Casey attended a meeting of a North Oakland Neighborhood Crime Prevention Council.¹⁹²

As of 2018, Oakland has forty-five neighborhood crime prevention councils, which meet regularly and work with Oakland Police to address criminal activity in their respective neighborhoods.¹⁹³ Neighborhood Crime Prevention Councils, are also one of the three sources Oakland’s Nuisance Abatement Division claims to receive nuisance eviction ordinance referrals from.¹⁹⁴

Casey attended a North Oakland Neighborhood Crime Prevention Council meeting in response to an act of gun violence in their neighborhood.¹⁹⁵ As a result of this violence, a bullet was shot into the home of a neighbor.¹⁹⁶ Following the shooting, rumors ran through the neighborhood surrounding who was responsible.¹⁹⁷ Neighbors had different ideas about who fired shots, why they did so, and where the perpetrators lived.¹⁹⁸ Ultimately, a meeting was called to sort out the details.¹⁹⁹ In a social media post on nextdoor.com (provided to me by Casey), a concerned neighbor stated,

There is going to be an emergency meeting with our Area 2 Commander Darren Allison and Problem Solving Officer Donald Lane to address last weekend’s gun violence on [redacted] st. . . . Please hold our elected officials accountable. If you can’t attend but have information you would like me to share feel free to email me. We are all still recovering from having bullets shot down our street but I don’t want us to feel helpless.²⁰⁰

191. Oakland Police, *supra* note 1.

192. Interview with anonymous, in San Francisco, Calif., via video chat (Apr. 1, 2019).

193. *Neighborhood Councils*, City of Oakland (Apr 20, 2019, 15:12 PST), <https://www.oaklandca.gov/documents/neighborhood-council-meeting-schedule>.

194. *Public Nuisance Ordinance & Nuisance Eviction Referral Process* (April 1, 2019, 19:33 PST), <http://www2.oaklandnet.com/w/dowd003936>.

195. Interview with anonymous, in San Francisco, Calif., via video chat (Apr. 1, 2019).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Screenshot of nextdoor.com post from anonymous, to Ethan Silverstein (Dec 16, 2014) (on file with *Hastings Journal of Crime and Punishment*).

Casey attended the meeting, which occurred in a neighbor's living room.²⁰¹ Casey believes that the meeting was advertised exclusively on nextdoor.com and possibly the Neighborhood Crime Prevention Council listserv.²⁰² Casey, disturbed by how the meeting was advertised, was further disturbed by who was in the living room. The attendees were predominately white, predominately new residents, and mostly young.²⁰³ Two Oakland Police officers and a City Council member were also present.²⁰⁴

When asked about the conversation that followed, Casey said that “it was this trifecta of concerned new neighbors [pause] new residents, pressuring city council to take action. City council turning to OPD and being like, what can we do about this?” and the Oakland Police officers telling the residents exactly what they could do.²⁰⁵ Casey said that

the police came to the meeting with their own narrative about who was responsible.²⁰⁶ The Oakland Police officers assigned culpability to a neighbor with alleged gang affiliation.²⁰⁷ The officers stated that the individual was on their “hot list,” but that they had not been able to acquire enough evidence to make an arrest.²⁰⁸ This confused Casey as until this point, she had heard that the drive-by shooting was carried out by someone outside the community, and that it targeted an individual at an adjacent property to the one where the Oakland Police's target lived.²⁰⁹ Casey said it was like they were saying he was “involved by proxy, because of gang affiliation.”²¹⁰

What followed next was not a discussion about gun violence, but one about nuisance evictions.²¹¹ The police officers instructed residents to call

201. Interview with anonymous, in San Francisco, Calif., via video chat (Apr. 1, 2019).

202. *Id.*; see also Sam Levin, *Racial Profiling Via Nextdoor.com*, EAST BAY EXPRESS (Oct. 7, 2015), <https://www.eastbayexpress.com/oakland/racial-profiling-via-nextdoorcom/Content?oid=4526919>.

203. Interview with anonymous, in San Francisco, Calif., via video chat (Apr. 1, 2019).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

the police as much as possible for “things that didn’t sound like a nuisance to me, like, hanging out outside, or in cars.”²¹² The police said to especially be on the lookout for guns and drugs, even marijuana.²¹³ A local community activist, supporting the police, said that she had success ridding nuisance tenants from her block using this tactic.²¹⁴ Casey said that the conversation was “what I would classify as profiling.”²¹⁵ To Casey, it didn’t seem like the Oakland Police were targeting the individuals who actually fired shots.²¹⁶ Rather, it seemed as if their main concern was pursuing the individual on their “hot list.”²¹⁷

Ultimately no nuisance abatement actions were initiated in response to this meeting.²¹⁸ Casey attributes this to the presence of community organizers, who spoke out against what they saw as a campaign of racialized surveillance and harassment.²¹⁹ It is unknown how many similar meetings have occurred in the city of Oakland.

C. There Is No Meaningful Oversight in How Landlords Subjected to Oakland’s Eviction Orders Evict Tenants

While it appears that Oakland Police, Neighborhood Crime Prevention Councils, The Nuisance Abatement Division, and the City Attorney’s office have ultimate discretion as far as who is cited in nuisance eviction orders, landlords too enjoy a significant lack of oversight. While the City’s eviction orders have become more thorough, it appears that how landlords remove tenants is largely a personal choice, as the city of Oakland “does not provide legal advice.”²²⁰ For example, in response to a nuisance eviction order in 2015, a landlord provided copies of a notice that was allegedly served on their tenants which stated,

212. *Id.*

213. *Id.*

214. Casey provided me with this individual’s street and the time period during which the action occurred. The Nuisance Abatement Division’s spreadsheet indicates that a nuisance abatement notice was sent to a landlord in regard to “unpermitted group assembly activity.” *Id.*; *NEU Matrix, supra* note 30.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*; *NEU Matrix, supra*, note 30.

219. Interview with anonymous, in San Francisco, Calif., via video chat (Apr. 1, 2019).

220. A bolded warning “The City does not provide legal advice. You have the right to consult an attorney, and you may find value in doing so” began appearing on Oakland’s Nuisance Eviction Ordinance Orders in 2015. Oakland City Attorney, *supra* note 2.

You have been arrested and or charged with criminal/drug activity in or around the property. You have 24-48 hours after receiving this notice to cure or quit. You must fix this non compliance by moving out within no more than 3 days after you receive this.”²²¹

The landlord also informed the City Administrator’s office that another individual “was given a verbal notice to vacate the premises in 24 hours.”²²² An unlawful detainer action based on these notices could almost certainly be dismissed.²²³ However, this may have not been necessary. The City was notified that the tenants vacated one day after receiving the landlord’s notices.²²⁴ The City was also notified that an individual “inforced the verbal Notice To Vacate and stayed till the action was completed.”²²⁵ It is unclear how this individual enforced the “verbal notice.”

While these documents paint the landlord in a negative light, the truth of what actually occurred at this property is unknown. The landlord was ordered to evict the tenants on March 3, 2015, due to alleged drug and firearm activity on March 12, 2014.²²⁶ On March 19, 2015, the landlord provided the city the abovementioned notices, these notices appear to be dated March 13, 2014, one day after the arrests and almost a year before the City’s notice.²²⁷ On March 23, 2015, the City called the landlord to set up a meeting.²²⁸ On February 8, 2016, the landlord informed the city that the tenants vacated one day after the notices were served in 2014.²²⁹ There are no further notes on this incident in the City’s spreadsheet.²³⁰ It is unclear whether the landlord was contending that the tenants were evicted a year prior to the City’s notice, or whether the landlord erroneously dated the documents. While what truly happened is unknown, one thing is clear, the city of Oakland tasked this landlord with the responsibility of evicting

221. Oakland City Attorney, *supra* note 2, at BN 529-30.

222. *Id.* at BN 528; there is no such thing as a verbal eviction notice. Cal. Civ. Proc. Code § 1161 (2019); Cal. Civ. Code § 1946-46.1(2019).

223. Cal. Civ. Proc. Code § 430.10(f) (1971).

224. Oakland City Attorney, *supra* note 2, at BN 531.

225. Oakland City Attorney, *supra* note 2, at BN 528, App. Ex. 6. There is no such thing as a verbal eviction notice. Cal. Civ. Proc. Code § 1161 (2019).

226. Oakland City Attorney, *supra* note 2, at BN 517-19.

227. *Id.* at BN 528-40.

228. *NEU Matrix*, *supra* note 30.

229. Oakland City Attorney, *supra* note 2, at BN 531.

230. *NEU Matrix*, *supra* note 30.

tenants while ensuring that their rights were not violated in the process.

