BAN LISTS: CAN PUBLIC HOUSING AUTHORITIES HAVE UNWANTED VISITORS ARRESTED?

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Public housing developments are overwhelmed by drug sales and incidents of gun violence that often involve nonresident visitors. In an attempt to deal with housing development crime, public housing authorities across the country have compiled so-called ban lists, which threaten named individuals with criminal trespass charges if they enter housing authority property. Ban lists have had a noticeably positive effect on the safety of many communities. At the same time, however, they often indiscriminately bar harmless individuals from visiting housing developments and conflict with the common-law tradition of allowing residents to entertain guests of their choice in their homes.

This note examines the constitutionality of ban list policies. Recognizing the tension between the beneficial and detrimental effects of ban lists, the author argues that courts should uphold them as long as they are narrowly tailored to achieving the goal of fighting crime in public housing. The author examines two possible grounds on which ban lists could be subjected to constitutional scrutiny. First, some of the broadest policies might be held to implicate the fundamental right to freedom of movement. Despite the typical association of the right to freedom of movement with a right to travel between states, current federal case law indicates courts' willingness to recognize a right to intrastate movement. Recognition of this right could lead to decisions holding that ban lists excluding individuals from all housing developments in a city are unconstitutional.

Second, some ban lists may affect the fundamental right to freedom of association. On that basis, courts may find ban lists that frustrate traditional nuclear family relationships to be unconstitutional. There is a distinction between familial relationships, which are protected by the right to freedom of association, and nontraditional family and nonfamilial relationships, which generally are not. Ban lists cases that involved relationships falling into the latter two categories may have been decided differently if the relationships had been familial in nature.

The author proposes a number of ways for public housing authorities to ensure their ban list policies are narrowly tailored to preventing illegal activity in public housing. In general, the policies should provide basic procedural safeguards to individuals banned

from properties, banning should be based on sufficient justification, offenses warranting banning should be clearly enumerated, and ban list policies should recognize an exception for invitees.

I. INTRODUCTION

In January of 1991, a Richmond police officer spotted Kevin Lament Hicks walking on a sidewalk adjacent to Whitcomb Court, a "notorious"[1] housing project owned by the Richmond Redevelopment and Housing Authority.[2] The officer knew that Hicks was not welcome on the premises—he had been arrested there twice before for trespassing.[3] The previous year, a Whitcomb Court manager had hand delivered a "barment" notice to Hicks, effectively banning him from the property.[4] The notice read:

> This letter serves to inform you that effective immediately you are not welcome on Richmond Redevelopment and Housing Authority's Whitcomb Court or any Richmond Redevelopment and Housing Authority property. This letter is an official notice informing you that you are not to trespass on RRHA property. If you are seen or caught on the premises, you will be subject to arrest by the police.[5]

The notice was apparently not in response to any illegal activity, but rather to Hicks's repeated visitation with family who lived on the property.[6] His two children, along with their mother, resided there, as did his mother and aunt.[7] Hicks twice requested permission to return to the property, but was denied both times by Whitcomb Court management.[8]

Because the sidewalk Hicks was walking on had been conveyed by the City of Richmond to the housing authority, Hicks's presence there was a violation of the barment notice.[9] Hicks told the officer that he was there "to bring pampers for his baby."[10] Nevertheless, he was served with a summons for trespass,[11] convicted, sentenced to one year sus-

1. *Court Negotiates Richmond Anti-Crime Law*, WASH. POST, July 2001, at B03.
2. Hicks v. Commonwealth, 548 S.E.2d 249, 252 (Va. Ct. App. 2001) (en banc).
3. Commonwealth v. Hicks, 563 S.E.2d 674, 677 (Va. 2002).
4. *Id.*
5. *Id.*
6. In addition to his two trespassing convictions, Hicks was also convicted for damaging property at Whitcomb Court. Virginia v. Hicks, 123 S. Ct. 2191, 2195 (2003). The Virginia courts, however, assumed that Hicks's barment notice was solely in response to his previous visits with family, since this contention was unrebutted by opposing counsel. Hicks v. Commonwealth, 535 S.E.2d 678, 686 (Va. Ct. App. 2000) (Coleman, J., concurring in part, dissenting in part); Hicks v. Commonwealth, 548 S.E.2d at, 252 n.2.
7. Alan Cooper, *Safe-Streets Plan Unconstitutional*, RICH. TIMES-DISPATCH, July 4, 2001, at B-1.
8. Hicks v. Commonwealth, 548 S.E.2d at 252.
9. Commonwealth v. Hicks, 563 S.E.2d at 675.
10. Hicks v. Commonwealth, 535 S.E.2d at 680.
11. *Id.*

pended sentence, and ordered to serve one year in jail for violating the terms of his previous suspended sentences for trespass.[12]

