

Kept Out: Responding to Public Housing No-Trespass Policies

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I got a call . . . about a tenant in the state development at Clinton. She works the second shift, 3–11 pm 5 nights a week, and she pays a babysitter for some of the time, but can't afford all 5 days. A few days a week the father of her youngest child takes care of the children. The Clinton Housing Authority [CHA] has claimed that he is living there, and even though he has brought proof of another address (mail, vehicle registration), the CHA's response has been to issue a no trespass notice against him. He is not allowed on the property indefinitely¹

The disturbing prevalence of drug use and crime in public housing projects has been well documented.² As one commentator notes, "Although public housing accounts for less than ten percent of the housing in the country today, more than twice the share of the community's crime occurs in and around public housing."³ Across the country, tenants, local housing authorities, and police forces have made a priority of improving safety in public housing. Communities and housing developments have opted for a variety of solutions, including community policing efforts,⁴ neighborhood associations,⁵ and zero-tolerance eviction policies.⁶

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¹ E-mail from Amy Copperman, Staff Attorney, Massachusetts Law Reform Institute, to Sergio Carvajal, Staff Attorney, Legal Assistance Corporation of Central Massachusetts (May 31, 2000) (on file with author).

² See, e.g., SUSAN J. POPKIN ET AL., *THE HIDDEN WAR: CRIME AND THE TRAGEDY OF PUBLIC HOUSING IN CHICAGO* (2000).

³ Dan Nnamdi Mbulu, Note, *Affordable Housing: How Effective Are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families?*, 8 AM. U.J. GENDER SOC. POL'Y & L. 387, 396 (2000).

⁴ See, e.g., Noah Mewborn, *McAllen to Get \$2.2 Million for Policing*, STATES NEWS SERVICE, May 29, 1998, LEXIS, News Library, Sns File.

⁵ See, e.g., Jeremy Pawloski, *Community to Drug-Dealers: It's War*, ALBUQUERQUE J., Oct. 6, 1999, at 1, LEXIS, News Library, Albjnl File.

⁶ See, e.g., Dana Bartholomew, *Court Backs Evictions for Guest, Kin Drug Use; Unaware Families Could Be Forced out of Homes*, DAILY NEWS L.A., Mar. 27, 2002, at N3, LEXIS, News Library, Lad File.

This Note will examine “no-trespass” policies, one strategy that many public housing authorities (PHAs)⁷ have adopted in an effort to combat drug use and crime on public housing property.⁸ The policies differ in their details but hew to the same general model. Typically, a PHA that hopes to reduce drug sales or crime on housing development property will ask its local police department to warn nonresidents who enter the development that they are trespassing. Persons issued a warning are placed on a no-trespass list, maintained by the housing development manager or, in some cases, by the police themselves; if they return to the development, they are arrested.

While improving safety on public housing property is an important goal, no-trespass policies too often are designed and enforced in ways that impede or deny the right of tenants to invite guests, friends, and family members into their homes. Accordingly, this Note will focus on no-trespass policies that operate to keep virtually *all* nonresidents—not merely those who are uninvited, disruptive, or engaging in criminal activity—from visiting public housing residents.

All too frequently under PHA no-trespass programs, “unwritten policies”⁹ without “written standards or time deadlines”¹⁰ and lacking “any guidelines that delineate how an individual may obtain permission to use the property”¹¹ prevent tenants from exercising their right to have visitors. Officials have barred nonresidents without inquiry into the legitimacy of their reasons for being on the property¹² and often in spite of their having legitimate business at the development.¹³ In fact, nonresident visitors have been banned from PHA property for literally “just ‘standing

⁷ Public housing authorities (PHAs) were created by an act of Congress in 1937. *See* United States Housing Act of 1937, 42 U.S.C. §§ 1437 to 1437bbb-9 (2000) (as amended). The statute created a system by which local PHAs own, operate, and manage low-income housing developments in accordance with federal statutes and regulations. In exchange, the federal government underwrites the capital cost of the development. *See generally* Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law that Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681, 694–95 (1994); Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. CHI. L. REV. 497, 499–500 (1993). As of 1990, approximately 3200 PHAs operated 1.3 million units of public housing. Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 894–96 (1990). The numbers appear to be roughly the same today. *See* Stephen B. Kinnaird, Note, *Public Housing: Abandon HOPE, But Not Privatization*, 103 YALE L.J. 961, 966 (1994); Mbulu, *supra* note 3, at 393.

⁸ *See, e.g.*, *Commonwealth v. Hicks*, 563 S.E.2d 674, 676 (Va. 2002) (noting that the PHA had adopted a no-trespass policy in response to drug activity on development property), *petition for cert. filed*, 71 U.S.L.W. 3178 (U.S. Sept. 5, 2002) (No. 02-371).

⁹ *Id.* at 677.

¹⁰ *Diggs v. Hous. Auth. of Frederick*, 67 F. Supp. 2d 522, 527 (D. Md. 1999) (holding that the PHA’s no-trespass policy, which lacked clear standards and guidelines, infringed plaintiff’s right to have guests).

¹¹ *Hicks*, 563 S.E.2d at 680.

¹² *See, e.g.*, *Bean v. United States*, 709 A.2d 85, 86 (D.C. 1998) (overturning a criminal trespass conviction where the police had made no effort to determine whether the defendant had a legitimate reason to be on the property).

¹³ *See infra* Part I.A.

there.”¹⁴ As a result, no-trespass policies regularly extend to friends and family members of tenants—including parents,¹⁵ siblings,¹⁶ and cousins.¹⁷ Moreover, barred nonresidents are often unable to appeal their status, and those who maintain no-trespass lists frequently wield total discretion in determining who may enter development property.¹⁸

In this context of uncodified, discretion-laden policies, no-trespass programs allow police and housing development authorities to circumvent the usual legal constraints on police stops: probable cause and reasonable suspicion.¹⁹ Given free rein to stop any nonresident at any time in order to ascertain whether she is listed in the no-trespass log, police may make pretextual stops or engage in racial profiling.²⁰ Indeed, during the first five years of a no-trespass regime promulgated by the Dayton Municipal Housing Authority, 2310 individuals were barred, “eighty-nine percent of whom were male, and most, if not all, were black.”²¹ The potential for abuse inherent in discretionary no-trespass orders is particularly troubling in light of the possibility that such policies do not substantially reduce drug use or crime in public housing. At least one court has suggested that there is no evidence establishing that no-trespass policies are highly effective tools in combating drugs or crime.²² A Maryland

¹⁴ *In re Jason Allen D.*, 733 A.2d 351, 353 (Md. Ct. Spec. App. 1999).

¹⁵ *See Brown v. Dayton Metro. Hous. Auth.*, No. C-3-93-037, 1993 U.S. Dist. LEXIS 21297, at *20 (S.D. Ohio, Aug. 26, 1993).

¹⁶ *L.D.L. v. State*, 569 So. 2d 1310, 1312 (Fla. Dist. Ct. App. 1990).

¹⁷ *See Jason Allen D.*, 733 A.2d at 356; *see also State v. Holiday*, 585 N.W. 2d 68 (Minn. Ct. App. 1998).

¹⁸ *See Commonwealth v. Hicks*, 563 S.E.2d 674, 677 (Va. 2002), *petition for cert. filed*, 71 U.S.L.W. 3178 (U.S. Sept. 5, 2002) (No. 02-371).

¹⁹ *See generally* David A. Moran, *Traffic Stops, Littering Tickets, and Police Warnings: The Case for a Fourth Amendment Non-custodial Arrest Doctrine*, 37 AM. CRIM. L. REV. 1143 (2000) (describing levels of suspicion required for different types of police stops).

²⁰ *Cf.* Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, SOC. JUST., Spring 2001, at 156, 170–71 (arguing that gang civil injunctions “give police *carte blanche* to engage in pretextual stops of suspected gang members in specific neighborhoods”).

²¹ Kimberly E. O’Leary, *Dialogue, Perspective, and Point of View as Lawyering Method: A New Approach to Evaluating Anti-crime Measures in Subsidized Housing*, 49 WASH. U. J. URB. & CONTEMP. L. 133, 140 (1996). Proponents of no-trespass policies may argue that since most public housing residents are minorities, concerns about racial profiling are overblown. It is true that public housing developments—particularly in older, inner-city projects—tend to be predominantly black and Hispanic. *See* Michelle Adams, *Separate and [Un]Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 441–42 (1996) (stating that minority families are concentrated in central city, conventional public housing developments, while white families outnumber blacks in Section 8 programs and privately managed developments); Mbulu, *supra* note 3, at 393–94 (2000) (stating that “sixty percent of families in all public housing are black or Hispanic”). While demographics suggest that police may be less likely to racially profile on housing authority property, it is troubling that the policies allow police to single out individuals for almost any reason based on less suspicion than would ordinarily be required. *See supra* notes 19–20 and accompanying text.

²² *See Diggs v. Hous. Auth. of Frederick*, 67 F. Supp. 2d 522, 533–34 (D. Md. 1999) (holding that enjoining a no-trespass policy would not overly harm a PHA’s ability to combat drugs).

housing authority trespass log, for example, contained approximately one thousand names. Of the one thousand people who were permanently barred from entering the development, only ninety-five had been barred for violent or drug-related criminal activity.²³

Despite the troubling consequences of many no-trespass policies, this Note does not advocate abandoning such policies altogether. On the contrary, no-trespass policies that cabin discretion, codify clear standards, and protect tenants' right to have visitors may be important for a variety of reasons. In the context of domestic violence, for example, trespass statutes play an important role in protecting individuals from their batterers.²⁴ Moreover, no-trespass orders that operate to keep violent or criminal nonresidents off public housing property can make developments safer for tenants and their invited guests.²⁵ While PHAs and their tenants have a compelling interest in promoting safety on public housing property, tenants have an equally vital interest in inviting friends and family into their homes. Policies that too broadly exclude all nonresidents—even invited, non-criminal guests—fail to strike a fair balance between these two interests.²⁶ This Note, therefore, focuses on those no-trespass policies that go beyond the legitimate goal of combating criminal activity and intrude on the visitation rights of tenants.

This Note is designed to be an advocacy piece. It is intended to assist practitioners who litigate no-trespass orders in the context of housing practices or in representing criminal defendants accused of violating no-trespass policies, as well as advocates seeking to reform no-trespass practices. Accordingly, I will outline concrete strategies that attorneys and advocates may find useful in responding to no-trespass policies. Part I examines legal arguments against no-trespass policies and suggests that there are strong common law, statutory, and constitutional arguments against such policies. Part II attempts to formulate solutions to the problem of overreaching no-trespass policies, proposing several non-legal

²³ *Id.* at 526.

²⁴ *See, e.g.,* Kathryn E. Suarez, *Teenage Dating Violence: The Need for Expanded Awareness and Legislation*, 82 CAL. L. REV. 423, 457 (1994) (describing the use of criminal trespass statutes to enforce domestic violence-related restraining orders).