The Nuisance Abatement Division provided very few documents that landlords sent to the City in response to my public records requests. It is unclear how the majority of Oakland's nuisance eviction orders are resolved. However, Oakland did report the number of tenants that received some form of legal process in 2015.²³¹ The City reported to the California Research Bureau that it served 10 nuisance eviction orders in 2015.²³² Three landlords filed evictions in court.²³³ While three evictions were filed in court, this does not necessarily mean these tenants received a hearing. One tenant entered into a settlement that allowed her to avoid a trial if she left the rental unit within two months.²³⁴ In regard to another eviction in 2015, the building's new owner emailed the City and stated, "That [sic] last day to answer [the eviction complaint] is May 4, 2105. To date, no answers have been filed."²³⁵ As mentioned in the Tenant's Together report, even when evictions are filed in court, many tenants are unable to respond and lose by default.²³⁶

The trend of city attorneys and landlords not being required to prove their claims was not Oakland specific. In its 2016 report, The California Research Bureau states,

[T]he first step a city attorney or city prosecutor using the pilot program must take is to send a warning letter advising of the likely eviction. City attorneys sent 64 of these letters in 2015. Table 1 provides the number of cases that advance through each step in the eviction process. The majority of cases (40 out of 64, or 62.5 percent) progressed no further than the warning letter, while 24 advanced to (37.5 percent) a notice to quit. Twelve of the 64 (18.8 percent) cases resulted in eviction proceedings being filed in court.

231. Neville et al., *supra* note 51, at 4.

232. *Id.* In response to my public records request, twelve nuisance eviction orders in the year of 2015 were produced. Oakland City Attorney, *supra* note 2.

233. Neville et al., *supra* note 51, at 4.

234. Oakland City Attorney, *supra* note 2, at BN 560-62.

235. *Id.* at BN 516.

236. Inglin & Preston, *supra* note 151, at 9. While thirty percent of tenants having the possibility of a hearing may seem low, 2015 actually had an unusually high rate of tenants who were served formal eviction lawsuits. Between 2014 and 2018, a mere four out of twenty-five Oakland tenants subject to Unlawful Detainer Pilot Program orders were served unlawful detainer lawsuits. Cal. Assemb. B., 2930 (Aug. 13, 2018), https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB2930.

	Warning Letter		Notice to Quit		Eviction Filed		Adjudicated		Pending	
	N	%	N	%	N	%	N	%	N	%
Grand Total	64	100.0%	24	100.0%	12	100.0%	8	100.0%	7	100.0%
Long Beach	42	65.6%	12	50.0%	8	66.7%	6	75.0%	4	57.1%
Drug	42	65.6%	12	50.0%	8	66.7%	6	75.0%	4	57.1%
Los Angeles	2	3.1%	1	4.2%	1	8.3%	1	12.5%	0	0.0%
Weapon	2	3.1%	1	4.2%	1	8.3%	1	12.5%	0	0.0%
Oakland	10	15.6%	3	12.5%	3	25.0%	1	12.5%	3	42.9%
Both	5	7.8%	2	8.3%	2	16.7%	1	12.5%	2	28.6%
Drug	1	1.6%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Weapon	4	6.3%	1	4.2%	1	8.3%	0	0.0%	1	14.3%
Sacramento	10	15.6%	8	33.3%	0	0.0%	0	0.0%	0	0.0%
Drug	7	10.9%	5	20.8%	0	0.0%	0	0.0%	0	0.0%
Weapon	3	4.7%	3	12.5%	0	0.0%	0	0.0%	0	0.0%

Chart from: Neville et al., *supra* note 29, at 4.

The California Research Bureau does not raise any serious concern as to how tenants who are not served eviction notices or unlawful detainer lawsuits are forced out of their rental units. Shockingly, the Research Bureau states that the city attorney warning letters may be “an effective means to remove them [tenants] from the property without initiating an eviction.”²³⁷ In a footnote to this point, the California Research Bureau states, “it might be that tenants do not know where to go to contest their eviction; however, the law requires that the initial notice provide information about legal assistance providers, including those who are free of charge.”²³⁸ Self-help and harassment tactics are not considered as a possibility by this report. Instead, sidestepping formal proceeding is characterized as a successful aspect of the program.

In Oakland, there appears to be no substantive oversight regarding how landlords proceed with evictions. In fact, by statute, following a citation under Oakland’s ordinance the landlord must, “Provide the City with all relevant information pertaining to the unlawful detainer case the Owner has filed **or** a statement that the Tenant has completely vacated and surrendered the Rental Unit.”²³⁹ In essence, the Oakland ordinance requires landlords to show evidence of a proper legal eviction . . . or not.

Citation pursuant to Oakland’s Nuisance Eviction Ordinance or the Unlawful Detainer Pilot Program does not authorize self-help tactics, does not

237. Neville et al., *supra* note 51, at 5. Attempting to remove a tenant from a rental unit without issuing an eviction notice, or issuing an eviction notice that does not comply with the Just Cause Ordinance, is generally considered a wrongful eviction. Oakland Municipal Code §§ 08.22.360(B)(1)-(7), 8.22.370(A)(2), 8.22.640(A)(6) (2019).

238. Neville et al., *supra* note 51, at 16.

239. Oakland Municipal Code § 8.23(F)(2)(d)(i) (2019).

create a justification for an improper eviction complaint, and is not a defense to a wrongful eviction lawsuit. A landlord remains responsible for their actions even when a nuisance eviction order is issued. However, there is a dangerous lack of oversight into the actions of landlords in Oakland. The available statistics and data should raise concern and spur further investigation into how exactly landlords are removing tenants from their rental units.

D. Statutory Weakness in Both Oakland and California Law Invites Abuse

Individuals targeted by nuisance eviction orders need not be charged with a crime. For gun-related crimes, California's Unlawful Detainer Pilot program requires an order to be based "upon an arrest or warrant by a law enforcement agency, reporting an offense committed on the property and documented by the observations of a law enforcement officer or agent."²⁴⁰ The same requirement exists for drug crimes, however, a warrant alone is insufficient.²⁴¹ Oakland's Nuisance Eviction Ordinance utilizes a weaker standard for when the City can order an eviction.

The City's evaluation of whether a Tenant is engaged in illegal conduct is to be based on whether the Owner could prevail in a unlawful detainer proceeding against the Tenant based on a preponderance of evidence that the Tenant is engaged in the illegal activities and that eviction under such grounds is permissible under the Just Cause for Eviction Ordinance (O.M.C. 8.22.300) and applicable state law; a Tenant need not be arrested, cited, or convicted of the conduct to justify removing the Tenant from the Rental Unit.²⁴²

Oakland's standard is largely illusive, as by statute, it does not require the City to demonstrate that the tenant committed a nuisance by a preponderance of the evidence. Rather, it requires the City to determine, at its sole discretion, that a landlord "could" prevail in a case judged by this standard.²⁴³ Even if this ambiguous standard is read as requiring the City Administrator's office to believe that a preponderance of the evidence demonstrates that a tenant committed a crime, this assessment occurs with no court or administrative oversight. While Oakland's Nuisance Eviction

240. Cal. Civ. Code § 3485(a) (2019).

241. Cal. Civ. Code § 3486(a) (2019).

242. Oakland Municipal Code § 8.23(F)(1)(b) (2019).

243. *Id.*

Ordinance does not change the burden of proof in an eviction lawsuit, it does not impose the “preponderance of the evidence” standard onto the city of Oakland prior to issuing an eviction order; at least not in any meaningful way. Rather, as a matter of practice, and potentially as a matter of law, it requires the City to believe that a landlord *could* hypothetically prevail in an eviction lawsuit.

In a letter refuting claims made in City Lab’s article *Oakland Can Now Order Landlords to Evict Sex Workers*, Oakland City Attorney Barbara Parker asserted that the

NEO [nuisance eviction ordinance] gives tenants significant advantages over the state required eviction procedures. Under state law, a landlord can evict a tenant for nuisance on less evidence than NEO requires. State law requires only that a tenant be given a three-day notice to quit for the nuisance conduct set out in the ordinance. And there is no requirement that an eviction for nuisance conduct be based particular [sic] evidence, let alone a conviction or even a police report.²⁴⁴

Ms. Parker’s apparent assertion that the Nuisance Eviction Ordinance gives tenants a “significant advantage” over existing state eviction law is inaccurate. The state and city laws regarding evictions are not changed by the Nuisance Eviction Ordinance. A citation under Oakland’s ordinance merely compels the landlord to utilize the city and state laws Ms. Parker speaks of (or potentially disregard them).²⁴⁵ While the landlord has twenty-five to thirty days to begin the eviction process, this is not time gained by the tenant, as the landlord may serve the three-day notice at any time.²⁴⁶ In many cases, landlords likely would not have initiated eviction proceedings absent the City’s involvement.