Hicks appealed his convictions, alleging that his First Amendment rights were violated when the government prevented him from visiting his family.[13] The Virginia Supreme Court agreed, striking down Hicks's convictions on the ground that the Whitcomb Court trespass policy was an overbroad restriction on protected speech.[14] Although the policy was "designed to punish activities that are not protected by the First Amendment," the court expressed concern that the policy gave Whitcomb Court's manager the unreviewable authority to determine what constituted a "legitimate business or social purpose,"[15] thus allowing her to "prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment."[16] The dissent strongly disagreed, writing that the U.S. Supreme Court "has not characterized the provision of diapers or visitation with family members as the exercise of fundamental rights."[17]

The U.S. Supreme Court granted certiorari, and unanimously reversed in *Virginia v. Hicks*.[18] The Court held that the Whitcomb Court policy was not an overbroad restriction on protected First Amendment speech because Hicks had not shown that the policy "prohibit[ed] a 'substantial' amount of protected speech in relation to its many legitimate applications."[19] However, the Court left open the possibility that on remand the policy could be challenged on other grounds.[20]

Policies similar to those of Whitcomb Court are sometimes called "ban lists" or "no-trespass lists" because they involve the maintenance of

12. Commonwealth v. Hicks, 563 S.E.2d at 675; Cooper, *supra* note 7.

13. Hicks v. Commonwealth, 535 S.E.2d at 682.

14. Commonwealth v. Hicks, 563 S.E.2d at 681. The Virginia Court of Appeals initially affirmed Hicks's conviction, *id.* at 684, but reversed itself in an en banc opinion. Hicks v. Commonwealth, 548 S.E.2d at 251. The Virginia Supreme Court affirmed the en banc Court of Appeals, but on a different rationale—while the Court of Appeals had found a First Amendment violation on the ground that the streets and sidewalks surrounding Whitcomb Court constituted a public forum, *id.* at 256–57, the Virginia Supreme Court based its finding on its view that the statute was an overbroad restriction on protected speech because it vested unfettered discretion in the housing development manager. Commonwealth v. Hicks, 563 S.E.2d at 681. In upholding the judgment of the en banc court, the Virginia Supreme Court did not pass judgment on the public forum issue. *Id.* at 681.

15. Commonwealth v. Hicks, 563 S.E.2d at 676.

16. *Id*. at 680–81.

17. *Id.* at 684–85 (Kinser, J., dissenting).

18. 123 S. Ct. 2191, 2199 (2003).

19. *Id*. The federal circuits had previously split on whether ban lists implicate freedom of speech. *Compare* Vasquez v. Hous. Auth., 271 F.3d 198, 205–06 (5th Cir. 2001), *reh'g granted sub nom*. De La O v. Hous. Auth., 289 F.3d 350 (5th Cir. 2002) (holding that a ban list policy violated plaintiff's First Amendment rights), *with* Daniel v. City of Tampa, 38 F.3d 546, 551 (11th Cir. 1994) (finding no First Amendment violation in the arrest of a man protesting the first Persian Gulf War on public housing property).

20. Virginia v. Hicks, 123 S. Ct. at 2199. In particular, the Supreme Court did not rule on the public forum rationale relied on by the en banc Virginia Court of Appeals. *See supra* note 14. The First Amendment public forum argument, however, is beyond the scope of this note.

a list of people who are prohibited from entering a property.[21] In the war against drugs and crime in public housing, ban lists are becoming an increasingly common weapon.[22] In cases like *Hicks*, however, those who are excluded may still have family living on the property.[23] While *Hicks* settled that ban list policies generally do not violate First Amendment freedom of speech, other rights not examined by the Supreme Court—including freedom of movement and freedom of association with family members—may still be implicated.[24]

21. Ban lists are also known variously as "barment notices," Holland v. Commonwealth, 502 S.E.2d 145, 145 (Va. Ct. App. 1998), "trespass after warning" statutes, *Daniel*, 38 F.3d at 548, "no trespass warnings," L.D.L. v. State, 569 So. 2d 1310, 1311 (Fl. Dist. Ct. App. 1990), and "barred notices," Williams v. Nagel, 643 N.E.2d 816, 818 (Ill. 1994), among other names.