²⁵ In contrast to the policies discussed in this Note, some housing authorities have promulgated reasonable no-trespass policies that make an exception for nonresidents who are visiting tenants. *See, e.g.,* Vasquez v. Hous. Auth. of El Paso, 271 F.3d 198, 205 (5th Cir. 2001) (noting that the housing authority's no-trespass policy does not apply to invited guests), *reh'g en banc granted*, 289 F.3d 350 (5th Cir. 2002); Daniel v. City of Tampa, 38 F.3d 546, 550 (11th Cir. 1994) (finding that the PHA's no-trespass policy does not exclude invited guests). For the purposes of this Note, I will use the term "no-trespass policy" to refer only to those more draconian policies which do not provide an exemption for tenants' guests.

²⁶ This Note does not argue that tenants have an unlimited right to invite significantly disruptive or criminal guests to their homes. *See infra* Part I.B (discussing tenant liability for guest misconduct) and Part I.D (advocating no-trespass policies that include a provision for barring even invited guests who commit serious crimes).

advocacy strategies and examining how policies could be better drafted to promote safety while also preserving tenants' rights.

Litigation challenging no-trespass policies arises in two principal contexts. First, a nonresident who has been subject to a no-trespass order and subsequently charged with criminal trespass may defend her conduct by arguing that the no-trespass policy violates constitutional, state, or federal law.²⁷ Second, public housing tenants may file suit against a PHA, alleging that a no-trespass policy violates their rights under the law.²⁸ Advocates should be aware that procedural posture may affect the claims that may be raised. For example, criminal defendants have on occasion been found to lack standing to raise claims involving the right of tenants to invite guests.²⁹ For the purposes of this Note, I will take the affirmative suit as the paradigmatic case; "plaintiff" will refer to the situation in which a tenant-plaintiff sues a housing authority alleging that a no-trespass policy is illegal.

I. LEGAL ARGUMENTS

This Part will outline a variety of legal arguments that advocates may use to challenge PHA no-trespass policies. I first examine the common law doctrines of invitation and the covenant of quiet enjoyment, both of which protect tenants' right to invite guests into their homes. Next, I explore the U.S. Housing Act, arguing that the Act's prohibition of unreasonable lease terms provides a strong argument in support of tenants. Third, I present the constitutional doctrines of intimate association, licensing, and procedural due process, the first two of which, though plausible bases for challenging no-trespass policies, are also the weakest. Finally, I turn to state law, identifying a number of ways in which state statutes may be used to bolster claims raised under federal or common law, using a Massachusetts statutory provision as an example.

While the small number of reported, fully litigated no-trespass cases makes it difficult to assess the relative efficacy of each of these claims, the case law demonstrates that tenants and their invited guests³⁰ typically

²⁷ See, e.g., *Williams v. Nagel*, 643 N.E.2d 816 (Ill. 1994); *State v. Holiday*, 585 N.W.2d 68 (Minn. Ct. App. 1998); *City of Bremerton v. Widell*, 51 P.3d 733 (Wash. 2002), cert. denied, 71 U.S.L.W. 3317 (U.S. Nov. 4, 2002) (No. 02-6186).

²⁸ E.g., *Diggs*, 67 F. Supp. 2d at 524-25; *Branish v. NHP Prop. Mgmt., Inc.*, 694 A.2d 1106 (Pa. Super. Ct. 1997).

²⁹ See, e.g., *Thompson v. Ashe*, 250 F.3d 399, 409 (6th Cir. 2001) (finding that the defendants in a criminal trespass case lacked standing to raise the question of whether a no-trespass policy violated the rights of tenants to invite guests). *But see* *L.D.L. v. State*, 569 So. 2d 1310, 1312-13 (Fla. Dist. Ct. App. 1990) (allowing a defendant a criminal trespass defense on the basis of the tenant's right to invite guests).

³⁰ In situations in which the excluded persons have not entered the development pursuant to an invitation, courts have upheld trespass convictions. See *Thompson*, 250 F.3d at 406 (granting summary judgment to the defendant housing authority where the court found that no invitation had been issued to the nonresident plaintiff); *Daniel*, 38 F.3d at 550 (up-

will prevail against no-trespass policies.³¹ Nevertheless, some of the following strategies are stronger than others. Plaintiffs seeking to minimize the number of claims brought should focus on arguments made under the common law doctrine of invitation as well as claims made under the U.S. Housing Act.

A. Arguments from the Common Law

1. Tenants' Right To Invite Guests Cannot Be Trumped by PHA No-Trespass Policies

The common law of landlord-tenant relations provides the clearest defense against no-trespass policies. Tenants possess the right to use any entrances, exits, and walkways necessary to obtain access to their residences; this right extends to those whom tenants invite into their homes.³²

holding a no-trespass policy where a nonresident leafletter was not invited); *Widell*, 51 P.3d at 743 (upholding criminal trespass convictions where defendants exceeded the scope of their invitation).

³¹ See *Vasquez v. Hous. Auth. of El Paso*, 271 F.3d 198 (5th Cir. 2001) (holding that the housing authority's no-trespass policy interfered with First Amendment protections), *reh'g en banc granted*, 289 F.3d 350 (5th Cir. 2002); *Diggs*, 67 F. Supp. 2d at 535 (issuing a preliminary injunction against a no-trespass policy); *Setser v. Moline Hous. Auth.*, No. 92-CV-04085 (C.D. Ill. June 15, 1993) (awarding public housing residents attorney fees after the PHA modified its no-trespass policy to exclude guests and family of the residents, and requiring the PHA to provide some due process protections); *Bean v. United States*, 709 A.2d 85 (D.C. 1998) (overturning a criminal trespass conviction); *L.D.L.*, 569 So. 2d at 1312-13 (overturning a criminal trespass conviction); *In re Jason Allen D.*, 733 A.2d 351 (Md. Ct. Spec. App. 1999) (overturning a criminal trespass conviction); *Souza v. Fall River Hous. Auth.*, No. 95 CV 00321 (Mass. Commw. Ct. June 11, 1996) (granting partial summary judgment to a tenant on invitation grounds); *Holiday*, 585 N.W.2d at 71 (holding that a no-trespass policy cannot bar a nonresident from all public housing in a city); *Branish v. NHP Prop. Mgmt., Inc.*, 694 A.2d 1106 (Pa. Super. Ct. 1996) (ruling in favor of a tenant challenge to a no-trespass order against an invited guest); *Commonwealth v. Hicks*, 563 S.E.2d 674 (Va. 2002) (holding that an overbroad policy infringes on First Amendment rights), *petition for cert. filed*, 71 U.S.L.W. 3178 (U.S. Sept. 5, 2002) (No. 02-371); *State v. Dixon*, 725 A.2d 920 (Vt. 1999) (overturning a criminal trespass conviction); *Widell*, 51 P.3d at 743 (overturning a criminal trespass conviction where the defendant had been invited). *But see Nagel*, 643 N.E.2d at 821 (holding that where the lease requires a tenant's guests to abide by development rules, and where guests who violate development rules can be barred from visiting, the tenants cannot issue valid invitations to those guests); *City of Dayton v. Gaessler*, No. 18039, 2000 Ohio App. LEXIS 6178, at *9-*10 (Ohio Ct. App. Dec. 29, 2000) (holding that where a nonresident was barred for threatening substantial bodily harm and no evidence indicated that the defendant was actually invited onto the development, the nonresident could be barred from entering).

³² See *Todisco v. Tishman Realty & Const. Co.*, 62 N.Y.S.2d 458, 459 (Sup. Ct. 1946) (holding that invitees of tenants have the right to make reasonable use of the tenants' means of entrance and exit into the building); *Commonwealth v. Burford*, 73 A. 1064, 1067 (Pa. 1909) (holding that a right of way appurtenant to a rental unit grants a right of use to the lessee and any guests "who with the permission of the tenant visited his home for any lawful purpose"); *Dixon*, 725 A.2d at 922-23 (holding that a landlord cannot block invitees of a tenant from passing through common areas in order to enter the tenant's residence); *Widell*, 51 P.3d at 739 (holding that a landlord may not prevent a tenant's guests from passing through common areas in order to enter the tenant's residence).

Persons granted an invitation to enter a tenant's apartment therefore receive an implied easement to use the sidewalks and roads necessary to gain access to that apartment.³³ A trespasser is a "person who enters the premises of another without . . . invitation,"³⁴ and permission or invitation functions as a defense to trespass.³⁵ A person who is invited to visit a tenant of a public housing apartment therefore has a right to walk through the development to reach that apartment.

In this context, it is important to stress that tenants, not landlords, have the right to choose who may enter the property in order to visit a tenant in her place of residence.³⁶ Since a tenant may determine who shall be allowed to enter her home, persons who enter a building with the permission of a tenant cannot be deemed a trespasser, even if they have been forbidden from entering by the landlord.³⁷ The same analysis applies to persons using roads or walkways to reach a tenant's apartment pursuant to an invitation.³⁸

Parties have used invitation as a successful defense against criminal trespass charges in a number of no-trespass cases. In *L.D.L. v. State*,³⁹ a federally subsidized housing project gave the Tallahassee police department permission to issue no-trespass warnings and arrest nonresidents for criminal trespass. Some months after first being issued a warning, L.D.L., a minor, was arrested for criminal trespass on housing development property.⁴⁰ L.D.L. claimed to be visiting his brother; L.D.L. had a

³³ See *Commonwealth v. Richardson*, 313 Mass. 632, 639 (1943); see also cases cited *supra* note 32.

³⁴ *BALLENTINE'S LAW DICTIONARY* 1298 (3d ed. 1969); see also *BLACK'S LAW DICTIONARY* 1510 (7th ed. 1999) (defining a trespasser as "one who intentionally and without consent or privilege enters another's property").

³⁵ See *Gruver v. State*, 816 So. 2d 835, 837 (Fla. Dist. Ct. App. 2002), *appeal dismissed*, 2002 Fla. LEXIS 2135 (Fla. Oct. 7, 2002) (No. SC02-1563); *People v. Washington*, 762 N.E.2d 698, 700 (Ill. App. Ct. 2002); *People v. Carroll*, 751 N.E.2d 44, 46 (Ill. App. Ct. 2001); *State v. Hall*, 47 P.3d 55, 56 (Or. Ct. App. 2002).

³⁶ *State v. Schaffel*, 229 A.2d 552, 561 (Conn. Cir. Ct. 1966) (stating that "it is the tenant, not the landlord, who has the final word as to the person or persons who may enter upon the demised premises"); *Commonwealth v. Hood*, 389 Mass. 581, 589 (1983) (holding that a tenant has a right to admit any visitor); *Lott v. State*, 132 So. 336, 338 (Miss. 1931) (holding that tenants have the right to choose their guests); *Colbee 52nd St. Corp. v. Madison 52nd St. Corp.*, 169 N.Y.S.2d 716, 722-23 (Sup. Ct. 1957) (holding that tenants have the right to choose their own invitees), *aff'd*, 173 N.Y.S.2d 243 (App. Div. 1958). *But see Gaessler*, 2000 Ohio App. LEXIS 6178, at *9-*10 (holding that a tenant's right to invite can be limited by a public housing landlord's policy).