While the Nuisance Abatement Division claims to require a police report, which is not a prerequisite for a landlord filing a nuisance-based eviction in California, this requirement is not technically part of Oakland’s ordinance unless the nuisance act is a “violent crime” or “threat of violent

244. Capps, *supra* note 53.

245. Oakland Municipal Code §§ 8.23.100(F)(2)(a), (d)(i) (2019).

246. Oakland Municipal Code § 8.23.100(F)(2)(a) (2019). The Unlawful Detainer Pilot program gives landlords 30 days to file an eviction action against a tenant before the City can file an eviction action in the name of “the people.” Cal. Civ. Code §§ 3485(a)(1)(A), 86(a)(1)(A) (2019). The city of Oakland appears to issue notices pursuant to both state and city law, and uses either the 25-day period or the 30-day period depending on the notice. Oakland City Attorney, *supra* note 2.

crime.”²⁴⁷ For other nuisance acts, Oakland’s ordinance merely requires “documentary evidence.”²⁴⁸ The Nuisance Eviction Ordinance does not require more evidence than California law for a tenant to be evicted, it simply requires that some documentary evidence be made available before the City compels a landlord to evict.²⁴⁹ The California evidentiary standards applicable to evictions are not altered by the issuance of a nuisance eviction order. It is safe to say that most tenants cited under the Nuisance Eviction Ordinance will not feel that they have been granted additional eviction protections.

Furthermore, neither the Unlawful Detainer Pilot Program nor the Nuisance Eviction Ordinance requires an arrest, warrant, police report, documentary evidence, or even an allegation of nuisance activity, for every tenant in a rental unit subject to an eviction order.²⁵⁰ Both laws allow those not involved in nuisance to be evicted.²⁵¹ Both laws allow children to be displaced due to the alleged crimes of their family members.²⁵² This concern was brought to the attention of the legislature in 2018 before it unanimously approved another six-years of the Unlawful Detainer Pilot Program.²⁵³ The Senate Judiciary Committee stated,

Arguably, the more disturbing potential downside to this pilot program is the collateral impact on what may be relatively innocent household members. It is probably not a good thing for children to be living where unlawful weapons or drug activity is taking place, but it is definitely not a good thing for children to go homeless. The pilot programs have a provision that deals with this problem in theory: courts may order “partial” eviction forcing just some of the household members to vacate while allowing others to stay. In practice, it is hard to imagine a court issuing such an order, in part because it is hard to envision how law enforcement would monitor compliance.²⁵⁴

247. While state law does not require a police report before a landlord can file a nuisance eviction, a landlord may have difficulty evicting a tenant for drug or firearms activity without one. Oakland Municipal Code §§ 8.23.100(B)(22)-(23), (F)(1)(b), (2)(b), (4)(d), (5) (2019).

248. Oakland Municipal Code §§ 8.23.100(F)(2)(b), (4)(d), (5) (2019).

249. Oakland Municipal Code §§ 8.23.100(F)(1)(b), (4)(d), (5) (2019).

250. *See generally* Cal. Civ. Code §§ 3485-86 (2016); Oakland Municipal Code § 8.23.100 (2019).

251. *Id.*

252. *Id.*

253. Cal. S. Jud. Comm. B. 2930 (June 18, 2018), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB2930.

254. *Id.*

While both the Unlawful Detainer Pilot Program and the Nuisance Eviction Ordinance contain partial eviction protections, their application is discretionary.²⁵⁵ It is the burden of the tenant(s) to request and receive a partial eviction.²⁵⁶ If the City, landlord, or alleged “offending tenant,” does not agree to resolve the matter via settlement, on the City’s terms, and without a hearing, the non-offending tenants must take their chances in the courts. The non-offending tenants must refuse to leave, get sued, respond to the lawsuit within five days, and hope that they can convince the court that they have “good cause” to remain.²⁵⁷ If this “good cause” is not present, the non-offending tenants may be evicted by the Sheriff, even if they were never accused of nuisance activity. If tenants are successful in attaining a partial eviction, unless their landlord is especially generous, the remaining tenant(s) must continue to pay all of the rent. The tenant(s) must continue to pay full rent even if one or more of the (former) tenants are prohibited from setting foot on the property.

In addition to partial eviction protections being of no help to many tenants, who the “offending tenant” is can often be a matter of opinion. Both laws allow tenants to be targeted for “permitting” nuisance activity.²⁵⁸ For example, in 2008, after a man was arrested for possessing guns and drugs, his mother was named in the City’s eviction order.²⁵⁹ The order stated “In your statement, you [REDACTED], indicated that you were aware that your son sold marijuana. Your knowledge of the activity and failure to remove your son from your home, and/or report activity to the authorities means you condoned this activity and subjects you to eviction.”²⁶⁰

Perhaps most disturbing, is that Oakland law provides no protections for tenants who are found to be innocent, or never charged in criminal

255. Cal. Civ. Code §§ 3485(b), 86(b) (2019); Oakland Municipal Code §§ 8.23.100(F)(6)(a), (H) (2019).

256. *Id.* Statutory authority for a court ordered partial eviction exists within the Unlawful Detainer Pilot Program, but not Oakland’s Nuisance Eviction Ordinance. Oakland Municipal Code § 8.23.100 et seq. (2019).

257. This protection exists under Unlawful Detainer Pilot Program, not the Nuisance Eviction Ordinance. Cal. Civ. Code §§ 3485(b), 86(b) (2019).

258. Oakland Municipal Code § 8.23.100(E)(1) (2019); Cal. Civ. Code §§ 3485(a), 86(a) (2016); Cal. Civ. Proc. Code § 1161(4) (2019).

259. Oakland City Attorney, *supra* note 2, at BN 238-340.

260. The assistant to the City Administrator who signed this eviction order now works as a marijuana lobbyist. Oakland City Attorney, *supra* note 2, at BN 238-340; Darwin BondGraham, *Oakland’s Revolving Door of Weed Lobbying*, EAST BAY EXPRESS (Feb. 7, 2018), <https://www.eastbayexpress.com/oakland/oaklands-revolving-door-of-weed-lobbying/Content?oid=13057408>.

court. For example, Ruben Leal was never charged and states that he was never even arrested in connection with the sealed search warrant executed on his parents' home.²⁶¹ There is no provision of Oakland, or California law, which prevents the City from issuing a nuisance eviction order against a tenant who was found to be innocent in a criminal court.

This report has not uncovered evidence of tenants who were found to be innocent in criminal court and subsequently targeted by nuisance eviction orders. However, several cases raised concern. For example, many cases involved significant passages of time between the alleged nuisance act and the issuance of a nuisance eviction citation. Ten of the seventy-nine cases involved gaps of more than five months between the alleged nuisance and the issuance of the City's eviction order.²⁶² Two of these cases involved a gap of more than ten months.²⁶³

While reviewing criminal court documents of every tenant cited in Oakland's eviction orders was beyond the scope of this paper, I did review two sets of criminal court documents at the Rene C. Davidson Courthouse in Oakland. These records indicate that in at least some cases, tenants were sentenced to serve jail time, and were likely incarcerated when the City issued its eviction orders.²⁶⁴ For these tenants, it is unclear if they ever received notice of Oakland's eviction orders, as the notices were sent to their residential addresses.²⁶⁵

To gain clarity on these cases, I spoke with Greg Minor, an assistant to the City Administrator.²⁶⁶ Minor informed me that the City's nuisance eviction program runs parallel to the criminal justice system.²⁶⁷ In essence, the process does not stop simply because a tenant may be incarcerated. Mr. Minor was unaware of whether the City does any sort of investigation into

261. E-mail from Ruben Leal, to Ethan Silverstein (Apr. 5, 2019, 11:35 PST) (on file with *Hastings Journal of Crime and Punishment*).

262. Oakland City Attorney, *supra* note 2.

263. *Id.*

264. I have chosen to not name individual tenants in this paper for privacy reasons. However, I retain sentencing documents for two of the ten tenants mentioned in the preceding paragraph. One was sentenced to one year with credit for 248 days of time served. Less than two months after this tenant's sentencing, the City issued its eviction order. Another tenant was sentenced to 16 months with credit for 84 days served. In this case, the City issued its order four and a half months after the sentencing. Oakland City Attorney, *supra* note 2.