22. *State Courts Revisit Public Housing Trespass Policies*, HOUSING L. BULL. (Nat'l Hous. Law Project, Oakland, Cal.) Aug. 2002, at 169–70. The following cases have considered ban lists: Johnson v. City of Cincinnati, 310 F.3d 484, 487–88 (6th Cir. 2002); Thompson v. Ashe, 250 F.3d 399, 403–05 (6th Cir. 2001); *Vasquez*, 271 F.3d at 200–01; United States v. Reed, 220 F.3d 476, 477 (6th Cir. 2000); *Daniel*, 38 F.3d at 550; Diggs v. Hous. Auth., 67 F. Supp. 2d 522, 524–25 (D. Md. 1999); Brown v. Dayton Metro. Hous. Auth., No. C-3-93-037, 1993 U.S. Dist. LEXIS 21297 (S.D. Ohio Aug. 26, 1993); Carey v. Edgewood Mgmt. Corp., 754 A.2d 951, 953 (D.C. 2000); Bean v. United States, 709 A.2d 85, 85–86 (D.C. 1998); *L.D.L.*, 569 So. 2d at 1311; Arbee v. Collins, 463 S.E.2d 922, 924 (Ga. Ct. App. 1996); *Williams*, 643 N.E.2d at 817–18; *In re* Jason Allen D., 733 A.2d 351, 368 (Md. Ct. Spec. App. 1999); State v. Holiday, 585 N.W.2d 68 (Minn. Ct. App. 1998); People v. Kojac, 671 N.Y.S.2d 949, 950 (N.Y. Sup. Ct. 1998); State v. Scott, 2004 Ohio 271 (Ohio Ct. App. 2004); City of Dayton v. Gaessler, No. 18039, 2000 Ohio App. LEXIS 6178 (Ohio Ct. App. Dec. 29, 2000); State v. Newell, 639 N.E.2d 513, 514 (Ohio Ct. App. 1994); City of Dayton v. Williams, No. 13686, 1994 Ohio App. LEXIS 466, at *2–4 (Ohio Ct. App. Feb. 11, 1994); Branish v. NHP Prop. Mgmt., 694 A.2d 1106 (Pa. Super. Ct. 1997); *Hicks*, 563 S.E.2d at 675–77; Collins v. Commonwealth, 517 S.E.2d 277, 278–79 (Va. Ct. App. 1999); O'Banion v. Commonwealth, 519 S.E.2d 817 (Va. Ct. App. 1999); *Holland*, 502 S.E.2d at 145–46; Jones v. Commonwealth, 443 S.E.2d 189, 190 (Va. Ct. App. 1994); State v. Dixon, 725 A.2d 920, 921 (Vt. 1999); City of Bremerton v. Widell, 51 P.3d 733, 735–36 (Wash. 2002); State v. Little, 806 P.2d 749, 750 (Wash. 1991); State v. Glover, 806 P.2d 760, 761 (Wash. 1991); State v. Blair, 827 P.2d 356, 357 (Wash. Ct. App. 1992).

23. *See Thompson*, 250 F.3d at 405–06 (finding that plaintiff was banned from the residence where his brother and two cousins lived); *Diggs*, 67 F. Supp. 2d at 527–28 (finding that a tenant's brother and the father of her child were both banned from her residence); *Brown*, 1993 U.S. Dist. LEXIS 21297, at *20 (noting two plaintiffs' allegations that they were banned from public housing property while visiting cousins, and another plaintiff's allegations that he was banned while making child support payments to the mother of his children); *Carey*, 754 A.2d at 953 (finding that the father of plaintiff's children had been banned from the premises); *L.D.L.*, 569 So. 2d at 1311 (finding that a juvenile was arrested at a housing complex where his grandmother and brother lived); *Jason Allen D.*, 733 A.2d at 357 (discussing case where a juvenile received a ban notice while leaving the apartment of his cousin); *Widell*, 51 P.3d at 737 (examining case where a defendant was banned from visiting his fiancée); Joe Surkiewicz, BALT. DAILY REC., Nov. 17, 2000, at 1A (quoting plaintiffs' attorney as saying that a tenant was threatened with arrest for helping his elderly mother carry her groceries inside); Melissa Williams, *Are Housing Bans Too Strict?*, ASHEVILLE CITIZEN-TIMES, Aug. 4, 2002, at 1A (discussing the case of a woman banned from public housing and unable to visit her son).

24. *See* Setser v. Moline Hous. Auth., No. 92-CV-04085 (C.D. Ill. June 15, 1993), *cited in State Courts Revisit Public Housing Trespass Policies*, *supra* note 22, at 170 (dismissing voluntarily a challenge to a ban list policy after the housing authority amended the policy to exclude guests or family members); Souza v. Fall River Hous. Auth., No. 95-CV-00321 (Mass. Comm. Ct. June 11, 1996), *cited in State Courts Revisit Public Housing Trespass Policies*, *supra* note 22, at 170 (granting partial summary judgment against trespass policy partially on freedom of association grounds); *Frederick Modifies No-Trespassing Policy*, WASH. POST, Nov. 17, 2000, at B7 (discussing settlement in which a housing authority agreed to pay $84,000 in damages and $240,000 in legal fees, and to modify its ban list policy to cover only visitors convicted of violent or drug-related crimes committed near the housing developments). *Compare Johnson*, 310 F.3d at 501 (finding "a fundamental freedom of association