³⁷ See *Arbee v. Collins*, 463 S.E.2d 922, 925 (Ga. Ct. App. 1995) (holding that an invitee who enters the premises with the tenant's permission, even if forbidden, is not a trespasser); *People v. Rynberk*, 415 N.E.2d 1087, 1091 (Ill. App. Ct. 1980) (holding that where a tenant has extended an invitation to be on the property, the visitor cannot be deemed a trespasser by the landlord); *Williams v. Lubbering*, 63 A. 90, 91 (N.J. 1906) (holding that invitees have a legal right to use public passages to reach tenants and are not trespassers); *Dixon*, 725 A.2d at 923 (holding that a tenant's guests, even if prohibited by the landlord, are not trespassers).

³⁸ See *Lubbering*, 63 A. at 91.

³⁹ 569 So. 2d 1310 (Fla. Dist. Ct. App. 1990).

⁴⁰ *Id.* at 1311-12.

brother, grandmother, and friends living at the development at the time.⁴¹ The court overturned L.D.L.'s conviction, stating:

A landlord generally does not have the right to deny entry to persons a tenant has invited to come onto his property. This law also applies to the common areas of the premises One who thus comes upon the premises upon the invitation of the tenant, although expressly forbidden to do so by the landlord, is not guilty of criminal trespass.⁴²

Thus, a tenant's invitation supersedes any landlord bar on visitors and prevents a nonresident from being deemed, or convicted as, a trespasser.⁴³

Similarly, in *In re Jason Allen D.*,⁴⁴ a juvenile successfully used an invitation argument to reverse his conviction for trespassing at a public housing development. Jason Allen D. was initially issued a no-trespass warning and entered into the "trespass log" for, as the police officer in the case acknowledged, simply "standing there" on housing development property.⁴⁵ The housing authority's policy required that police issue no-trespass notices "to all individuals who are on the property . . . who do not live there," irrespective of any business or relationships those non-residents might have on housing authority property.⁴⁶

Nearly a year later, Jason was arrested for trespassing while standing with his cousin, a tenant at the development.⁴⁷ The court rejected the housing authority's claim that the no-trespass order superseded any invitation given by Jason's cousin and reversed Jason's conviction.⁴⁸ The court held that invitation gave rise to a bona fide claim of right to be on the property and that Jason therefore could not be convicted of trespassing.⁴⁹

An invitation from a tenant is not, however, equivalent to a free pass to come onto any area of housing development property at any time. Rather, invitations are limited in their scope. In *City of Bremerton v. Widell*,⁵⁰ defendants were charged with several counts of criminal tres-

⁴¹ *Id.* at 1312.

⁴² *Id.*

⁴³ *See id.*; *see also* Souza v. Fall River Hous. Auth., No. 95 CV 00321 (Mass. Commw. Ct. June 11, 1996) (granting partial summary judgment to a tenant on invitation grounds in a no-trespass case).

⁴⁴ 733 A.2d 351 (Md. Ct. Spec. App. 1999).

⁴⁵ *Id.* at 353.

⁴⁶ *Id.*

⁴⁷ *Id.* at 356, 363.

⁴⁸ *Id.* at 357, 372.

⁴⁹ *Id.* at 366. *But see* City of Dayton v. Gaessler, 2000 Ohio App. LEXIS 6178, No. 18039, at *9-*10 (Ohio Ct. App. Dec. 29, 2000) (holding that the right to invite can be limited by a public housing no-trespass order).

⁵⁰ 51 P.3d 733 (Wash. 2002), *cert. denied*, 71 U.S.L.W. 3317 (U.S. Nov. 4, 2002) (No. 02-6186).

pass on public housing grounds. Police arrested the defendants after seeing them on public housing property subsequent to being issued warnings pursuant to the development's no-trespass policy.⁵¹ The defendants alleged that they were visiting their fiancées who lived in the development and who had invited them onto the premises.⁵² The court reversed some of the convictions on the basis that invitation is a defense to a charge of criminal trespass.⁵³ However, in several of the criminal complaints, the defendants were seen far away from their fiancées' homes.⁵⁴ The court upheld those convictions on the grounds that the scope of the invitation had been exceeded.⁵⁵

Further, it is not clear from the case law precisely what constitutes a valid invitation. Must invitations be issued explicitly and in advance? Are standing invitations acceptable? While most courts have presumed that invitation exists when a nonresident has a tenant friend or relative at the development, other courts have taken a more restrictive view of invitation.⁵⁶ While this should not pose a difficulty in cases in which tenants file affirmative suits claiming that no-trespass policies infringe upon their right to have guests, criminal defendants attempting to use invitation as a defense should be aware of these ambiguities.

Tenants, then, have a right to invite guests that takes priority over a landlord's prohibition or no-trespass order. When guests have been invited onto the property, plaintiffs should argue that invitation supercedes the no-trespass policy. Further, the doctrine of invitation places an affirmative obligation on police who seek to issue no-trespass orders or arrest nonresidents for trespass. Rather than summarily arresting or charging nonresidents, police must first ascertain whether a nonresident is on the premises pursuant to an invitation.⁵⁷

⁵¹ *Id.* at 736.

⁵² *Id.* at 737.

⁵³ *Id.* at 743.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Compare *Widell*, 51 P.3d at 739 (holding that defendants were presumed to be on the development pursuant to an invitation when seen near their fiancées' apartments), and *L.D.L. v. State*, 569 So. 2d 1310, 1312 (Fla. Dist. Ct. App. 1990) (finding that the fact that the defendant had family and friends who resided at the property was sufficient to suggest that a standing invitation existed), with *Thompson v. Ashe* 250 F.3d 399, 406 (6th Cir. 2001) (finding that in the absence of an express prior invitation, the mere fact that the defendant had family members residing at the public housing property was not sufficient to constitute an invitation).

⁵⁷ See *Bean v. United States*, 709 A.2d 85 (D.C. 1998) (reversing a criminal trespass conviction where the police made no inquiry into whether the defendant had an invitation to be on the premises and where the prosecution introduced no evidence demonstrating that the defendant had no legitimate reason to be on the premises).

2. *Tenants Are Entitled To Have Guests Under the Common Law Covenant of Quiet Enjoyment*

When real property is leased, the law implies a covenant of quiet enjoyment, even if the lease itself is silent on the subject.⁵⁸ This covenant is “an assurance that . . . the lessee shall not be evicted or disturbed in his possession of the demised premises *or any part thereof*.”⁵⁹ The covenant of quiet enjoyment is violated by “any breach of duty by the landlord which effectively deprives the tenant of his enjoyment of the leasehold.”⁶⁰ Landlords may not take actions that impair the character and value of the leased premises.⁶¹ A landlord’s actions need not rise to the level of actual or constructive eviction for a breach to occur. Rather, if a landlord’s actions substantially interfere with the tenant’s enjoyment of her residence by “depriv[ing] the tenant of expectations under the lease and reduc[ing] the value of the lease,” the tenant is entitled to compensatory damages for the breach.⁶² In evaluating whether or not a breach has occurred, the effect of the landlord’s action—not her intent—is dispositive.⁶³

Tenants who have been denied the right to invite guests into their residences because of no-trespass policies promulgated by their public housing landlords may argue that the covenant of quiet enjoyment has been breached. Denying a tenant the ability to invite guests to her home undeniably reduces the value of her lease agreement. Indeed, lesser intrusions than the denial of visitors have been found to constitute violations of the covenant of quiet enjoyment.⁶⁴

⁵⁸ See, e.g., *Spencer Investments, Inc. v. Bohn*, 923 P.2d 140, 143 (Colo. Ct. App. 1995); *Hankins v. Smith*, 138 So. 494, 496 (Fla. 1931); *Silver Creek Computers, Inc. v. Petra, Inc.*, 42 P.3d 672, 675 (Idaho 2002); *Wade v. Halligan*, 16 Ill. 507, 508 (1855); *Stewart v. Murphy*, 148 P. 609, 610 (Kan. 1915); *Mayor of N.Y. v. Mabie*, 13 N.Y. 151, 151 (1855); *McNamara v. Wilmington Mall Realty Corp.*, 466 S.E.2d 324, 328–29 (N.C. Ct. App. 1996); *Dworkin v. Paley*, 638 N.E.2d 636, 638 (Ohio Ct. App. 1994); *Kelly v. Miller*, 94 A. 1055, 1056 (Pa. 1915); *Branish v. NHP Prop. Mgmt., Inc.* 694 A.2d 1106, 1107 (Pa. Super. Ct. 1997); *L-M-S Inc. v. Blackwell*, 233 S.W.2d 286, 289 (Tex. 1950); *Eldred v. Leahy*, 31 Wis. 546, 549 (1872).

⁵⁹ *BALLENTINE’S LAW DICTIONARY* 286 (3d ed. 1969) (emphasis added); see also *BLACK’S LAW DICTIONARY* 371 (7th ed. 1999) (defining covenant for quiet enjoyment as “a covenant ensuring that the tenant will not be evicted or disturbed by the grantor or a person having a lien or superior title”).

⁶⁰ *Sidney M. Knight, Special Project on Landlord-Tenant Law in the District of Columbia Court of Appeals: Constructive Eviction—An Illusive Tenant Remedy?*, 29 *How. L.J.* 13, 17 (1986) (quoting Charles Donahue, Jr., *Change in the American Law of Landlord and Tenant*, 37 *MOD. L. REV.* 242, 248 (1974)).

⁶¹ See *Winchester v. O’Brien*, 164 N.E. 807, 809 (Mass. 1929).

⁶² *Echo Consulting Servs., Inc. v. North Conway Bank*, 669 A.2d 227, 232 (N.H. 1995); see also *Howard v. Simon*, 480 N.E.2d 99, 102 (Ohio Ct. App. 1984).

⁶³ See *Blue Cross Ass’n v. 666 N. Lake Shore Dr. Assocs.*, 427 N.E.2d 270, 273 (Ill. App. Ct. 1981).