265. Oakland City Attorney, *supra* note 2, at BN 164, 46.

266. This telephone call occurred due to a request for release of oral public information under Oakland's Sunshine Ordinance. In this instance, the City eventually honored my request. It did so despite the information not existing in the written form. Telephone Call with Gregory Minor, Assistant to the City Administrator (July 5, 2019).

267. *Id.*

a tenant's criminal case, or physical whereabouts, prior to the issuance of a nuisance eviction order.²⁶⁸ While Mr. Minor could not fully explain why an eviction order would be issued on an incarcerated tenant, he did emphasize that a goal of the program is to make sure that nuisance tenants do not return to their rental units.²⁶⁹

While one can only speculate, ensuring that tenants do not return after their incarceration may be the ultimate goal of issuing eviction orders on incarcerated tenants. However, if intentional, this goal is not based in law. Oakland's ordinance contains a provision that requires landlords to not re-rent to the same tenant, at any property the landlord owns, for three years if the tenant is named in a nuisance eviction order.²⁷⁰ However, Oakland's three-year prohibition applies only when a tenant is removed following a court order evicting the tenant, or when a tenant vacates "voluntarily after the City has sent a notice to the owner."²⁷¹ While the three-year prohibition on re-renting does not actually require the tenant to receive a notice, it does require the tenant to vacate "voluntarily" and "after" the landlord receives a notice.²⁷² In the cases of the two tenants whose criminal records I examined, both tenants were likely in prison at the time the notices were issued at their residential address.²⁷³ Both tenants presumably did not leave their residential units "voluntarily" to go to jail. Neither of these tenants vacated "after" the notices were sent.²⁷⁴ While a three-year prohibition on re-rental would likely not be enforceable if a tenant was in jail when the City issued an eviction order, asserting that the prohibition is unenforceable would be the burden of the landlord, who has little incentive to re-rent to the same tenant and potentially face a lawsuit from the city of Oakland.²⁷⁵

E. Preliminary Findings

The abovementioned issues raise concern in how Oakland utilizes its nuisance eviction powers. Primarily in regard to the racially disparate nature of the City's enforcement activities, the excess of discretion on the part of city government, the lack of oversight into the actions of landlords, and the general statutory shortcomings of both city and state law that allow these issues to flourish. These findings are based on a limited set of

268. *Id.*

269. *Id.*

270. Oakland Municipal Code § 8.23.100(I)(1) (2019).

271. Oakland Municipal Code § 8.23.100(I)(2) (2019).

272. *Id.*

273. Oakland Police, *supra* 1.

274. *Id.*

275. Oakland Municipal Code § 8.23.100(I)(3) (2019).

primary documents. If Oakland's nuisance eviction program is to continue, a more thorough investigation is much needed.

VII. Equal Protection, Due Process, and the Weaponization of Gentrification

Policy considerations aside, Oakland's nuisance eviction program may rest on legally questionable ground. While the racial disparities present in Oakland's enforcement efforts are shocking, it is unlikely that the enforcement patterns in and of themselves present a constitutional violation. Rather, Oakland's actions likely present a violation of the procedural due process rights of tenants.

A. The Racial Disparities Present in Oakland's Nuisance Eviction Actions Unlikely Render the Program Unconstitutional

Perhaps the most shocking data from the Oakland Police reports, were the racial demographics of those who were eventually cited in eviction orders. While the previously mentioned statistics may reflect troubling enforcement patterns, this in and of itself is unlikely to render Oakland's nuisance eviction program unconstitutional. The Fourteenth Amendment of the United States Constitution prohibits states from denying "any person within its jurisdiction the equal protection of the laws."²⁷⁶ The Fourteenth Amendment's equal protection clause triggers a strict scrutiny analysis when state action, such as legislation or judicial enforcement, implicates race.²⁷⁷ The fact that a law is race-based does not necessarily make it illegal, but if challenged, the state must demonstrate that the law is "narrowly tailored to further compelling governmental interests."²⁷⁸ For example, the Supreme Court struck down Virginia's criminal laws prohibiting interracial marriage.²⁷⁹ In doing so, the Court stated, "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."²⁸⁰

While the Constitution protects citizens from most forms of racialized state action, the equal protection clause loses significant power when the

276. U.S. Const. amend. XIV, § 1.

277. *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Nonmalicious state action such as affirmative action programs at public universities also triggers a strict scrutiny review. *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013).

278. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

279. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

280. *Id.* at 11.

state's intent is unclear. For example, In *McCleskey v. Kemp*, the Supreme Court upheld a death sentence imposed on a black man convicted of killing a white police officer.²⁸¹ It did so despite evidence of Georgia's death penalty being disproportionately applied to African Americans and people who murder whites.²⁸² McCleskey presented "two sophisticated statistical studies that examine[d] over 2,000 murder cases that occurred in Georgia during the 1970's."²⁸³ The study took into account thirty-nine independent mitigating variables that could have explained the racial disparities.²⁸⁴ Even with the mitigating variables applied, defendants who killed white victims were 4.3 times more likely to receive the death penalty compared to those who killed black victims.²⁸⁵ When the mitigating variables were not considered, the probability rose from 4.3 times to eleven.²⁸⁶ The data also showed that black individuals who killed white individuals were twenty-two times more likely to be sentenced to death than black individuals who killed other black individuals.²⁸⁷

This evidence alone was not sufficient to call McCleskey's death sentence in to question absent a showing of "invidious intent" on the part of the state.²⁸⁸ The Court stated that "Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious."²⁸⁹ Perhaps more reflective of the Court's justification was its conclusion,

if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice

281. *Id.* at 320.

282. *McCleskey v. Kemp*, 481 U.S. 279, 320 (1987).

283. *Id.* at 286.

284. *Id.* at 287.

285. *Id.*

286. *Id.* at 326-27.

287. *Id.* at 327.

288. *Id.* at 320.

289. *Id.* at 313.

system, such as defense attorneys or judges.²⁹⁰

While disparate racial impact alone is usually insufficient to justify a finding of a violation of the Equal Protection Clause, the Court in *McCleskey* seems to acknowledge that there may be a line.²⁹¹ In footnote five of *McCleskey*, the court cites a case it decided in the previous year, *Batson v. Kentucky*.²⁹² In *Batson*, the Supreme Court held that Batson's burglary conviction could be reversed if the prosecutor was unable to justify, with race-neutral reasoning, utilizing peremptory strikes on black jurors following the defense making a prima facie showing of discrimination.²⁹³ The Court in *McCleskey* cites this case for the proposition that "under some circumstances proof of discriminatory impact may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."²⁹⁴

One of the rare cases where this line was crossed was the 1886 case of *Yick Wo v. Hopkins*.²⁹⁵ *Yick Wo* concerned a San Francisco ordinance that required laundromats to obtain a permit unless they were located in brick or stone buildings.²⁹⁶ At the time, there were roughly 320 laundromats in San Francisco, 310 of which were located in buildings made of wood.²⁹⁷ Many of these laundromats were operated by Chinese immigrants.²⁹⁸ When the City received permit applications, it denied all 200 which were submitted by Chinese individuals, while granting all but one application made by non-Chinese individuals.²⁹⁹ The Court, in a surprisingly progressive opinion stated that enforcing the ordinance, and sustaining Yick's conviction for violating it, would "drive out of business all the numerous

290. *Id.* at 315-317.

291. *Id.* at 352, note 5.

292. *Batson v. Kentucky*, 476 U.S. 79 (1986).

293. A peremptory strike is the act of removing a juror from a jury without stating a reason. *Id.* at 83, 100.

294. *McCleskey*, 481 U.S. at 352 note 5.

295. Yick Wo's real name was Lee Yick, however Hopkins, the sheriff of San Francisco, booked him as Yick Wo "because that was the name of the laundry, which was a common name for a laundry at the time and meant to signify harmony and tranquility." *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); Diana Fan, *Yick Wo: How a Racist Laundry Law In Early San Francisco Helped Civil Rights*, HOODLINE (Aug. 23, 2015), <https://hoodline.com/2015/08/yick-wo-and-the-san-francisco-laundry-litigation-of-the-late-1800s>.

296. *Yick Wo*, 118 U.S. at 365.

297. *Id.*

298. *Id.* at 365.

299. *Id.*

small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital.”³⁰⁰ The court further stated, “Can a court be blind to what must be necessarily known to every intelligent person in the State?”³⁰¹

Oakland’s Nuisance Eviction Ordinance, on its face, does not implicate race.³⁰² While gangs are often a racialized construct, and the ordinance does target “gang-related crime,” this is almost certainly insufficient for a court to trigger a strict scrutiny analysis.³⁰³ As such, to challenge the ordinance on equal protection grounds, one would need to show invidious intent on the part of the state. The lack of evidence of invidious intent on the part of the city of Oakland would most likely be the death of an equal protection clause challenge to Oakland’s nuisance eviction program. There is no evidence that the city utilizes its program specifically to harm black tenants.