This note examines case law on ban lists and discusses the question of whether ban lists violate fundamental constitutional rights that could subject them to strict scrutiny in the courts.[25] It argues that to survive constitutional challenges based on freedom of movement and privacy, ban list policies should provide procedural protections, strictly define the sort of behavior that will subject an individual to banishment, and provide exceptions for visitation with family and friends. Part II considers the history and legal landscape of ban list policies.[26] Part III then examines the ways in which these laws may infringe upon protected liberty interests in freedom of movement and freedom of intimate association.[27] Part IV suggests that the important values involved in a right to visit family members counsel toward cautious, narrowly tailored ban list policies.[28] Part V presents a brief conclusion.[29]

II. BACKGROUND

A. The Epidemic of Crime in Public Housing

More than 2.6 million people, including one million children, are residents of public housing projects in the United States.[30] Although crime rates across the country generally declined between 1993 and 2000, residents of public housing still face the devastating effects of rampant crime.[31] Public housing residents are more than twice as likely as others to be shot—one in a hundred residents are victims of gun-related violence.[32] In the nation's 100 largest public housing projects, about one person per day is killed by gunfire.[33] Drugs also pose a serious problem. Whitcomb Court, where Kevin Lamont Hicks was arrested for attempting to bring diapers to his baby, was described as an "open-air drug market."[34] Congress has found that "drug dealers are increasingly imposing a

right to participate in the upbringing of [one's] grandchildren") *with Thompson*, 250 F.3d at 407 (holding that the Supreme Court "has not extended constitutional protection to mere visitation with family members").

25. The focus of this note is on challenges to ban list policies by nonresident visitors. For an analysis of challenges that can be brought by residents of housing authorities, see Elena Goldstein, Note, *Kept Out: Responding to Public Housing No-Trespass Policies*, 38 HARV. C.R.-C.L.L. REV. 215 (2003). Additionally, this note will not discuss First Amendment challenges to these policies. *See supra* note 20.

26. *See infra* Part II.

27. *See infra* Part III.

28. *See infra* Part IV.

29. *See infra* Part V.

30. U.S. DEP'T OF HOUS. & URBAN DEV., IN THE CROSSFIRE: THE IMPACT OF GUN VIOLENCE ON PUBLIC HOUSING COMMUNITIES, *available at* http://www.hud.gov/library/bookshelf18/pressrel/crossfir.pdf (last visited Dec. 1, 2002).

31. *Id.*

32. *Id.*

33. *Id.*

34. Commonwealth v. Hicks, 563 S.E.2d 674, 676 (Va. 2002).

reign of terror on public and other federally assisted low-income housing tenants."[35]

State statutes creating housing authorities typically require the authorities to maintain safe and sanitary conditions for their residents.[36] In response to the epidemic of violence and drugs, housing managers introduced a variety of crime-control measures. Zero-tolerance policies, for example, allow housing managers to evict tenants for a single drug offense by any guest or member of the household, even when the tenant is not aware of the illicit activity.[37] These policies, however, are enforced by eviction, and are thus only effective against residents. They may be less useful in housing complexes like Whitcomb Court, where the majority of people arrested for drug crimes are nonresidents.[38]

One method of targeting nonresident visitors is to require tenants to obtain prior approval before inviting guests onto the premises.[39] This method has been attempted by housing authorities, but rejected by courts as violating constitutional rights of privacy and freedom of asso-

35. Public Housing Drug Elimination, 42 U.S.C. § 11901 (2000). Congress found the following:

(1) the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs;

(2) public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime;

(3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;

(4) the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures;

(5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities;

(6) the Federal Government should provide support for effective safety and security measures to combat drug-related and violent crime, primarily in and around public housing projects with severe crime problems;

(7) closer cooperation should be encouraged between public and assisted housing managers, local law enforcement agencies, and residents in developing and implementing anti-crime programs; and

(8) anti-crime strategies should be improved through the expansion of community-oriented policing initiatives.

Id. Congress cut all funding for this program from the 2002 budget. *Severe HUD Cuts Merit Second Look*, GREENSBORO NEWS & REC., Jan. 21, 2003, at A6.

36. *See, e.g.*, TENN. CODE ANN. § 13-20-102(15)(A), 413 (1999); WASH. REV. CODE ANN. § 35.82.010-020(9) (West 2003); Daniel v. City of Tampa, 38 F.3d 546, 548 (11th Cir. 1994) (noting that the mission of the housing authority was to provide "'a safe and healthy physical environment for eligible low income citizens'").

37. *See, e.g.*, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002) (upholding such a zero-tolerance provision).

38. *Hicks*, 563 S.E.2d at 676; *see also* Vasquez v. Hous. Auth. of El Paso, 271 F.3d 198, 201 (5th Cir. 2001) (noting that most people arrested on El Paso public housing property were nonresidents); Daniel v. City of Tampa, 38 F.3d 546, 548 n.2 (11th Cir. 1994) (finding that nearly ninety percent of those arrested on housing authority property were nonresidents); Brown v. Dayton Metro. Hous. Auth., No. C-3-93-037, 1993 U.S. Dist. LEXIS 21297, at *48 (S.D. Ohio Aug. 26, 1993) (noting resident complaints that "between ninety and ninety-nine percent of those selling drugs were not residents of the site").