⁶⁴ See *Ianello v. Court Mgmt. Corp.*, 509 N.E.2d 1, 3 (Mass. 1987) (finding a violation of the covenant of quiet enjoyment where the tenant was locked out of the common conference room that he used for exercise); *Westland Hous. Corp. v. Scott*, 44 N.E.2d 959, 963 (Mass. 1942) (presence of smoke and soot due to defective boiler); *Howard*, 480 N.E.2d at

In *Branish v. NHP Property Management, Inc.*,⁶⁵ for example, a tenant-plaintiff successfully argued that a no-trespass order as applied to her guest violated the covenant of quiet enjoyment. In *Branish*, a landlord issued a no-trespass notice to a tenant's boyfriend after he entered the property on one occasion without an invitation and caused a disturbance.⁶⁶ The landlord sought to enforce the no-trespass order despite the tenant's subsequent invitation to her boyfriend.⁶⁷ The court prohibited the landlord from excluding the guest, holding that by "preventing [the tenant] from inviting social guests to her apartment, [the landlord] has wrongfully interfered with [tenant]'s possession. As a result, [landlord] has breached [tenant]'s covenant of quiet enjoyment."⁶⁸ This result seems correct. Denying a tenant the right to have visitors does impair the value and character of her lease. A leasehold where visitors are allowed is worth more than a leasehold in which one cannot invite visitors of one's choice. Indeed, as one court has noted in the context of tort liability, "[p]art of the rent paid to the landlord is the consideration for giving to the tenants the right to invite others onto the property."⁶⁹ Correspondingly, the withdrawal of that right should require compensation by the landlord or modification of the policy.

B. Arguments from Federal Law: The U.S. Housing Act

The United States Housing Act of 1937 (Housing Act)⁷⁰ sought to assist states and localities in their efforts to "remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families" by vesting "in public housing agencies . . . the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public."⁷¹ Under the Housing Act, public housing agencies and the federal government execute a contract delegating rights and obligations to both local housing authorities and the federal government.

102 (frequent absence of air conditioning in summer when apartment "with air" was advertised).

⁶⁵ 694 A.2d 1106 (Pa. Super. Ct. 1996). While *Branish* involved a private landlord issuing a single no-trespass order, not a PHA no-trespass policy, there is no reason why this analysis would not apply in the public housing context. Apartments from which guests are barred, whether rented in the private or public sector, are worth less than similar apartments that allow guests.

⁶⁶ *Id.* at 1107.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1107–08. In *Branish*, the court found that the tenant's right to invite guests—and the landlord's corresponding breach of the covenant—arose from the text of a Pennsylvania statute. Nonetheless, to the extent that tenants possess a right to invite guests rooted in the common or federal law, the court would have reached the same result.

⁶⁹ *Stanley v. Town Square Coop.*, 512 N.W.2d 51, 54 (Mich. Ct. App. 1993).

⁷⁰ 42 U.S.C. §§ 1437 to 1437bbb-9 (2000).

⁷¹ *Id.* § 1437.

The federal government, for example, subsidizes the construction of public housing, and local housing authorities agree to build and rent apartments in accordance with federally mandated lease conditions.⁷² Local housing authorities are also given the responsibility for carrying out the purposes of the Act.⁷³

The Housing Act provides another avenue by which advocates may challenge the legality of no-trespass policies promulgated by PHAs. The Housing Act mandates that public housing leases may not contain “unreasonable terms and conditions.”⁷⁴ The Housing Act and its implementing regulations further establish that tenants in public housing “shall have the right to . . . reasonable accommodation of their guests.”⁷⁵ Plaintiffs in no-trespass cases should argue that no-trespass policies that bar invited guests from the premises violate the duty of public housing authorities to reasonably accommodate tenants’ guests and constitute an unreasonable lease condition.⁷⁶

In *Diggs v. Housing Authority of Frederick*,⁷⁷ a Maryland district court addressed such a claim, concluding that a policy allowing a PHA to bar tenants’ invited guests is an “unreasonable condition” under the statute. The *Diggs* no-trespass policy entailed the issuance of citations to non-residents found to be at a Maryland housing development without “apparent legitimate reason.”⁷⁸ Subsequent to being issued a citation, non-residents were subject to arrest for trespass if they returned to the development for any reason, including visiting a tenant.⁷⁹ Plaintiffs filed a § 1983 action,⁸⁰ arguing that the housing authority’s no-trespass policy constituted an “unreasonable condition” under 42 U.S.C. § 1437d(l)(2) and failed to reasonably accommodate guests under 24 C.F.R. § 966.4(d)(1).⁸¹ The housing authority responded with a motion to dismiss, arguing that the Housing Act did not provide a cause of action for the plaintiffs. The

⁷² See *id.* §§ 1437a–1437e, 1437g–1437m, 1437d(l); see also Green, *supra* note 7, at 695.

⁷³ See Mbulu, *supra* note 3, at 426 n.15.

⁷⁴ 42 U.S.C. § 1437d(l)(2) (2000).

⁷⁵ 24 C.F.R. § 966.4(d)(1) (2002).

⁷⁶ See, e.g., *Thompson v. Ashe*, 250 F.3d 399, 409 (6th Cir. 2001) (noting that the federal law requiring reasonable accommodation of a tenant’s guests may require the invalidation of no-trespass policies that interfere with tenant invitations, but nonetheless denying the requested injunction based on the plaintiff’s lack of standing).

⁷⁷ 67 F. Supp. 2d 522 (D. Md. 1999); see also *Herring v. Chi. Hous. Auth.*, No. 90 C 3797, 1993 U.S. Dist. LEXIS 5388, at *52 (N.D. Ill. Apr. 22, 1993) (suggesting that 42 U.S.C. § 1437d(l) is enforceable through § 1983).

⁷⁸ *Diggs*, 67 F. Supp. 2d at 525.

⁷⁹ *Id.* at 526.

⁸⁰ 42 U.S.C. § 1983 (2000) (permitting persons deprived “of any rights, privileges, or immunities secured by the Constitution and laws” by any person acting under color of state law to bring a private action to seek redress). See generally Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982).

⁸¹ *Diggs*, 67 F. Supp. 2d at 531.

court rejected the PHA's argument, holding that plaintiffs may use § 1983 to enforce the Housing Act and its regulations.⁸²

The court noted that in order for plaintiffs to successfully state a cause of action under § 1983, they must demonstrate that “the statute creates enforceable rights, privileges, or immunities within the meaning of § 1983” and also that “Congress has not foreclosed such enforcement of the statute.”⁸³ After recognizing that Congress had not foreclosed individual suits to enforce the U.S. Housing Act, the court set out to determine whether or not the Housing Act endowed plaintiffs with an enforceable right under § 1983.⁸⁴ The court focused on the regulatory provision granting tenants the right to reasonable accommodation of their guests, finding that the accommodation requirement is a “valid interpretation of the statute entitled to deference” and “implicit” in the Housing Act's statutory prohibition on “unreasonable” lease conditions.⁸⁵ The court then analyzed the reasonable accommodation regulation, concluding that the regulation was intended to benefit the plaintiffs, was neither vague nor amorphous, and created mandatory obligations, and it therefore created rights enforceable under § 1983.⁸⁶

Further, the court held that the Housing Act and its regulations did in fact protect tenants from housing authority no-trespass policies that infringed upon tenants' right to have their guests reasonably accommodated. The court, agreeing with plaintiffs' interpretation of the statute and regulations, stated:

[I]t would be patently unreasonable to prohibit public housing tenants from entertaining guests . . . the regulation substantively prohibits public housing authorities from unreasonably interfering with tenants' ability to entertain guests in the tenants' public housing apartments.⁸⁷

Finding a likelihood of success on the merits, the court issued a preliminary injunction against the policy.

The Supreme Court's recent decision in *Gonzaga University v. Doe*⁸⁸ alters this analysis of § 1983 standing to some extent. In *Gonzaga*, the Court pulled back from the three-factor test upon which the district court in *Diggs* relied, holding instead that the relevant test in determining

⁸² *Id.* at 532.

⁸³ *Id.* at 531.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 532; *see also* *Lancor v. Lebanon Hous. Auth.*, 760 F. 2d 361 (1st Cir. 1985) (holding that a regulation requiring advance permission for overnight guests was neither a “necessary and reasonable regulation” under 24 C.F.R. § 966.4(f)(4) (1984) nor a “reasonable accommodation of the tenant's guests” under 24 C.F.R. § 966.4(d) (1984)).

⁸⁷ *Diggs*, 67 F. Supp. 2d at 531–32 (citations omitted).

⁸⁸ 122 S. Ct. 2268 (2002).

whether a statute is enforceable through § 1983 is whether Congress intended to create a private right, a more rigorous standard.⁸⁹

Nevertheless, plaintiffs have a strong case for arguing that the relevant provisions of the Housing Act are enforceable through § 1983 even under the test articulated in *Gonzaga*. Unlike *Gonzaga*, where the Court noted that the Family Educational Rights and Privacy Act (FERPA) had never been found to give rise to enforceable rights,⁹⁰ federal courts—including the Supreme Court—*have* found other provisions of the U.S. Housing Act thus enforceable.⁹¹ For example, in *Wright v. Roanoke Redevelopment and Housing Authority*, the Supreme Court held the rent-ceiling provisions⁹² of the Housing Act enforceable through § 1983. Indeed, the *Gonzaga* Court cited *Wright* favorably, noting that the rent ceiling provision upheld in *Wright* “conferred ‘a mandatory [benefit] focusing on the individual family and its income,’” used terms sufficiently clear to confer definite entitlements, and failed to provide a governmental mechanism through which tenants could complain about alleged violations of the rent-ceiling provision.⁹³

The “unreasonable terms and conditions” provision of the Housing Act conforms to the standard set out in *Gonzaga*. The language confers a mandatory benefit to be given to individual tenant-households: leases that do not include “unreasonable terms or conditions.” Unlike the FERPA statute at stake in *Gonzaga*, the lease condition provisions of the Housing Act—like its rent-ceiling provisions—do not create a centralized enforcement scheme, reinforcing the suggestion that Congress intended to create a private right enforceable by the individual beneficiaries of the statute.⁹⁴ And unlike the “‘aggregate’ focus” of FERPA, the lease provisions at issue *are* concerned with “whether the needs of any particular person have been satisfied”⁹⁵: they aim to ensure that each tenant household has a lease that contains particular, concrete provisions. Accordingly, plaintiffs should be able to bring a § 1983 action to enforce the unreasonable conditions provision of the Housing Act.

Public housing authority attorneys may nevertheless argue that the Housing Act permits PHA no-trespass policies by virtue of a termination provision. A few lines down from the proscription against “unreasonable

⁸⁹ *Id.* at 2275.

⁹⁰ *Id.* at 2273.

⁹¹ See *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987) (finding the U.S. Housing Act provision regulating rent amounts, 42 U.S.C. § 1437a (1982 & Supp. III 1985), enforceable through a § 1983 action); *Concerned Tenants Ass’n v. Pierce*, 685 F. Supp. 316 (D. Conn. 1988) (allowing a § 1983 suit to enforce 42 U.S.C. § 1437p, the provision of the U.S. Housing Act explicating the conditions under which a development may be demolished). *But see* *Edwards v. District of Columbia*, 821 F.2d 651, 658–60 (D.C. Cir. 1987) (holding that the plaintiffs could not use § 1983 to enforce 42 U.S.C. § 1437p).