While evidence of invidious intent on the part of the state is lacking, the fact that in a sample of seventy-six tenants cited, only one was white, is certainly of concern. While Oakland’s nuisance eviction program has a racially disparate impact, it is unlikely sufficient to reach the levels of a case like *Yick Wo*, which while still good law, is somewhat of a rare case.³⁰⁴ *Yick Wo* tends to stand not for the proposition that a law can have an impact so disparate that it automatically becomes unenforceable regardless of intent. Rather, in *Yick Wo*, the intent was made obvious by the nature of the enforcement which involved “arbitrary power, without regard to competency of persons or to fitness of places, to grant or refuse licenses to carry on public laundries, and which was executed by the supervisors by refusing licenses to all Chinese residents, and granting them to other persons under like circumstances”³⁰⁵ Oakland’s nuisance evictions are more likely to be viewed by a court as Georgia’s implementation of the death penalty; racially disparate, yet not a violation of the United States Constitution.

300. *Id.*

301. *Id.*

302. See generally Oakland Municipal Code § 8.23.100 *et seq.* (2019).

303. See generally Ana Muniz, *Maintaining Racial Boundaries: Criminalization, Neighborhood Context, and the Origins of Gang Injunctions*, 61 Soc. Probs 216-23 (2014).

304. See generally David Crump, *Evidence, Race, Intent, and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases*, 27 HOFSTRA L. REV. 285-333 (1998).

305. *Fong Yue Ting v. United States*, 149 U.S. 698, 725 (1893).

B. The Due Process Rights of Oakland's Tenants are Likely Violated Through Oakland's Nuisance Eviction Actions

While Oakland's nuisance eviction actions are unlikely a violation of the Fourteenth Amendment's equal protection clause, both Oakland's ordinance and California's pilot program may still run afoul of the Fourteenth Amendment's due process protections. In addition to equal protection, the Fourteenth Amendment guarantees that the states shall not "deprive any person of life, liberty, or property, without due process of law."³⁰⁶ One California city has already had its nuisance eviction ordinance struck down on due process grounds.³⁰⁷ In *Cook v. City of Buena Park*, California's Fourth Appellate District affirmed a trial court judgment holding that the City of Buena Park's "Narcotics and Gang-Related Crime Eviction Program" was an unconstitutional violation of a landlord's due process rights.³⁰⁸ The Buena Park ordinance was distinguishable from both the Oakland Nuisance Eviction Ordinance and the California Unlawful Detainer Pilot Program. In fact, the court compared the Buena Park ordinance to the Unlawful Detainer Pilot Program in order to support its holding.³⁰⁹ The court noted that California's Pilot Program requires 1) thirty days-notice to the landlord; 2) documentation of the nuisance or illegal activity; 3) the nuisance or illegal activity must be observed by a peace officer; and 4) the owner can request assignment of the eviction to the city attorney if they fear for their safety.³¹⁰ The court also noted that tenants can possibly receive a partial eviction.³¹¹ The Buena Park ordinance, while functionally similar to California and Oakland law, provided owners only ten days-notice, the determination was made solely by the chief of police, who did not need to observe the conduct, and further, if the landlord failed to prevail in the eviction action, the landlord could be held criminally liable.³¹²

While the Fourth Appellate District highlighted the Unlawful Detainer Pilot Program as an example of a program with more adequate protections, it seemed to hint that the Pilot Program may suffer from its own constitutional issues. When discussing the Buena Park ordinance, The Fourth Appellate District Court stated "We express no opinion on the

306. U.S. Const. amend XIV, § 1.

307. *Cook v. City of Buena Park*, 126 Cal. App. 4th 1, 10 (2005).

308. *Id.* at 9-10.

309. *Id.* at 8.

310. *Id.* at 7-8.

311. *Id.*

312. *Id.* at 8-9.

constitutionality of the pilot program. Set against its example, however, the inadequacies of the ordinance stand out in bold relief.”³¹³ The concurrence went further,

I share the misgivings of my colleagues about the procedural due process problems of this ordinance. I fully agree it does not pass constitutional muster in regard to those considerations. But I would be remiss if I did not also express my concern the ordinance may have more carcinogenic problems than we discuss in this opinion. I am not yet convinced this ordinance does not suffer from other, more fundamental constitutional infirmities than procedural due process. I am concerned, *inter alia*, about its sweeping requirement that *all* occupants of the premises must be evicted for the sins of one, its disparate treatment of property owners and renters (our record reflects no nuisance abatement efforts against the *owners* of property for similar crimes), and the Damoclean substantive due process issue which hangs over this statutory scheme . . . if the city chooses to revise the ordinance to address its procedural due process problems, I encourage it to give more thought to these other issues as well.³¹⁴

Oakland’s Ordinance suffers from some of the same issues as the City of Buena Park. For example, the alleged nuisance activity does not need to be observed directly by a peace officer. Oakland’s ordinance also only requires twenty-five days-notice to the landlord as opposed to thirty.³¹⁵ However, it appears that after 2014, when the City ordered an eviction for drug or weapons activity, it issued the notices pursuant to both local and state law and generally utilized the protections of California’s program.³¹⁶

While the Fourth Appellate District refrained from commenting on the constitutionality of the Unlawful Detainer Pilot Program, it also limited its analysis to the due process rights of landlords.³¹⁷ While landlords may have due process concerns regarding Oakland’s nuisance eviction program, tenants too should not have their due process concerns overlooked.

The United States Supreme Court has held that due process is a

313. *Id.* at 8.

314. *Id.* at 10-11 (W. Bedsworth concurring).

315. Oakland Municipal Code § 8.23.100(F)(2)(a) (2019).

316. On some occasions after 2014, the city utilized 25-days notice to the landlord. Oakland City Attorney, *supra* note 2.

317. *See Cook*, 126 Cal. App. 4th 1.

flexible inquiry.³¹⁸ The Due Process Clause of the United States Constitution protects more than tangible physical property.³¹⁹ For example, a Section Eight housing subsidy is a protected property interest.³²⁰ To terminate a Section 8 housing subsidy, “due process requires, among other things, timely and adequate notice of the reasons for the proposed termination and a written decision following a pretermination hearing.”³²¹

In addition to the Fourteenth Amendments protecting property interests broadly, property interests need not be seized by the state directly to be protected. The Supreme Court has held that the Fourteenth Amendment can protect property even in disputes between individuals, when the state enables or assists one side of the dispute.³²² For example, in *Connecticut v. Doehr*, the U.S. Supreme Court held that a Connecticut statute authorizing plaintiffs to place a pre-judgment attachment on a defendant’s real property, without notice, violated the Fourteenth Amendment.³²³ The Court in *Doehr* ruled this way despite the fact that the attachments did not physically deprive defendants of their property.³²⁴

When determining whether the state is sufficiently guaranteeing due process, a three-prong inquiry is often utilized.³²⁵ When using this test, courts balance:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the

318. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

319. *See generally Mathews*, 424 U.S. 319 (concerning an individual’s due process rights during the termination of disability payments). *See also Nozzi v. Hous. Auth.*, 806 F.3d 1178, 1191 (9th Cir. 2015) (stating that “property interests that due process protects extend beyond tangible property and include anything to which a plaintiff has a legitimate claim).

320. *Johnson v. Hous. Auth. Of City of Oakland*, 38 Cal. App. 5th 603, 607 (2019); *see also Nozzi*, 806, F.3d at 1199 (holding that the housing authority violated the plaintiffs’ procedural due process rights when decreasing his housing subsidy by \$104 per month without proper notice); The Section Eight housing program subsidizes a portion of tenants’ rent in private rental housing. *Section 8, Oakland Housing Authority*, <http://www.oakha.org/Residents/Housing%20choice-voucher-residents/Pages/default.aspx> (last visited Nov. 14, 2019).

321. *Johnson*, 38 Cal App. 5th at 607.

322. *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991).

323. *Id.* at 24.

324. *Id.* at 4.

325. *Mathews*, 424 U.S. at 335.

fiscal and administrative burdens that the additional or substitute procedural requirement would entail.³²⁶

A balancing of these three factors indicates that tenants likely have their due process rights violated through Oakland's nuisance eviction orders.