39. *See, e.g.*, Lancor v. Lebanon Hous. Auth., 760 F.2d 361, 362 (1st Cir. 1985); McKenna v. Peekskill Hous. Auth., 647 F.2d 332, 335 (2d Cir. 1981).

ciation.[40] "It would be ignoring the realities of human nature and relationships," the Second Circuit wrote in *McKenna v. Peekskill Housing Authority*, "to conclude that the disclosure of this highly intimate information, coupled with the necessity of registration and advance approval, did not impinge on the tenants' freedom to have whomever they wanted visit their homes."[41] Although housing authorities have a legitimate interest in maintaining the safety of their housing, the *McKenna* court held that housing authorities could achieve this interest using less intrusive means.[42] Advance-notice policies have also been found to violate statutory and administrative requirements of the U.S. Department of Housing and Urban Development (HUD), which require housing authorities to allow for reasonable accommodation of guests.[43]

A more recent trend—gaining strength in the previous decade—is the creation of ban lists, which threaten certain named individuals with criminal trespass charges if they enter the housing property.[44] These policies are the focus of this note.

B. Common-Law and Statutory Background

Policies excluding visitors from a property against the wishes of a tenant contrast with the common-law right of tenants to invite guests.[45] At common law, a guest invited by a lawful tenant cannot be prosecuted for trespass, even if the landlord has prohibited the guest from entering the property.[46] This right extends to "those common areas necessary for ingress and egress from the tenant's unit,"[47] but invitees still "may not proceed at will to a part of the premises wholly disconnected to the purpose of the invitation . . . ."[48]

In *L.D.L. v. State*,[49] a juvenile was arrested for trespassing on the property of Griffin Heights Apartments, a federally subsidized housing

40. *McKenna*, 647 F.2d at 335; *see also Lancor*, 760 F.2d at 363 (suggesting in dicta that it would accept the reasoning of *McKenna*).

41. *McKenna*, 647 F.2d at 335.

42. *Id.* at 335–36.

43. *Lancor*, 760 F.2d at 363.

44. *State Courts Revisit Public Housing Trespass Policies*, *supra* note 22, at 169–70.

45. Residents of public housing might also attack ban list policies on the ground that they interfere with the common-law covenant of quiet enjoyment, Goldstein, *supra* note 25, at 224–25, but this defense would presumably not be available to a visitor.

46. *See, e.g.,* L.D.L. v. State, 569 So. 2d 1310, 1312–13 (Fla. Dist. Ct. App. 1990) (holding that, absent a lease provision to the contrary, "[o]ne who . . . 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"); *In re* Jason Allen D., 733 A.2d 351, 368 (Md. Ct. Spec. App. 1999) ("'The common law is clear that the landlord may not prevent invitees or licensees of the tenant from entering the tenant's premises by passing through the common area.'") (quoting State v. Dixon, 725 A.2d 920, 922 (Vt. 1999)); State v. Dixon, 725 A.2d 920, 922 (Vt. 1999) ("[T]he law is clear that an invitee or licensee who [comes on the property], even after a specific prohibition by the landlord, is not a trespasser and does not violate a criminal trespass statute.").

47. City of Bremerton v. Widell, 51 P.3d 733, 739 (Wash. 2002).

48. *Id.* at 739 (quoting Arbee v. Collins, 463 S.E.2d 922, 925–26 (Ga. Ct. App. 1996)).

49. 569 So. 2d at 1310.

project.[50] Griffin Heights had previously authorized the Tallahassee Police Department to issue "no trespass warnings" and to arrest nonresidents found loitering on the property.[51] L.D.L. had been issued a warning about four-and-a-half months before, but had been invited back on the premises by a family friend.[52] His grandmother and brother also lived in the complex.[53] A Florida appellate court overturned L.D.L.'s conviction for trespass, writing that "'[o]ne 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.'"[54]

Although the common-law right of invitation has been called "the clearest defense against no-trespass policies,"[55] there are several problems with the use of a common-law defense to a trespass conviction. First, some courts have questioned whether a visitor to a public housing facility has standing to invoke the resident's right to invite guests.[56] In addition, at least one court has questioned the continued viability of the common-law invitation rule. In *City of Bremerton v. Widell*, the court doubted the doctrine's applicability in light of modern cases subjecting landlords to liability for the conduct of third parties causing injury to tenants.[57] The court reasoned that "[i]t would seem only reasonable that the landlord should . . . enjoy the right to exclude persons who may foreseeably cause such an injury."[58] The Restatement of Torts similarly recognizes the "right of the landlord to make reasonable regulations concerning entry upon or use of the portions of the premises retained within his control, for the protection of the premises themselves or of other tenants."[59]

Another possible problem is state preemption of the common-law doctrine.[60] A New York statute, for example, specifically forbids entering property "where a building is used as a public housing project in violation of a personally communicated request to leave the premises from a housing police officer or other person in charge thereof."[61] In formulat-

50. *L.D.L.*, 569 So. 2d at 1311.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 1312–13 (quoting 49 AM. JUR. 2D LANDLORD AND TENANT § 235); *see also* Arbee v. Collins, 463 S.E.2d 922, 925 (Ga. Ct. App. 1996) ("A landlord who arrests and prosecutes a person for trespass without inquiring as to whether the person had a right to be on the premises pursuant to invitation by a tenant does so at his own risk.").