⁹² 42 U.S.C.A. § 1437a (West 1994 & Supp. 2002).

⁹³ *Gonzaga*, 122 S. Ct. at 2273 (quoting *Wright*, 479 U.S. at 430).

⁹⁴ See *id.* at 2280 (Breyer, J., concurring).

⁹⁵ *Id.* at 2274 (quoting *Blessing v. Firestone*, 520 U.S. 329, 343 (1997)).

conditions,” the Housing Act requires that public housing agencies utilize leases that

provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.⁹⁶

The Supreme Court has upheld the use of this provision to evict tenants for the criminal behavior of their guests.⁹⁷ Housing authority attorneys may argue that no-trespass policies are therefore less intrusive than other anti-crime measures constitutionally available to housing authorities.⁹⁸ Since housing authorities may be liable for criminal activity committed by nonresident guests on public housing property,⁹⁹ no-trespass policies are calculated to reduce crime without taking the more drastic step of evicting residents.

However, there is a strong argument that this provision of the Housing Act—providing that criminal activity “engaged in by a public housing tenant, member of tenant’s household, or any *guest*,” shall be grounds for evicting that tenant¹⁰⁰—actually supports the premise that tenants have a right to have visitors. In this context, the Housing Act shifts the responsibility for crime committed by tenants’ guests from housing authorities onto the tenants themselves. Tenants bear the risk of eviction if their guests engage in criminal activity.¹⁰¹ They are entitled to have guests visit them in their apartments, but they invite guests at their own risk. In adopting such a rule, the legislature struck a balance between accommodating tenants’ right to have visitors and maintaining safety on public housing property. Plaintiffs should argue that this balance should not be disturbed by no-trespass policies aimed at controlling tenant visitors.¹⁰²

⁹⁶ 42 U.S.C. § 1437d(l)(6) (2000).

⁹⁷ See *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

⁹⁸ *Cf. Commonwealth v. Hicks*, 563 S.E.2d 674, 685 (Va. 2002) (Kinser, J., concurring in part and dissenting in part) (citing *Rucker* for the proposition that since preventing crime is a legitimate governmental goal, banning policies should be upheld), *petition for cert. filed*, 71 U.S.L.W. 3178 (U.S. Sept. 5, 2002) (No. 02-371).

⁹⁹ See, e.g., *Doe v. New Bedford Hous. Auth.*, 630 N.E.2d 248, 254 n.10 (Mass. 1994) (noting that landlords can be held civilly liable if a tenant or other party is “harmed by the criminal acts of third parties and the harm resulted from a breach of the landlord’s tort duty to provide protection”).

¹⁰⁰ 42 U.S.C. § 1437d(l)(6) (2000) (emphasis added).

¹⁰¹ See *Rucker*, 535 U.S. at 125; see also *Burton v. Tampa Hous. Auth.*, 271 F.3d 1274 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 1910 (2002); *cf. City of Bremerton v. Widell*, 51 P.3d 733, 739 n.2 (Wash. 2002) (stating that *Rucker* and the U.S. Housing Act provision afford PHAs an alternative to no-trespass orders “for maintaining a safe environment”), *cert. denied*, 71 U.S.L.W. 3317 (U.S. Nov. 4, 2002) (No. 02-6186).

¹⁰² In addition, the provision of the Housing Act allowing eviction for criminal guests

*C. Constitutional Arguments**1. The Right to Intimate Association*

The Supreme Court has held that certain relationships attending “the creation and sustenance of a family” are entitled to constitutional protection.¹⁰³ As the Supreme Court noted in *Roberts v. United States Jaycees*:

[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.¹⁰⁴

Accordingly, plaintiffs have alleged that no-trespass policies interfere with and burden their ability to visit with family members, thus violating their rights of intimate association.¹⁰⁵

To succeed on an intimate association claim, a plaintiff must demonstrate both that she has a familial relationship with a barred visitor¹⁰⁶ and that visitation rights are constitutionally protected under the doctrine of intimate association. This two-prong requirement is a difficult standard to meet. While plaintiffs may be able to convince courts to broadly construe the meaning of familial relations for these purposes, it is unlikely that plaintiffs will succeed in arguing that visitation rights are constitutionally protected under intimate association. I address the two prongs in turn.

Intimate association can only be raised where a trespass policy is applied to a familial visitor. Some courts have adopted a broad standard in assessing the existence of a protected familial relationship, including not only the nuclear family, but also extended family visitors.¹⁰⁷ If no-

cannot justify no-trespass policies that extend to non-criminal, non-disruptive visitors.

¹⁰³ *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984); *see also Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958) (stating that “state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny”).

¹⁰⁴ *Roberts*, 468 U.S. at 618–19.

¹⁰⁵ *See supra* notes 106–115 and accompanying text. The actions of PHAs constitute state action. *See, e.g., Rudder v. United States*, 226 F.2d 51, 53 (D.C. Cir. 1955) (“The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law.”).

¹⁰⁶ *See Moore*, 431 U.S. at 498–99 (1977) (distinguishing permissible regulation of unrelated individuals from impermissible regulation of the family); *Brown v. Dayton Metro. Hous. Auth.*, No. C-3-93-037, 1993 U.S. Dist. LEXIS 21297, at *20–*21 (S.D. Ohio Aug. 26, 1993).

¹⁰⁷ *See McKenna v. Peekskill Hous. Auth.*, 647 F.2d 332, 335 (2d Cir. 1981) (holding that requiring a register for overnight visitors violates privacy rights and freedom of association); *Brown*, 1993 U.S. Dist. LEXIS 21297, at *20 (granting standing on an intimate

trespass policies are enforced in such a way as to prevent family members from visiting tenants, advocates may argue that these policies impermissibly burden tenants' rights of intimate association.¹⁰⁸

Even given a clear familial relationship between a tenant and a barred visitor, however, plaintiffs will have a difficult time prevailing on an intimate association ground. While most courts accept the proposition that public housing residents and family member visitors may hold a right of intimate association,¹⁰⁹ at least one court has held that family visitation does not fall under the rubric of intimate association at all. In *Thompson v. Ashe*,¹¹⁰ a no-trespass policy allowed a PHA vice president to place nonresidents on a no-trespass list using "no formal set of written criteria."¹¹¹ Upon receipt of undefined "reliable information" of nonresident misconduct, the vice-president would ban nonresidents from entering the property.¹¹² Banned individuals were given notice of their banned status, but were not informed of the reason for the ban or advised of any way to remove their names from the list.¹¹³

Albert Thompson, whose name appeared on the no-trespass list, told police officers that he came onto development property to visit his brother, a tenant. Despite Thompson's explanation, he was subsequently arrested for criminal trespass.¹¹⁴ An Ohio district court ruled that while cohabitation with family members was constitutionally protected under an intimate association theory, "mere visitation" with family members was not constitutionally protected.¹¹⁵ Family visitors, under the court's theory in *Thompson*, simply fall outside of the intimate association rubric. Burdens on visitation imposed by public housing no-trespass policies can never, in this view, give rise to an intimate association violation.

In addition, while state action that directly and substantially interferes with a protected relationship is sometimes sufficient to trigger protection, some courts impose a more stringent test, finding no-trespass policies that do not facially target familial relationships insufficient to trigger protection.¹¹⁶ Moreover, courts generally seem reluctant to find

association claim where the plaintiff claimed that he was visiting a cousin living in the development); *State v. Holiday*, 585 N.W.2d 68, 70-71 & n.1 (Minn. Ct. App. 1998) (finding a statute constitutionally overbroad where it applied a "sweeping limitation" to intimate association).

¹⁰⁸ See *supra* note 107. But see *City of Bremerton v. Widell*, 51 P.3d 733 (Wash. 2002) (finding that the right of intimate association does not attach to engaged couples), *cert. denied*, 71 U.S.L.W. 3317 (U.S. Nov. 4, 2002) (No. 02-6186).

¹⁰⁹ See cases cited *supra* note 107.

¹¹⁰ 250 F.3d 399 (6th Cir. 2001).

¹¹¹ *Id.* at 403.

¹¹² *Id.*

¹¹³ *Id.* at 404.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 407.

¹¹⁶ *Cf. Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Brown v. Dayton Metro. Hous. Auth.*, No. C-3-93-037, 1993 U.S. Dist. LEXIS 21297 (S.D. Ohio Aug. 26, 1993) (rejecting freedom of association claims on the grounds that the no-trespass policy, though it had

violations of intimate association, often refraining from extending the scope of the doctrine to new fact situations.¹¹⁷ For these reasons, intimate association claims are generally unlikely to succeed.

2. *Discretion and Overbreadth*

The unconstitutionality of policies or laws granting unfettered discretion to government officials to allow or disallow speech is now well-settled law.¹¹⁸ In *City of Lakewood v. Plain Dealer Publishing Co.*, a seminal case on the subject, a newspaper challenged an ordinance giving a mayor the authority to grant or deny permits to place newsracks on city property.¹¹⁹ The Supreme Court found the statute unconstitutional, holding that by affording unfettered discretion to the mayor, the ordinance gave individuals an incentive to censor their own speech in order to obtain a permit and allowed potential censorship by the mayor.¹²⁰

Plaintiffs may attempt to employ this theory—that unfettered discretion to license speech is unconstitutional—in the no-trespass context. For example, the no-trespass policy at issue in *Commonwealth v. Hicks* allowed the manager of a public housing development “unfettered discretion” to determine whether or not a nonresident had “legitimate reasons” to be on the premises,¹²¹ but failed to provide any guidance as to what constituted a “legitimate” reason.¹²² Indeed, much of the housing authority’s trespass policy was not even written down.¹²³ Kevin Lamont Hicks was arrested for criminal trespass while walking through the housing project.¹²⁴ Despite the fact that Hicks was not at that time attempting to engage in any expressive activity, he alleged that the discretionary no-trespass policy infringed on First Amendment protections.¹²⁵ At trial, the

an incidental effect on family relationships, did not target family relationships); *see also* O’Leary, *supra* note 21, at 203–13.

¹¹⁷ *See, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (holding that there was no right of intimate association among Jaycees members); *Parks v. City of Warner Robins*, 43 F.3d 609, 614 (11th Cir. 1995) (holding that intimate association was not violated by the city’s anti-nepotism policy); *Coronel v. Haw. Dep’t of Corr.*, No. 91-16842, 1993 WL 147318, at *2 (9th Cir. May 6, 1993) (unpublished) (holding that a prison policy prohibiting inmates from calling their families during evening hours did not violate their right of intimate association); *see also* O’Leary, *supra* note 21, at 212–13.

¹¹⁸ *See, e.g.*, *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750 (1988); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969).

¹¹⁹ *Plain Dealer Publ’g Co.*, 486 U.S. at 750.

¹²⁰ *Id.* at 757, 769–70.