1. Tenants Have a Strong Private Interest in Their Tenancies

While it may not appear obvious, tenants have a significant private interest in their rental units. This interest is not merely intangible, though intangible interests such as community connection, proximity to employment, and the stresses of looking for new housing should not be overlooked. While the intangible interests are of tremendous value, tenants in rent-controlled jurisdictions also have a significant property interest in their tenancies. As mentioned above, in Oakland, most tenants cannot be evicted without a "just cause."³²⁷ Unless a landlord has a just cause, and successfully proves it, potentially in a trial by jury, the tenant does not need to leave the rental unit.³²⁸ In addition to just cause protections, tenants in Oakland also benefit from Oakland's Rent Adjustment Ordinance.³²⁹ The Rent Adjustment Ordinance, which was enacted to provide a fair return to landlords, while stabilizing housing for tenants, limits rent increases.³³⁰ Each year, the Rent Adjustment Program assigns a maximum rent increase for landlords whose rental units are subject to the ordinance.³³¹ If a landlord asserts a rent increase in excess of the allotted amount, the increase is unenforceable.³³²

While Oakland's Just Cause and Rent Adjustment ordinances provide strong protections for tenants, the state of California has largely restricted localities in their ability to effectively restrict rent increases. In 1996, California passed the Costa-Hawkins Rental Housing Act.³³³ The Costa-Hawkins act restricted rent control in substantive ways, most notably, an outright prohibition on vacancy-control.³³⁴ Following the passage of

326. *Id.*

327. Oakland Municipal Code § 8.22.300 *et seq.* (2019).

328. *Id.*

329. Oakland Municipal Code § 8.22.010 *et seq.* (2019).

330. Oakland Municipal Code § 8.22.010(C) (2019).

331. Oakland Municipal Code § 8.22.065(A). Most multi-unit buildings built before 1983 are subject to the Rent Adjustment Ordinance. Oakland Municipal Code § 8.22.030.

332. *Id.*

333. Cal. Civ. Code § 1954.52 *et seq.*

334. Cal. Civ. Code § 1954.53.

Costa-Hawkins, property owners in California have become free to rent their units at any rental rate, regardless of local law, if tenants leave voluntarily, or are evicted for cause, such as not paying rent, nuisance, or using the property for an illegal purpose.³³⁵ The Costa-Hawkins Rental Act, in effect, has created a large profit motive in for-cause eviction, as following an eviction, a landlord can escape the restrictions of local rent control ordinances.³³⁶ These laws have created a somewhat unique housing market. In Oakland, it is common for tenants in the same neighborhood, or even the same building, to rent comparable units, yet pay significantly different rents. Oftentimes this difference can be hundreds or even thousands of dollars per month.

The interaction between the Costa-Hawkins Rental Act and Oakland's local ordinances has put a high dollar value on rent-controlled tenancies. A common trend in the Bay Area is for landlords to offer tenants monetary payments to voluntarily vacate their rental units.³³⁷ While the issue of what is a "fair buyout" is of much debate, rent-controlled tenants in the Bay Area can often receive anywhere from \$8,000 to \$100,000, or even more for a well-negotiated buyout.³³⁸ These high figures have led both unscrupulous actors and city governments to step into the tenant buy-out market. San Francisco, Berkeley, and Oakland have passed tenant buyout ordinances that give tenants time to withdraw from buyout agreements, regulate how tenants are approached in these negotiations, and prescribe minimum monetary payments.³³⁹ Arguably predatory start-ups have also stepped in to profit from acting as middlemen between tenants and landlords in buyout

335. Cal. Civ. Code § 1954.53; California Civil Code section 1954.53 does not apply to a landlord if the previous tenancy is terminated through a notice pursuant to California Civil Code section 1946.1, these notices provide 30 or 60 days and are used to evict a tenant without stating a reason (when allowed by local law), or in rent-controlled jurisdictions, to carry out just cause evictions that do not reflect a fault of the tenant, such as an owner move-in eviction. Cal. Civ. Code § 1954.53(a)(1).

336. Even if an eviction is not for cause, most cities have no way of ensuring that landlords do not raise rent to "market rate" regardless.

337. Jay Barman, *How Much Should You Get Paid If Your Landlord Wants To Buy You Out Of Your Rent-Controlled Apartment*, SFIST (July 31, 2014), https://sfist.com/2014/07/31/how_much_should_you_be_getting_if_y.; Seung Lee, *One Startup Wants To Speed Buyouts In San Francisco's Rent-Controlled Units*, NEWSWEEK (Mar. 25, 2016), <https://www.newsweek.com/one-startup-wants-speed-buyouts-san-franciscos-rent-controlle-d-units-440630>.

338. *Id.*; Laura Waxmann, *Tenant Advocates Denounce Startup Offering Buyout Services*, MISSION LOCAL (Mar. 30, 2016), <https://missionlocal.org/2016/03/tenant-advocate-s-denounce-startup-offering-buyout-middleman-service/>.

339. Oakland Municipal Code § 08.22.700 *et seq.*; San Francisco Administrative Code § 37.9E; Berkeley Municipal Code § 13.79.050.

negotiations.³⁴⁰ One such service advertises “Live in a rent-controlled apartment? Get paid over \$20,000 to move out.”³⁴¹

While \$20,000 may sound like a windfall to some, in reality, the true value of many rent-controlled tenancies far exceeds this sum. For example, in wrongful eviction lawsuits, tenants often claim the loss of their rent-control as part of their damages.³⁴² In *Chacon v. Litke*, following a family’s wrongful eviction, the loss of the family’s rent control was valued at \$381,825, a sum that was tripled under San Francisco’s Rent Ordinance to \$1,145,475.³⁴³

The high dollar value which can be placed on a tenant’s tenancy makes one thing clear, even if the significant intangible aspects of community connection are disregarded, tenants in Oakland have a strong private interest in their tenancies.³⁴⁴ In the context of state-mandated evictions, this private interest is arguably much stronger than that of a landlord. While a landlord who evicts a tenant will escape Oakland’s Rent Adjustment Ordinance and charge “market rate” for their unit, the tenant loses their rent-controlled tenancy permanently, which is of significant monetary value, and likely cannot be replaced. The tenant, and potentially their family, will be thrown into the deregulated housing market. The strong private interest present demands a low risk of error as well as a strong government interest in order to guarantee due process.

2. *The Risk of Erroneous Nuisance Eviction Orders is Significant and Unlikely to be Mitigated*

Oakland’s nuisance eviction orders do not fit neatly into the Court’s *Mathews* test, especially in regard to the second prong, which considers “the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.”³⁴⁵

If the private interest is said to be the tenant’s tenancy, the next question is what an erroneous deprivation of that tenancy looks like. For example, would a tenant be erroneously deprived of their tenancy if a landlord, in response to a city order, utilized self-help tactics such as

340. Waxmann, *supra* note 336.

341. Rent Masters, <http://www.rentmasters.co> (last visited Nov. 11, 2019).

342. *Chacon v. Litke*, 181 Cal. App. 4th 1234, 1245-1246 (2010).

343. *Id.*

344. *See generally* Causa Justa :: Just Cause and Alameda County Public Health Department, Place Matters Team, *supra* note 167 (analyzing the nonmonetary aspects of eviction).

345. *Mathews*, 424 U.S. at 334.

changing the tenant's locks? Is a tenant erroneously deprived of their tenancy if the tenant is unable to obtain legal resources and defaults in the eviction lawsuit? Is a tenant erroneously deprived if they did indeed commit a nuisance act, yet had their rights violated in the eviction process? What if the tenant did not commit a nuisance act, yet was found culpable in a civil jury trial nonetheless? What if the resident who is targeted is not actually a tenant, and the property owner is not a landlord, such as the Leal family.

These are all unanswered questions which make this inquiry difficult. The City asserts that "all NEO evictions go through the same court process that every other eviction does. NEO does not and cannot supplant the eviction process required by state law. California state law governs eviction process and this process cannot be changed by a city."³⁴⁶ This claim is true. However, the question remains, is the City absolved from any responsibility for erroneously depriving a tenant of their tenancy, simply because the landlord, after being compelled by the City, carries out the eviction, and *should* follow state and city eviction laws?