55. *See* Goldstein, *supra* note 25, at 220.

56. Thompson v. Ashe, 250 F.3d 399, 409 (6th Cir. 2001). In *L.D.L.*, however, the court allowed the trespasser to raise this defense. *L.D.L.*, 569 So. 2d at 1312–13.

57. City of Bremerton v. Widell, 51 P.3d 733, 738–39 (Wash. 2002).

58. *Id.* at 739.

59. RESTATEMENT (SECOND) OF TORTS § 189 cmt. c (1965). A landlord would thus have to argue that the policy was "reasonable." *Cf. infra* notes 184–87 and accompanying text.

60. *Cf.* State v. Scott, No. 19902, 2004 WL 103175, at *3–4 (Ohio Ct. App. Jan. 23, 2004) (holding that a tenant has no right to invite a guest onto property in contravention of a housing authority's no-trespass notice).

61. N.Y. PENAL LAW § 140.10 (2004).

ing their trespass laws, however, many state legislatures follow the common-law rule and provide exceptions for invitees.[62] Because trespass statutes are used to enforce ban list policies, this exception could provide some relief to tenants who invite guests.[63] The trespass statute at issue in *Widell* accepted those who "reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain."[64] Even some trespass statutes that do not explicitly contain this exception have been held to implicitly contain a requirement that the trespass be willful, and courts have crafted exceptions for guests who have a good faith claim of right to be on the property.[65]

The final and most serious problem is that even a statutory right to invite guests will not necessarily save a visitor from prosecution for trespass in the presence of a lease agreement giving landlords the power to ban visitors.[66] The Restatement of Torts conditions the common-law privilege on the terms of the lease, stating that the privilege "may be increased or diminished by express or implied agreement."[67] This problem arose in the case of *Williams v. Nagel*, where the tenant's lease provided that "[m]anagement ha[d] the right to bar individuals from the property."[68] Invitees arrested pursuant to this lease provision argued that they nevertheless possessed a "statutory right to be present in the complex because of the invitations extended to them by certain tenants."[69] The code provision at issue in *Williams* provided the usual exception for invitees:

> This Section does not apply to . . . anyone living on such land at the request of, or by occupancy, leasing or other agreement or arrangement with the owner or his agent, nor to anyone invited by such . . . person so living on such land to visit him at the place he is so living upon the land.[70]

While this section would seem to immunize invited guests from prosecution for trespass, the court held that "[a]ny tenant's attempt to invite an

62. *See, e.g.*, WASH. REV. CODE § 9A.52.090 (2002); *see also* D.C. CODE ANN. § 22-3302 (2002); GA. CODE ANN. § 16-7-21(b)(2) (2003); TENN. CODE ANN. § 39-14-401(3) (2003) (excepting from trespass provisions those who are on the property with the owner's consent); VA. CODE ANN. § 18.2-119 (2002); VT. STAT. ANN. tit. 13, § 3705 (2002).

63. *See Widell*, 51 P.3d at 737 (citing statutory defense to criminal trespass).

64. *Id.*

65. O'Banion v. Commonwealth, 519 S.E.2d 817, 821–22 (Va. Ct. App. 1999); Jones v. Commonwealth, 443 S.E.2d 189, 191 (Va. Ct. App. 1994) ("Jones's mere presence with another man on the premises at four o'clock in the afternoon near an automobile parked on a street by an apartment complex was insufficient to establish probable cause to believe that Jones was neither a resident of the apartment complex nor legitimately upon the premises at the invitation of a resident."); *see also In re* Jason Allen D., 733 A.2d 351, 369 (Md. Ct. Spec. App. 1999) (finding trespass conviction invalid because defendant had a bona fide claim of right).

66. *See* Williams v. Nagel, 643 N.E.2d 816, 822 (Ill. 1994).

67. RESTATEMENT (SECOND) OF TORTS § 189 cmt. c (1965).

68. *Williams*, 643 N.E.2d at 817.

69. *Id.* at 818.