¹²¹ 563 S.E.2d 674, 680 (Va. 2002), *petition for cert. filed*, 71 U.S.L.W. 3178 (U.S. Sept. 5, 2002) (No. 02-371); *see also* *Vasquez v. Hous. Auth. of El Paso*, 271 F.3d 198 (5th Cir. 2001) (holding that a housing authority’s use of its no-trespass policy against nonresident political canvassers violated the tenants’ First Amendment right to receive information), *reh’g en banc granted*, 289 F.3d 350 (5th Cir. 2002).

¹²² *Hicks*, 563 S.E.2d at 676.

¹²³ *Id.*

¹²⁴ *Id.* at 677.

¹²⁵ *Id.*

development's housing manager testified that nonresidents could only distribute informational materials on the property when she granted them permission to do so.¹²⁶ The court found that the no-trespass policy operated to grant the housing manager:

unfettered discretion to determine . . . who has a right to speak on the Housing Authority's property . . . [the housing manager] may prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment. [The housing manager] may even prohibit speech that is political or religious in nature.¹²⁷

Since First Amendment rights may not be conditioned on the total discretion of a government official, the court struck down the trespass policy on the grounds that it was overbroad and infringed upon First Amendment protections.¹²⁸

While an “unfettered discretion” claim was effective in *Hicks*, other plaintiffs have not been as successful. Courts have summarily rejected overbreadth and licensing arguments in a number of no-trespass cases.¹²⁹ Indeed, the *Hicks* victory may have come in part because of advocates' explicit cross-examination regarding the implications of the no-trespass policy on individuals seeking to disseminate information, canvas, and picket; only in *Hicks* has a court in a no-trespass case referred to evidence in the record—here, the testimony from the housing manager—that spoke directly to the First Amendment issue.¹³⁰ Advocates seeking to make First Amendment licensing or overbreadth arguments should therefore attempt to determine exactly what procedures canvassers and picketers must submit to when entering development property.

3. Procedural Due Process

The Due Process clause of the Fourteenth Amendment provides that “no person shall be deprived of life, liberty or property without due process of law.”¹³¹ Depending on the details of the particular no-trespass pol-

¹²⁶ *Id.* at 680–81.

¹²⁷ *Id.* at 681.

¹²⁸ *Id.*

¹²⁹ See *Daniel v. City of Tampa*, 38 F.3d 546, 551 (11th Cir. 1994) (holding that where a no-trespass statute requires police to arrest nonresidents named on the no-trespass list, the policy is neither overbroad nor vague as applied to the canvasser); *City of Bremerton v. Widell*, 51 P.3d 733 (Wash. 2002) (finding that a no-trespass policy was not overbroad and that the First Amendment was not implicated), *cert. denied*, 71 U.S.L.W. 3317 (U.S. Nov. 4, 2002) (No. 02-6186).

¹³⁰ *Hicks*, 563 S.E.2d at 680–81.

¹³¹ U.S. CONST. amends. V & XIV, § 1. The procedural requirements of the Fifth Amendment have been incorporated into the Fourteenth Amendment. See *Ingraham v. Wright*, 430 U.S. 651, 672–73 (1977).

icy in question, plaintiffs may have a strong claim for relief under a procedural due process theory. To succeed, plaintiffs must undergo a two-step analysis.¹³² First, plaintiffs must demonstrate they have a protected liberty or property interest with which the state has interfered.¹³³ Second, plaintiffs must establish that the procedures surrounding the deprivation of their interests were constitutionally insufficient.¹³⁴

In the context of public housing, tenant-plaintiffs do have a “legitimate claim of entitlement”¹³⁵ that is abridged by draconian no-trespass policies. To claim a protected property interest, plaintiffs must point to “existing rules or understandings” that give rise to a protected interest.¹³⁶ With respect to public housing, a number of potential sources may give rise to such a protected property interest. To the extent that tenants have a right to invite visitors to their homes under state common law doctrine,¹³⁷ no-trespass policies that contravene that right interfere with a protected property interest. Tenants might also look to the terms of their lease agreements; leases that mandate “reasonable rules” or mention guest visitation also give rise to a claim of entitlement.¹³⁸ Finally, state law itself may create a protected interest.¹³⁹

After demonstrating that plaintiffs have a protected interest, the court inquires into what procedures are constitutionally required when the state interferes with that interest. The nature and extent of the necessary process turns on the result of a three-prong balancing test. *Mathews v. Eldridge*¹⁴⁰ lays out the relevant factors to be weighed:

¹³² See, e.g., Douglas S. Miller, *Off Duty, Off the Wall, But Not Off the Hook: Section 1983 Liability for the Private Misconduct of Public Officials*, 30 AKRON L. REV. 325, 371–72 (1997) (describing the test used in assessing procedural due process claims).

¹³³ See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571 (1972).

¹³⁴ See *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

¹³⁵ *Roth*, 408 U.S. at 577; cf. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that procedural due process attaches to welfare benefits received under statutory and administrative standards defining eligibility).

¹³⁶ *Id.*

¹³⁷ See *supra* notes 32–57 and accompanying text. Nonresident visitors may try to claim a liberty interest in visiting tenants. In *Thompson v. Ashe*, 250 F.3d 399 (6th Cir. 2001), the Sixth Circuit addressed the due process claim of a defendant prosecuted for entering PHA property in violation of a no-trespass policy. However, the court found that Thompson was on the property *without* a valid invitation. *Id.* at 408. In such circumstances, the defendant’s protected interest could only be “a liberty interest in associating with [PHA] residents, whether he is welcome there or not.” *Id.* In this context, the court concluded that Thompson’s very limited interest was not entitled to due process protection. *Id.* The court acknowledged that *invited* nonresidents or tenants themselves may have a stronger claim to due process protection, but found that those issues were not presented in the case. *Id.* at 407–08.

¹³⁸ See 24 C.F.R. § 966.4(d)(1) (2002) (requiring that public housing leases include a provision mandating the “reasonable accommodation” of tenants’ guests).

¹³⁹ See *infra* notes 146–162 and accompanying text.

¹⁴⁰ 424 U.S. 319 (1976).

First, 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 safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.¹⁴¹

Under this test, plaintiffs have a persuasive claim that they are entitled to some procedural protections.

First, tenants have a strong interest in avoiding an erroneous or spurious decision permanently barring a family member or guest from visiting their homes. Barring orders can result in social isolation, emotional distress, and other costs specific to individual cases. For example, as the quote that opens this Note suggests,¹⁴² barring orders can seriously interfere with tenants' ability to balance work and childcare—if a tenant's babysitter is barred, the tenant bears real economic costs.

Second, depending on the facts of the specific policy in question, no-trespass policies may well run a high risk of error. As argued above, PHA policies frequently lack even minimal procedural protection, vesting total discretion in housing managers to add or remove nonresidents from the trespass log.¹⁴³ There is often no opportunity for the plaintiff to be heard "at a meaningful time and in a meaningful manner"¹⁴⁴ in order to resolve questions of whether or not a guest was invited, was disruptive, or should be barred.¹⁴⁵ The risk of error would be dramatically reduced by the adoption of simple notice, hearing, and appeal procedures.

Finally, it is in the interest of the PHAs themselves to grant some procedural protections to tenants and their guests. PHAs are landlords, and as such, share tenants' interests in the promulgation of fair rules that provide adequate notice regarding prohibited conduct and promote tenants' satisfaction with their living situations. While PHAs do have a legitimate interest in avoiding costly procedures, the cost of procedural protections is likely to be low in this context. PHAs need only create and publish a procedural framework incorporating basic safeguards, such as a mechanism for appeal. The costs associated with standardizing and codifying existing barring procedures and the costs of creating new hearing procedures is justified given the serious cost to tenants facing the permanent, potentially erroneous exclusion of a close friend or relative.

¹⁴¹ *Id.* at 335.

¹⁴² See *supra* quotation accompanying note 1.

¹⁴³ See *supra* notes 18, 118–130 and accompanying text.

¹⁴⁴ *Mathews*, 424 U.S. at 333.

¹⁴⁵ See *Commonwealth v. Hicks*, 563 S.E.2d 674, 677 (Va. 2002), *petition for cert. filed*, 71 U.S.L.W. 3178 (U.S. Sept. 5, 2002) (No. 02-371).

D. Arguments from State Law

The preceding Parts have focused on arguments that are not specific to any particular state or jurisdiction. However, state landlord-tenant law is often more favorable to tenants than corresponding federal law.¹⁴⁶ In attacking no-trespass policies, plaintiffs may find that some state laws buttress arguments under federal and common law and may provide alternative, additional arguments as to the illegality of no-trespass policies.¹⁴⁷

Many state statutes include language that can bolster plaintiffs' arguments that tenants have a right to invite visitors into their homes. For example, some states require tenants to ensure that their guests do not create a disturbance, thereby creating an inference that tenants may, in fact, invite guests to their residences.¹⁴⁸ Other state statutes may set up particular conditions under which guests may be barred from visiting a tenant, suggesting that in other circumstances, guests may not be barred.¹⁴⁹ Statutes may also specifically codify the rights of tenants to have guests.¹⁵⁰ Even state statutes outside the landlord-tenant context may be useful for advocates. For example, advocates may draw on state criminal trespass statutes that explicitly exempt persons issued an invitation¹⁵¹ in arguing that guests cannot be charged with criminal trespass.

This Part will examine a Massachusetts statutory provision, exploring various ways in which this statute may bolster claims that no-trespass policies are illegal. The Massachusetts statute may provide a model for

¹⁴⁶ See, e.g., Robert G. Schwemm, *Discriminatory Housing Statements and 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 *FORDHAM URB. L.J.* 187, 275 (2001) (describing state fair housing statutes that are more favorable to tenants than the corresponding federal fair housing law).

¹⁴⁷ See, e.g., James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 *ALB. L. REV.* 1183 (2000) (suggesting that state constitutions may give rise to more expansive rights than the federal Constitution).

¹⁴⁸ For example, Nebraska, Ohio, and Vermont, using nearly identical language, mandate that a tenant shall "require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises." *NEB. REV. STAT.* § 76-1421(7) (1996); accord *OHIO REV. CODE ANN.* § 5321.05(A)(8) (West 1994); *VT. STAT. ANN.* tit. § 4456(b) (1993).

¹⁴⁹ *CAL. HEALTH & SAFETY CODE* § 11571.1 (West Supp. 2002) (authorizing barring of guests who have violated a controlled substance statute, suggesting that guests who have not violated that statute may not be barred).

¹⁵⁰ See, e.g., *N.M. STAT. ANN.* § 47-8-15(E) (Michie Supp. 1999) (preventing landlords from burdening tenants' right to have guests by assessing additional fees against tenants); *PA. CONS. STAT. ANN.* tit. 68 § 250.504-A (West 1994) (giving tenants the unwaivable right to invite visitors).