There is no clear answer to this question. However, it could be argued that once the City inserts itself into eviction proceedings, existing city and state protections are insufficient. A landlord who is ordered to evict by the City may be in a different position than a landlord who chooses to evict a tenant. For example, a landlord compelled to evict may not be willing or able to hire an attorney, and may be more prone to engaging in improper eviction practices. The State's Unlawful Detainer Pilot Program has addressed some of these risks by mandating that as part of the nuisance eviction process, tenants are told that the nuisance eviction order is not an eviction notice, and are provided a list of legal service providers. Oakland, since 2014, appears to comply with this requirement.³⁴⁷

While Oakland is taking small steps in the right direction, the eviction process itself invites error due to the high risk of demanding a meaningful evidentiary hearing. While a tenant can refuse to vacate their rental unit, respond to the eviction lawsuit within five days, and then demand a trial by jury, doing so is risky. If a tenant chooses this path and is unsuccessful, the eviction judgment will be a public record, one that new landlords will be able to view.³⁴⁸ This can be a significant barrier to tenants finding new rental housing in the Bay Area or elsewhere. The tenant can also be found responsible for the landlord's costs, and depending on their lease

346. Parker, *supra* note 243.

347. Cal. Civ. Code §§ 3485(a)(1)(C), 3486(a)(1)(C) (2019).

348. Cal. Civ. Proc. Code § 1161.2 (2017).

agreement, even the landlord's attorney fees.³⁴⁹ While the tenant can request a reconsideration from the City, this procedure may not be of much help to many tenants, as no hearing, let alone one by an independent fact-finder ever occurs.³⁵⁰ Further, even if the City does reconsider in favor of the tenant, the landlord is not precluded from carrying out an eviction against the entire rental unit regardless. All of these factors have potential to prevent or dissuade tenants from challenging the City's claims, and increase the likelihood that a wrongful eviction will proceed unchecked.

One could argue that many of these concerns are related to the unlawful detainer process itself as opposed to nuisance eviction orders from city governments. In fact, the State Senate Judiciary Committee made this argument in 2018 when renewing the program.³⁵¹ Under a heading entitled "due process considerations" the Judiciary Committee states:

While these are, arguably, valid due process concerns, it is also true that they are not unique to these pilot programs. Tenants frequently move out "voluntarily" when confronted by the prospect that an eviction lawsuit will be filed against them. Those who do stay rarely manage to navigate the complex procedural requirements for responding to a lawsuit within the greatly compressed timeline that eviction cases operate on. If they do manage to reach the point of appearing in court on the case, the overwhelming majority of tenants do so without the benefit of counsel, while the plaintiff landlords are nearly always accompanied by an attorney. Finally, when it comes to nuisance evictions of any kind, the standard of proof is merely "preponderance of the evidence" not "beyond a reasonable doubt," since eviction actions are civil, not criminal cases. Thus, the testimony of a law enforcement official as to the existence of a nuisance in a rental property would likely carry the day in an eviction case independent from these pilot programs. In short, if there are due process shortcomings to this program, it may be that they are more the result of the due process shortcomings inherent in California's eviction procedures than anything unique to these pilot programs.³⁵²

349. Cal. Civ. Code § 1717 (1872).

350. E-mail from Richard Luna, Assistant to the City Administrator, to Ethan Silverstein (Apr. 1, 2019, 11:27 PST) (on file with *Hastings Journal of Crime and Punishment*).

351. *Unlawful detainer: nuisance: unlawful weapons and ammunition: Analysis of AB 2930 Before the Cal. S. Jud. Comm.* (Santiago), (June 18, 2018), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB2930.

352. *Id.*

The Judiciary Committee points out that all tenants in California may have legitimate due process concerns when facing eviction. However, this point is not made to promote stronger protections for tenants. Instead, the point is made to evade accountability. The legislature makes no inquiry into the due process implications of the state seizing an individual's home through proceedings that are admittedly unfair.

If the City's actions and the landlord's actions are viewed as distinct, with the City being in no way culpable for any consequences of their eviction orders, there is no meaningful risk of error. The nuisance eviction order is not an eviction notice, and therefore, in a vacuum, is of no consequence to the tenant. However, this notice triggers real consequences; consequences that are largely out of the City's hands as soon as the notice is placed in the mail.

Oakland's eviction orders do not fit neatly into the *Mathews* analysis of erroneous deprivation. While the City's actions are somewhat unique, depending on how the issue is framed, there is a significant risk of error. While this risk could be mediated through further protections for tenants, such protections would likely require a significant shift in state and local law.

3. *Oakland's Interest in Displacement is Unclear.*

The third and final prong of the *Mathews* analysis looks at "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"³⁵³ The stated purpose of Oakland's Nuisance Eviction ordinance is that

The City of Oakland has a significant problem wherein owners of rental property have tenants who commit illegal acts on the property or use it to further illegal activities. Often rental property owners fail to take action to evict such tenants for a variety of reasons including, but not limited to: neglect, lack of knowledge of the illegal activity, monetary gain from renting to the offending tenants, or fear of retribution from the offending tenants. This illegal activity represents a serious threat to the health, safety, and welfare of other residents in the rental property, the neighborhood in which the rental property is located, and the City as a whole.³⁵⁴

This statement of purpose takes as a given that the proper response

353. *Mathews*, 424 U.S. at 335.

354. Oakland Municipal Code § 8.23.100(A) (2019).

to nuisance activity is an eviction. There is certainly room for debate on this position.

There are some circumstances in which a tenant, after receiving due process, should be removed from a rental unit for committing a crime. For example, in 2016, there was one nuisance eviction order involving a tenant who allegedly fired a gun into another tenant's rental unit, wounding one individual and nearly shooting his children.³⁵⁵ In circumstances such as these, Oakland has an interest in supporting the other tenants and removing the violent tenant. However, these cases are few and far between.³⁵⁶ Out of the 80 cases from the beginning of 2008 until the end of 2016, a mere four cited violent acts as justification for the eviction order.³⁵⁷ Further, it is unclear why the criminal justice system cannot handle issues such as these.

As noted by Glesner "At best, forfeiture and nuisance actions simply relocate crime."³⁵⁸ For nonviolent acts such as drug or weapon possession, which made up the vast majority of Oakland's eviction orders between 2008 and 2016, it is unclear how evictions play any role in mediating or preventing criminal acts. Eviction does not force a tenant to stop engaging in gun or drug-related activity. An eviction action does not force a tenant to cease association with gangs or obtain treatment for drug addiction. An eviction action surely does not create economic opportunities for individuals who resort to criminal activity as a means of survival. An eviction also does not protect the community from truly violent tenants, as nothing is stopping a violent tenant from returning to commit a violent act following an eviction. The nexus between eviction, crime prevention, and community safety is attenuated at best. Especially being that an individual who is evicted due to nuisance activity is free to rent another rental unit in the same neighborhood, or even next-door. If economic conditions make this impossible, they can live with community members, on the street, or in other unstable situations.

While the city of Oakland has an interest in preventing crime, if it seeks to avoid, or is unable to utilize the criminal justice system, the effectiveness of the alternative tactics used should be thoroughly assessed. When assessing the effectiveness of Oakland's program, the assessment should be of the program itself, not of the secondary effects of its use. In

355. Oakland City Attorney, *supra* note 2, at BN 764-66; Oakland Police, *supra* note 1, at BN 823-68.

356. Oakland Police, *supra* note 1.

357. It is possible that violent acts occurred and were not cited in eviction orders or police reports, yet motivated the City to pursue nuisance eviction orders. Oakland Police, *supra* note 1.

358. Glesner, *supra* note 169, at 788.

the case of nuisance evictions for non-violent tenants, the City's interests in preventing crime are only truly served if the tenant is persuaded to cease partaking in criminal activity in response to the punitive nature of the eviction, or the tenant is forced to leave Oakland completely. Assuming tenants are generally not engaging in crime due to a lack of challenging personal and economic circumstances (such as evictions), it appears the effectiveness of Oakland's nuisance eviction program as a crime-fighting tool would rely on forcing tenants out of Oakland completely.

If the program's effectiveness lies in removing tenants from Oakland, it is not the Nuisance Eviction Ordinance or Unlawful Detainer Pilot Program which can take credit for this accomplishment. The displacement of a tenant from the city is possible only due to tenants being forced to grapple with larger systemic issues such as the lack of affordable housing, housing discrimination, and the social stigma associated with criminal records and eviction judgments. As such, the use of eviction actions as a crime-prevention tool represents a dangerous and regressive form of policing—the weaponization of gentrification.³⁵⁹

Oakland's efforts, at their most effective, simply push crime out of gentrifying neighborhoods into more marginalized communities.³⁶⁰ While the City may have an interest in pushing certain tenants out of Oakland, this interest is accomplished due to systematic inequalities in the housing market, and at the expense of neighboring communities.³⁶¹ As such, it should not be viewed as legitimate. Absent a showing of state-imposed

359. *Causa Justa :: Just Cause* defines gentrification as a “profit-driven racial and class reconfiguration of urban, working-class and communities of color that have suffered from a history of disinvestment and abandonment. The process is characterized by declines in the number of low-income, people of color in neighborhoods that begin to cater to higher-income workers willing to pay higher rents. Gentrification is driven by private developers, landlords, businesses, and corporations, and supported by the government through policies that facilitate the process of displacement, often in the form of public subsidies. Gentrification happens in areas where commercial and residential land is cheap, relative to other areas in the city and region, and where the potential to turn a profit either through repurposing existing structures or building new ones is great ... the recent wave of gentrification is deeply tied to the emergence of a significant rent gap.” I have adopted this definition for this paper. *Causa Justa :: Just Cause & Alameda County Public Health Department, Place Matters Team, supra* note 167, at 11-12.