70. *Id.* at 821.

individual onto the property who had already been barred by management would result in breach of the lease."[71] Therefore, the court concluded that the invitees had not received a valid invitation, taking them outside the scope of the statutory exception.[72] The Washington Supreme Court cited the *Williams* holding with approval in *Widell*, noting that restrictive leases may have been "another option . . . available to the [housing authority]."[73]

This interpretation was criticized by the *Williams* dissent as an overly broad interpretation of the trespass statute.[74] The statute in *Williams* said nothing about a "valid" invitation, and explicitly applied to "anyone invited" by "anyone living on [the] land [through] agreement or arrangement with the owner or his agent."[75] According to the dissent, the majority's holding contradicted previous Illinois cases which had held that "[a] person on leased premises at the invitation of the tenant is exempt from prosecution for criminal trespass to land."[76] In *People v. Carroll*,[77] for example, an Illinois appellate court overturned a trespass conviction against an anti-abortion protester who entered the property of a private medical clinic to distribute anti-abortion literature.[78] Although the property was marked with "No Trespassing" signs, the court found that the defendant could not be convicted for trespass because a patient had invited her onto the property.[79]

Using a lease provision to override a statutory exception to a criminal act raises fairness issues as well. Implying the "valid" invitation requirement implicates the rule of statutory construction requiring a narrow interpretation of criminal statutes.[80] As the Supreme Court wrote in *United States v. Bass*: "[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."[81] This "rule of lenity"[82] gives people fair warning that potential conduct is criminal and recognizes that legislatures, not courts, should define the criminal law.[83] In

71. *Id.* at 822.

72. *Id.*

73. City of Bremerton v. Widell, 51 P.3d 733, 739 n.2 (Wash. 2002); *see also* L.D.L. v. State, 569 So. 2d 1310, 1312 (Fla. Dist. Ct. App. 1990) (noting that an examination of the lease did not reveal a prohibition against having visitors); *In re* Jason Allen D., 733 A.2d 351, 368 (Md. Ct. Spec. App. 1999) (distinguishing its holding from cases where there may have been a lease provision).

74. *Williams*, 643 N.E.2d at 823 (Harrison, J., dissenting).

75. *See id.* at 821; *see also id.* at 823 ("No matter how strenuously the landlord objected to the presence of the plaintiffs in this case, the fact remains that they were invited by the tenants of the complex to be there. Nothing in the law of criminal trespass gave the landlord the right to nullify that invitation.").

76. *Id.*

77. 751 N.E.2d 44, 47 (Ill. App. Ct. 2001).

78. *Id.* at 47–48.

79. *Id.* at 48.

80. For a discussion of narrow interpretations of criminal statutes, see United States v. Bass, 404 U.S. 336, 346–48 (1971).

81. *Id.* at 348.

82. Staples v. United States, 511 U.S. 600, 619 n.17 (1994).

83. *See, e.g.*, *Bass*, 404 U.S. at 346–48.

State v. Dixon, the Vermont Supreme Court applied this rule, construing a trespass policy "in a manner most favorable to the accused" in order to avoid "creat[ing] criminal liability outside the contemplation of the Legislature."[84] The court thus overturned the conviction of the defendant, who had been banned by the landlord but who had returned to the premises to visit friends.[85]

Another fairness issue was also raised by the *Williams* dissent, which emphasized that the normal remedy for a lease violation in Illinois is eviction, not criminal arrest.[86] Holding that a third party can be criminally prosecuted for violation of the terms of a tenant's lease, the dissent wrote, is "tantamount to finding that private parties have the right to alter the criminal law through contractual agreements."[87]

Furthermore, a court may find, as did a Maryland district court in *Diggs v. Housing Authority*,[88] that this kind of lease provision is void as an unreasonable restriction on a tenant's right to entertain guests.[89] For public housing agencies accepting HUD funds, "[f]ederal law requires reasonable accommodation of guests in public housing."[90] Public housing leases may not contain "unreasonable terms and conditions."[91] HUD regulations also require reasonable guest accommodations.[92] Citing these rules, the court in *Diggs* issued a preliminary injunction against a ban list policy, holding that it would be "patently unreasonable" to prohibit public housing residents from entertaining guests.[93] However, even if another court were to adopt this rule, it still would not benefit trespassers, who lack standing to enforce a tenant's statutory rights.[94]

Although arguments can thus be made to prevent lease and statutory provisions from overriding the common-law right of visitation, the common law provides at best only imperfect protection—especially for visitors who may not be able to enforce a tenant's common-law rights. Those who cannot claim the protection of the common law will therefore have to turn to other sources of law for assistance.

84. State v. Dixon, 725 A.2d 920, 922 (Vt. 1999).

85. *Id.* at 921–22; *see also* Bean v. United States, 709 A.2d 85, 85–87 (D.C. 1998) (overturning a trespass conviction because the state did not prove that an individual served with a "barring notice" did not have a legitimate reason to be on the property).