¹⁵¹ See, e.g., 720 *ILL. COMP. STAT.* 5/21-3(c) (2000) (a criminal trespass statute does not apply to persons issued an invitation by a tenant or resident); see also *CAL. CIV. CODE* § 1942.6 (West Supp. 2002) (stating that "[a]ny person entering onto residential real property, upon the invitation of an occupant . . . for the purpose of providing information regarding tenants' rights . . . shall not be liable in any criminal or civil action for trespass").

other states seeking to balance the rights of tenants to have guests with the interests of ensuring safety on public housing property.

In Massachusetts, a specific statutory provision squarely addresses the ability of state public housing landlords to eject and bar nonresidents. In contrast to wide-reaching PHA no-trespass policies, chapter 121B, section 32C of the Massachusetts General Laws lays out a narrow exception to the common law right of invitation in the context of public housing projects.¹⁵² The statute was promulgated for the same reasons that motivate housing authorities to adopt no-trespass policies—to give public housing authorities the ability to address safety concerns and combat serious crime on public housing property.¹⁵³ Toward that end, the statute authorizes Massachusetts state housing authorities to file civil actions to enjoin certain persons from entering or remaining on public housing property.¹⁵⁴

However, unlike many locally promulgated, overbroad policies, the statute permits housing authorities to bar only persons who have committed one of several specified acts. Housing authorities may bar nonresidents for causing serious physical harm to a tenant or housing authority employee; engaging in repeated vandalism or theft, alone or in combination with an attempt to physically harm a tenant or housing authority employee; possessing certain weapons or explosives; unlawfully selling certain controlled substances; or committing certain civil rights crimes.¹⁵⁵

¹⁵² MASS. GEN. LAWS ch. 121B § 32C (2000).

¹⁵³ See *Commonwealth v. Wallace*, 730 N.E.2d 275, 278 (Mass. 2000) (stating that the purpose of the statute is “to allow a housing authority to create a safe public housing environment, by protecting tenants from the unlawful actions of nontenants”).

¹⁵⁴ MASS. GEN. LAWS ch. 121B § 32C (2000).

¹⁵⁵ Section 32C states:

Whenever a person who is not a member of a tenant household has, on or near a public housing development or a subsidized housing development: (a) caused serious physical harm to a member of a tenant household or employee of the landlord, (b) intentionally, willfully, and repeatedly destroyed, vandalized, or stolen property of a member of a tenant household or of the landlord (c) intentionally and willfully destroyed, vandalized, or stolen property of a member of a tenant household or of the landlord and attempted to seriously physically harm a member of a tenant household or employee of the landlord (d) possessed or carried a weapon in violation of section ten of chapter two hundred and sixty-nine or possessed or used an explosive or infernal machine, as such is defined in section one hundred and two A of chapter two hundred and sixty-six with the exception of fire-crackers or violated any other provision of section one hundred and one, one hundred and two, one hundred and two A or one hundred and two B of chapter two hundred and sixty-six; (e) unlawfully sold or possessed with intent to distribute a controlled substance established as class A, B, C, or D in section thirty-one of chapter ninety-four C; or (f) committed or repeatedly threatened to commit a battery upon a person or damaged or repeatedly threatened to commit damage to the property of another for the purpose of intimidation because of said person's race, color, religion, or national origin or on account of said person's participation in an eviction proceeding; the landlord of such premises may bring a civil action for injunctive or other appropriate equitable relief in order to prohibit said person from entering or remaining in or upon the public or subsidized housing develop-

Housing authorities are not authorized to bar a person who has engaged in such conduct if there is cause to believe that the unlawful conduct is not likely to continue or does not pose a serious threat to the health or safety of the development.¹⁵⁶

In addition to clearly specifying circumstances under which nonresidents may be barred, the statute sets out due process safeguards. Section 32E requires housing authorities to bring civil actions to enjoin nonresidents in housing or superior court.¹⁵⁷ Unlike typical no-trespass policies, which tend to lack formalized hearing provisions, this statute provides an opportunity for parties to be heard and to respond to allegations in court, with an impartial judicial arbiter, subject to additional appellate review.¹⁵⁸

While the court may ultimately issue an order barring a nonresident from housing development property, all interlocutory orders must be time-limited, though orders are subject to extension for good cause.¹⁵⁹ A permanent injunction barring a nonresident may only be issued after a trial on the merits.¹⁶⁰ Moreover, the statute lays out a mechanism by which nonresidents may request a previously granted no-trespass order to be modified or vacated. The statute states:

A person subject to an order . . . may request that such order be modified or vacated at any time. Grounds for modification shall include, but not be limited to, hardship that would result from the person's inability to visit a tenant or a member of a tenant household, the person's need to carry out legitimate business on or near the public or subsidized housing development, or new evidence or evidence of a change in circumstances showing that it is unlikely that the person's presence in the public or subsidized housing development shall continue to pose a serious threat to the health and safety of the development.¹⁶¹

Massachusetts law thus provides a means for public housing landlords to ensure safety on development property, while providing safeguards to ensure that the right of tenants to invite guests is not abrogated needlessly or capriciously.

ment, unless there is cause to believe that such unlawful conduct is unlikely to continue or to pose a serious threat to the health or safety of the development, the tenant households at such development, or the employees of the landlord.

Id.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* ch. 121B § 32E.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* ch. 121B § 32F.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Advocates in no-trespass cases might use this statute as the basis for several arguments. First, advocates may argue that this law bolsters the claim that housing authorities cannot generally override the invitations of their tenants. The statute was enacted in order to provide public housing authorities with a remedy against nonresidents who commit crimes on public housing property. If public housing authorities already had the power to bar nonresidents, there would have been no need to create the Section 32C remedy.

Further, the requirements of Section 32C must preempt the ability of housing authorities to themselves make more sweeping, less protective no-trespass policies. Otherwise, public housing authorities in Massachusetts could more easily bar nonresidents who commit no infraction or minor infractions than those who commit serious crimes on public housing authority property. It is implausible that the legislature intended to allow housing authorities to permanently bar non-criminal nonresidents without process, while affording nonresidents who commit specific, serious crimes a trial on the merits prior to any permanent barring order.

Additionally, the statute's emphasis on process and safeguards reflects the legislature's recognition that tenants' right to invite visitors is valuable and should not be overridden without due process protections. The provisions laid out in the Massachusetts statute—court hearings, time-limited injunctions, and procedures for modifying and vacating injunctions—stand in sharp contrast to many of the no-trespass policies adopted by housing authorities.¹⁶²

The Massachusetts statute described above could serve as a model for public housing authorities seeking to balance safety concerns with the rights of tenants to have guests. By limiting the scope of a housing authority's barring power to persons who commit serious and specified crimes, and by institutionalizing various due process safeguards, the statute avoids the problems of discretion and overbreadth described above. At the same time, it gives housing authorities the authority to bar those nonresidents who pose a serious threat to safety, thus giving effect to the anti-crime impulse motivating housing authority no-trespass policies.

¹⁶² See, e.g., *Thompson v. Ashe*, 250 F.3d 399, 404 (6th Cir. 2001) (nonresidents given no opportunity for a hearing); *Diggs v. Hous. Auth. of Frederick*, 67 F. Supp. 2d 522, 534 (D. Md. 1999) (once nonresidents were added to the no-trespass list, the mechanisms for removing their names were inherently unreasonable); *Commonwealth v. Hicks*, 563 S.E.2d 674, 680–81 (Va. 2002) (housing authority manager had unfettered discretion to ban nonresidents for any reason), *petition for cert. filed*, 71 U.S.L.W. 3178 (U.S. Sept. 5, 2002) (No. 02-371); *Plaintiffs' Complaint, Revere Fed. Residents Council v. Revere Hous. Auth.*, No. 99-2332 E (Mass. Super. Ct. 1999) (no-trespass policy failed to provide procedural safeguards and was applied even in circumstances not involving serious crimes).

II. MOVING TOWARD SOLUTIONS: CHANGING THE POLICIES

The arguments laid out in Part I form the basis of an effective legal strategy to combat no-trespass policies. However, these legal arguments have limits. Housing authorities in the United States are decentralized and numerous; there are more than 3300 public housing authorities nationwide.¹⁶³ In Massachusetts alone, there are approximately 250 local housing authorities.¹⁶⁴ Case-by-case litigation, particularly in such a decentralized system, is expensive and time-consuming. Further, while litigation against individual housing authorities may cause some PHAs to modify or repeal their no-trespass policies, other housing authorities—even within the same state—are not bound by the outcomes in those cases. In fact, local housing authorities often fail to modify their own draconian policies in response to litigation in neighboring communities, forcing advocates to continue to bring repetitive, expensive suits.¹⁶⁵

In this context of decentralized local housing authorities, advocates may wish to consider two non-litigation strategies—legislative reform and trade association lobbying—in seeking a more wide-ranging solution to the problem of no-trespass policies.

A. *Legislative Fixes*

A legislative solution to the no-trespass problem would be relatively straightforward. Advocates could lobby state or national legislators to incorporate language that makes explicit tenants' right to invite visitors to their public housing residences. Legislatures might amend the current federal or state regulations that govern public housing developments.¹⁶⁶ For example, a statute might specify, "Public housing tenants' right to have guests may not be abrogated by housing authority no-trespass policies." Any such provision would then define "no-trespass policies," adopting a broad, functional definition designed to encompass the range of draconian no-trespass policies adopted by local housing authorities. An amendment of this sort would not interfere with federal or state legislative efforts authorizing housing authorities to bar nonresidents who

¹⁶³ Nat'l Low Income Hous. Coalition, *Public Housing, in 2002 ADVOCATES' GUIDE TO HOUSING AND COMMUNITY DEVELOPMENT POLICY* (2002), available at <http://www.nlihc.org/advocates/publichousing.htm> (last visited Nov. 18, 2002); see also Mbulu, *supra* note 3, at 393–94 (2000).

¹⁶⁴ Mass. Dep't of Hous. & Cmty. Dev., *Division of Public Housing and Rental Assistance*, at <http://www.state.ma.us/dhcd/components/public/default.htm> (last visited Nov. 18, 2002).

¹⁶⁵ See Interview with Amy Copperman, Staff Attorney, Massachusetts Law Reform Institute, Boston, Mass. (July 2002).

¹⁶⁶ See, e.g., United States Housing Act of 1937, 42 U.S.C. §§ 1437 to 1437bbb-9 (2000).

commit serious crimes on development property,¹⁶⁷ nor with legislative policies that assign tenants the risk of having disruptive guests.¹⁶⁸ Under the proposed language, only *public housing authority* policies would be prohibited.