360. In a report by the Senate Judiciary Committee, under a heading entitled “Deterrence or just displacement” the author states, “The program may perhaps nonetheless be justified for its effect on the immediate neighbors. The criminal activity may only have moved to a new location, but that may still come as a considerable relief to those still living at the old location. Then again of course, the neighbors at the new location may view things differently.” Cal. S. Jud. Comm. Analysis, AB 2930 (Santiago) (June 18, 2018), https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB2930.

361. *Id.*

housing insecurity leading to reform on the part of those accused of crime, or larger positive effects on community safety, it is unclear what interest the City has in imposing evictions.

When Oakland's nuisance eviction actions are viewed through the *Matthews* framework, serious issues arise as to tenants' due process rights. It is clear that tenants have a strong private interest in their tenancies, and that this interest, depending on how the issue is framed, is at high risk of erroneous deprivation. As such, an incredibly strong government interest is required to guarantee due process. That interest is not present, as the nexus between evictions and crime prevention is largely illusory. As such, tenants subjected to the city of Oakland's nuisance eviction orders may not benefit from the Fourteenth Amendment guarantees of the United States Constitution.³⁶²

C. Oakland's Nuisance Eviction Program Rests on Legally Questionable Ground

Oakland's nuisance eviction program may present numerous constitutional issues. While the racial disparities present in Oakland's nuisance eviction program unlikely render the program unconstitutional, it appears likely that tenants subjected to Oakland's nuisance eviction orders are not receiving due process nonetheless. This may not be the extent of the legally questionable nature of Oakland's nuisance eviction program. At their roots, Oakland's Nuisance Eviction Ordinance and the California Unlawful Detainer Pilot Program are laws that require private individuals to sue one another. If the landlord follows the law, they are compelled to become a Plaintiff in an eviction lawsuit. To avoid further state action, the landlord may need to repeat the narrative of the state in their sworn testimony, namely, that the tenant has committed a criminal act, and that they should not be allowed to reside in the rental unit. Forced eviction lawsuits, for this reason, may bring up issues surrounding substantive due process and compelled speech.

There may also be due process implications regarding tenants' parallel criminal cases. For instance, it may be more difficult for a tenant to receive bail if they do not have a home, which may encourage guilty pleas. A tenant may also face complications regarding their fifth amendment privilege when being prosecuted criminally as well as civilly for the same act. In addition to these issues, the fact that wealthy Oakland residents can exclude themselves from the law entirely by becoming homeowners could also potentially cast legal doubt upon the program. Those with enough money will continue to have a home, even if they are accused of a weapon

362. U.S. Const. amend. XIV, § 1.

or drug crime. These issues are beyond the scope of this paper, however further legal analysis is much needed.

VIII. Conclusion

While the legal implications of Oakland's nuisance eviction program are certainly worth examining, the discourse must surpass the legal realm. Programs such as Oakland's bring to light important fundamental questions regarding race and law enforcement, gentrification, and citizens' relation to the state and role in crime-prevention. These questions are larger than local ordinances or state pilot programs, and require us to reconsider basic assumptions surrounding the law, and how it is enforced. This conversation is not just about Oakland, and not just about evictions, as Oakland's nuisance eviction program is just one of the many forms of aggressive policing that shock certain members of our society, yet are commonplace for others.

For example, a mere two years after Ruben Leal was named by the City in a nuisance eviction order, he was named by the City Attorney's office in the Norteños gang injunction.³⁶³ The injunction sought to prohibit forty-two alleged gang members, including Ruben Leal, from participating in a series of illegal actions such as firearms activity and graffiti.³⁶⁴ The injunction also sought to criminalize the defendants for activities such as loitering, breaking a curfew, and wearing red clothing.³⁶⁵ In its complaint, the City Attorney's office stated that "equity demands that the Defendants should not be allowed to deny their gang's existence, and their members' affiliation, while Defendants have received benefits from holding

363. Leal speculates that he was named in the injunction as a result of being a victim of a shooting two days prior to the issuance of the City Attorney's Complaint. Leal was denied victim compensation funding for his medical bills resulting from the shooting, because based on his lawyer's advice, he refused to talk with a specific police officer. His attorney stated that the officer was "providing direct evidence against Ruben. It was definitely not in [Leal's] interest ... to have communications with him." Sam Levin, *Unfair Punishment Part One: Victim Discrimination*, East Bay Express (Mar. 5, 2014), <https://eastbayexpress.com/oakland/unfair-punishment-part-one-victimdiscrimination/Content?oid=3854521&storyPage=3>; following the issuance of the injunction, Leal began to work with a local transformative justice group and began tending to a community garden. Connor Grubaugh, *UC Berkeley Alumnus Wins Award For Oakland Community Activism*, DAILY CALIFORNIAN, Oct. 24, 2014, <http://www.dailycal.org/2013/10/24/uc-berkeley-alumnus-wins-award-oakland-community-activism/>.

364. Compl. ¶3, *The People of the State of California ex rel John A. Russo, City Attorney for the City of Oakland v. Norteños, a Criminal Street Gang*, Case No. RG10541141, Superior Court of the State of Calif. County of Alameda (on file with UC Hastings Journal of Crime and Punishment).

365. *Id.*

themselves out to the public as an entity.”³⁶⁶ In essence, the City should not need to prove the named individuals were actually affiliated with a gang. These policing techniques were not new to Leal.

Unfortunately, systematic inequality in law enforcement can be a difficult subject to address through the legal system. As the Supreme Court stated in *McCleskey*, “Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.”³⁶⁷ While the courts may be limited in challenging the discretion of law enforcement agencies and city attorneys, the people are not. While a constitutional challenge to Oakland’s nuisance eviction program could be effective, the most effective actions against state-mandated evictions, as well as other forms of repressive policing, will likely be outside the courts. Thankfully, communities interested in opposing Oakland’s nuisance eviction practices have many avenues of resistance.

1) **Organize Against the Unlawful Detainer Pilot Program Renewal in 2024** – Without meaningful opposition, the Unlawful Detainer Pilot Program will likely be renewed or expanded. There is time to organize an effective opposition to the renewal or any proposed expansion.

2) **Organize and Educate Against State-Mandated Eviction on a Local Level** – Local politics can be an effective arena to curtail the overly aggressive actions of local law enforcement. Communities can and should demand that if their local governments are to retain eviction powers, that these powers be reserved for only the most dangerous tenants who have attempted to harm others in the immediate community.

3) **Peoples’ Monitoring of City Nuisance Abatement Activities** – Records associated with nuisance eviction orders and other nuisance abatement activities are largely public. While since 2014, the city of Oakland has been required to report its use of the Unlawful Detainer Pilot Program to the California Research Bureau, further analysis and oversight is much needed.³⁶⁸ Journalists, researchers, activists, academics, and other concerned individuals have a unique opportunity to ensure proper utilization of local nuisance abatement practices.

4) **Organize and Build Tenant Power** – Building tenant power is necessary to conceptually shift housing from a commodity that can be seized by the state as a form of punishment—to a human right.

366. *Id.*

367. *McCleskey*, 481 U.S. at 313.

368. Neville et al., *supra* note 51, at 4.

Due to public outcry in 2014, Oakland may be taking steps in the right direction. In 2016, Oakland issued ten nuisance eviction orders.³⁶⁹ One was for a shooting, while another was related to a tenant brandishing a firearm. This is in stark contrast to 2008, where 42 eviction orders were issued, none of which cited violent incidents.³⁷⁰ While Oakland may be making positive changes and shifting away from eviction as a form of arbitrarily enforced punishment for non-violent crime, any positive changes are discretionary. Since 2008, the City's power has only expanded. Left unchecked, nothing prohibits Oakland from punishing any crime involving guns, drugs, gambling, or sex-work, with a state-imposed eviction.

369. Oakland produced evidence of five eviction orders in response to my public records requests. Oakland City Attorney, *supra* note 2. However, it reported ten to the California Research Bureau. Tang, *supra* note 110, 5. If there were indeed ten eviction orders, it is unclear what activities were cited in the other five. *Id.* Oakland also served several notices to abate which resulted in tenants being evicted. NEU Matrix, *supra* note 30.

370. Oakland City Attorney, *supra* note 2. Oakland Police, *supra* note 1.