However, legislative attempts to prevent local housing authorities from adopting no-trespass policies may not be effective. Even where state law explicitly codifies the right of tenants to invite guests, housing authorities create no-trespass policies that deny this right. For example, Pennsylvania law specifically codifies the unwaivable right of tenants to invite guests into their apartments:

The tenant . . . shall have the right to invite to his apartment or dwelling unit, for a reasonable period of time, such social guest, family or visitors as he wishes so long as his obligations as a tenant under this article are observed. These rights may not be waived by any provisions of a written rental agreement and the landlord and/or owner may not charge any fee, service charge or additional rent to the tenant for exercising his rights under this act.¹⁶⁹

Despite this clear statutory language, landlords in Pennsylvania have barred nonresident visitors in clear contravention of the law, forcing aggrieved parties to engage in costly litigation.¹⁷⁰ Even in Massachusetts, where a statute squarely addresses the issue of no-trespass policies on public housing property, at least seven PHAs have adopted problematic no-trespass policies.¹⁷¹ As Part I of this Note makes clear, the problem is not that no-trespass policies are defensible under the law of most states. Rather, the problem is that local housing authorities systematically disregard the law.¹⁷²

¹⁶⁷ See discussion of Massachusetts public housing law *infra* Part I.D; see also MASS. GEN. LAWS ch. 121B § 32C (2000).

¹⁶⁸ See discussion of the United States Housing Act *infra* Part I.B.

¹⁶⁹ PA. CONS. STAT. ANN. tit. 68 § 250.504-A (West 1994).

¹⁷⁰ See, e.g., *Branish v. NHP Prop. Mgmt.*, 694 A.2d 1106 (Pa. Super. Ct. 1997) (holding that a Pennsylvania law prohibited a private landlord from issuing a no-trespass order against a tenant's guest).

¹⁷¹ See Interview with Amy Copperman, *supra* note 165. These include housing authorities in the cities of Clinton, Revere, Fall River, Plymouth, Boston, Wellesley, and Medford. *Id.*

¹⁷² A thorough assessment of the efficacy of a legislative solution would have to consider the reasons that PHAs in states with very clear no-trespass statutes regularly flout those laws. If housing authorities are merely ignorant as to the state of the law, a legislative solution may raise local housing authority awareness of the issue, potentially making these authorities more likely to change their policies in response. If, however, housing authorities choose to adopt no-trespass policies based on an assessment of the low likelihood that these policies will actually be challenged in court, legislative action may be less effective. While willingness of local housing authorities in many cases to litigate and defend their no-trespass policies may suggest the latter, an assessment of the motivations of local PHAs

Still, federal or state legislation specifically targeting the no-trespass issue and explicitly codifying the right of tenants to invite guests to their homes would at least generate publicity. Housing authorities may be more likely to change their policies in response to clear legislative statements than they are to heed warnings of illegality from tenant advocates and attorneys—particularly because legislatures provide PHA funding. Further, clear legislative action would provide tenants and visitors with a powerful tool in responding to public housing authority efforts to bar visitors.

B. Trade Associations

There are three major trade associations comprised of PHAs and executive directors in the United States. This Section will briefly outline each of these trade associations, suggesting that these organizations may provide a means to distribute information, communicate effectively with many local housing authorities, and encourage localities to modify their no-trespass policies.

First, the Public Housing Authorities Directors Association (PHADA), founded in 1979,¹⁷³ represents administrators from more than 1700 public housing authorities across the United States, including many of the smaller agencies.¹⁷⁴ Another trade association, the Council of Large Public Housing Authorities (CLPHA), represents fifty-five of the nation's largest public housing authorities who together comprise forty percent of the country's public housing stock.¹⁷⁵ A third trade association, the National Association of Housing Redevelopment Officials (NAHRO), is a professional membership organization made up of 9000 community development agencies and officials throughout the nation who administer affordable housing and development programs.¹⁷⁶ In all, NAHRO members own or manage ninety-nine percent of public housing in the United States.¹⁷⁷

is outside the scope of this Note.

¹⁷³ Pub. Hous. Auths. Dirs. Ass'n, *About PHADA*, at <http://www.phada.org/about.htm> (last visited Nov. 18, 2002).

¹⁷⁴ *Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 2001 (Part 8): Hearings Before the House Comm. on Appropriations, Subcomm. on VA/HUD & Indep. Agencies*, 106th Cong. 763 (2000) (testimony of James Tabron, Executive Director, Durham, North Carolina Housing Authority, on behalf of the Public Housing Authorities Directors Association).

¹⁷⁵ *Affordable Housing Programs: Hearings on H.R. 3995 Before the House Fin. Servs. Comm., Subcomm. for Hous. & Econ. Opportunity*, 107th Cong. (2002) (prepared statement of Terri Hamilton Brown, Executive Director, Cuyahoga Metropolitan Housing Authority, on behalf of the Council of Large Public Housing Authorities), available at 2002 WL 100237007.

¹⁷⁶ See NAT'L ASS'N OF HOUS. REDEV. OFFICIALS, NAHRO: AN OVERVIEW OF THE ASSOCIATION 1 (n.d.), available at <http://www.nahro.org/about/nahroguide.pdf> (last visited Nov. 18, 2002).

¹⁷⁷ *Id.* at 3.

Advocates could use these trade associations to encourage local housing authorities to adopt reasonable no-trespass policies. These trade associations have an information infrastructure that allows them to communicate information to large numbers of local, decentralized housing authorities. Each holds conferences designed to promote communication between the various local housing authorities. CLPHA members, for example, meet three times a year; recent conferences have included discussions of resident income levels, community safety, and Welfare to Work.¹⁷⁸ Further, each association is national in scope and includes housing officials from across the country. All publish newsletters or journals for their members focusing on issues pertaining to the management of public housing developments. PHADA, for example, publishes *The Advocate*—a newsletter that analyzes housing legislation, reprints housing-related articles, and aims to keep its membership informed on relevant issues—twenty-two times per year.¹⁷⁹ In addition, each association distributes news, fact sheets, and policy papers on its Web site.

These organizations may be receptive to advocates who seek to disseminate information regarding the current state of the law on no-trespass issues. As this Note argues, tenant advocates are likely to prevail in lawsuits against local housing authorities.¹⁸⁰ Local housing authorities must bear substantial costs of time and money in litigating these lawsuits. Trade associations may therefore be convinced that it is in their members' interests to be well-informed on the current state of no-trespass law. The associations currently provide fact sheets and policy papers on their Web sites; a no-trespass fact sheet, laying out guidelines for implementing a defensible no-trespass policy, might help discourage local housing authorities from adopting draconian policies. Advocates could supply trade associations with model no-trespass policies that codify clear grounds for barring people from housing property and provide procedural protections, exceptions for tenant visitors, and provisions for review.¹⁸¹

¹⁷⁸ See generally Council of Large Pub. Hous. Auth., *Public Housing News*, at <http://www.clpha.org> (last visited Nov. 18, 2002) [hereinafter CLPHA]; see also *Housing Authority Executives Huddle in LA to Discuss Public Housing Issues at CLPHA Conference*, BUS. WIRE, Sept. 15, 1997, LEXIS, News Library, Bwire File.

¹⁷⁹ See generally CLPHA, *supra* note 178.

¹⁸⁰ See *infra* Part I; see also *Setser v. Moline Hous. Auth.*, No. 92-CV-04085 (C.D. Ill. June 15, 1993) (awarding public housing residents attorney fees after the PHA modified their no-trespass policy to exclude guests and family of the residents, and requiring the PHA to provide some due process protections); *Souza v. Fall River Hous. Auth.*, No. 95 CV 00321 (Mass. Commw. Ct. June 11, 1996) (granting partial summary judgment to a tenant in a no-trespass case).

¹⁸¹ See *Vasquez v. Hous. Auth. of El Paso*, 271 F.3d 198, 201 (5th Cir. 2001) (noting that the housing authority's no-trespass policy makes an exception for invited guests), *reh'g en banc granted*, 289 F.3d 350 (5th Cir. 2002); *Daniel v. City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994) (noting that the PHA no-trespass policy, adopted to combat crime and drugs at the development, excludes invited guests).

CONCLUSION: BUILDING BETTER NO-TRESPASS POLICIES

This Note has examined the phenomenon of public housing authority no-trespass policies, arguing that too often no-trespass policies undermine the rights of tenants to have visitors. Many of these policies grant housing authority officials unlimited discretion to determine who is allowed to enter development property and fail to provide clear guidelines and standards for implementing, enforcing, and reviewing decisions made under the policies. Despite the prevalence of unreasonable policies, it is possible to design no-trespass policies that both protect the right of tenants to have visitors and provide housing authorities a tool to keep disruptive nonresidents off of housing development property, while satisfying the requirements of federal, state, and common law.

First, legitimate no-trespass policies should explicitly codify the right of tenants to have guests and provide mechanisms by which a non-resident's assertion that she is visiting a tenant can be verified. If a claim of invitation is raised by a nonresident, housing authorities and police should be required to consult with the resident who allegedly issued the invitation, issuing a barring notice only if the resident consents to the barring. Further, since housing authorities typically seek to bar nonresidents with no "legitimate business" on the property, policies should presume that invited guests have "legitimate business" at the development.

If a nonresident is a guest of a tenant, public housing authorities should only be able to utilize their barring power if the nonresident has committed a specified, serious criminal act. Housing authorities might look to chapter 121B, Section 32C of the Massachusetts General Laws—which allows housing authorities to bar individuals who have, for example, caused serious physical harm, possessed certain weapons or explosives, or unlawfully sold certain controlled substances—in constructing limited exceptions to the rights of tenants to have guests. Such a provision would preserve tenants' right to invite guests, but not at the expense of safety at the development.

In addition, no-trespass policies should provide reasonable due process safeguards. Persons placed onto a no-trespass log should receive notice apprising them that if they knowingly return to the development, they will be trespassing. The notice should include the reasons for denying the nonresident entry onto the development and indicate the time period during which the notice is effective. Further, the notice should inform the nonresident of a right to appeal. Guidelines for an appeals process—including an impartial arbiter, standards for review, and procedures for offering evidence—should be codified. Moreover, the no-trespass log should be available to the public, and some process for removing names from the list should be provided.

In negotiating settlements and drafting model policies, advocates should think creatively about how to balance the safety interests of PHAs—

and their tenants—with the right of tenants to have guests. For example, policies could tie the issuance of a no-trespass order to specified seriously disruptive or criminal activity engaged in by the nonresident. By limiting the scope of no-trespass orders to those engaging in criminal behavior, police officers would be prevented from simply using no-trespass policies as a pretext for racially profiling persons on housing development property.

Advocates may further seek to draft policies requiring housing authorities to remove nonresidents' names from a no-trespass log at the expiration of one year, thus ensuring that lists do not become clogged with stale names and verifying that those barred from the development actually remain a current threat to safety on the property. In the end, we should hope for policies that provide housing authorities with effective means of combating drugs and violence, while preserving the ability of tenants to use their homes as homes, and as places where they may gather undisturbed with family and friends.