86. Williams v. Nagel, 643 N.E.2d 816, 823 (Ill. 1994) (Harrison, J., dissenting) ("No one would dispute that a landlord has the right to place some restrictions on his tenants' right to have guests on the premises. That right, however, is not enforceable through criminal prosecution."). The dissent in *Williams* further stated: "Until today, the sole recourse for a landlord who disapproved of this tenant's guests was to terminate the tenancy. Now, there is no longer a need to bother with civil process. The landlord can just call the police and have the tenant's guests hauled away to jail." *Id.* at 824.

87. *Id.* at 823.

88. 67 F. Supp. 2d 522 (D. Md. 1999).

89. *Id.* at 531–32.

90. Thompson v. Ashe, 250 F.3d 399, 409 (6th Cir. 2001).

91. 42 U.S.C. § 1437d(l)(2) (2002).

92. 24 C.F.R. § 966.4(d)(1) (2003).

93. *Diggs*, 67 F. Supp. 2d at 531–32.

94. *Thompson*, 250 F.3d at 409.

C. Ban List Policies

Ban lists come in many varieties, but all share a few common features. All ban lists generally involve a "'no trespass list'" of people prohibited from entering a property.[95] Anyone placed on the list and subsequently caught on the premises is subject to arrest for criminal trespass.[96] This is true even if the subsequent visit is for a legitimate purpose, such as visitation with friends or family.[97] While some policies only ban an individual from a particular property,[98] others prohibit entry onto all public housing property in the municipality.[99]

The Sixth Circuit examined and upheld a typical trespass policy in *Thompson v. Ashe*.[100] The Knoxville Community Development Corporation, the public housing authority for Knoxville, instituted a "no-trespass policy" through which it compiled a list of people prohibited from entering the housing authority's property.[101] Knoxville at one point listed 693 names on its no-trespass list.[102] Other lists vary in length: a Roanoke public housing program banned more than 50 people.[103] The Annapolis Housing Authority banned 118 people.[104] The Augusta Housing Authority listed 175 names.[105] Frederick, Maryland: 1000 names.[106] Asheville, North Carolina: nearly 1100 names.[107] And in Dayton, Ohio, 2310 people were "trespassed off" public housing property.[108]

95. Williams v. Nagel, 643 N.E.2d 816, 818 (Ill. 1994).

96. *Id.*

97. *Diggs*, 67 F. Supp. 2d at 526; Hicks v. Commonwealth, 548 S.E.2d 249, 252 (Va. Ct. App. 2001) (en banc) ("Once barred, the person who returns is a trespasser without regard to whether, on that subsequent occasion, he or she is there on legitimate business or at the invitation of a Whitcomb Court tenant."); *see also* Holland v. Commonwealth, 502 S.E.2d 145, 145–46 (Va. Ct. App. 1998) (discussing a "barment notice" prohibiting defendant from returning to the property "under any circumstances").

98. *Williams*, 643 N.E.2d at 818.

99. *See, e.g.*, *Thompson*, 250 F.3d at 406 (banning plaintiff from twelve housing developments in Knoxville); Commonwealth v. Hicks, 563 S.E.2d 674, 677 (Va. 2002) (banning violators from "any Richmond Redevelopment and Housing Authority property"); Brian Haynes, *Court Backs City Housing Authority's Ban on Felons*, CAPITAL (Annapolis, Md.), Aug. 22, 2002, at B1 (describing a judge's order banning a nonresident from all ten of the city's public housing properties); Williams, *supra* note 23 (discussing case of fourteen-year-old youth charged with disorderly conduct and banned from every public housing development in the city). *But see* State v. Holiday, 585 N.W.2d 68, 71 (Minn. Ct. App. 1998) (narrowly construing a housing authority policy to avoid this effect).

100. 250 F.3d at 403.

101. *Id.*

102. *Housing Project Ban OK'd on Appeal*, COM. APPEAL (Memphis, Tenn.), May 18, 2001, at B4.

103. Lindsey Nair, *War on Drugs Gets Boost from Power to Evict; 'It's a Whole Lot Better Honey,' One Community Watch Member Said*, ROANOKE TIMES & WORLD NEWS, Sept. 8, 2001, at B4.

104. Brian Haynes, *Housing Authority Questions Visit Ruling*, CAP., July 16, 2002, at B1.

105. Jessica Rinck, *Deputy Punished in 'Judge-Shopping'*, AUGUSTA CHRON., Nov. 14, 1999, at B1.

106. Diggs v. Hous. Auth., 67 F. Supp. 2d 522, 526 (D. Md. 1999).

107. Williams, *supra* note 23.

108. 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).

Typically, ban list provisions are incorporated either into a lease or the written rules and regulations of a public housing property.[109] In *Williams*, the rules and regulations, incorporated by reference in the lease, read:

> BARRED: Management has the right to bar individuals from the property. You must inform your guests of all Parkside and Mansard Square Apartments rules and regulations. If rules and regulations are broken by your guests, they may be barred and/or arrested for criminal trespassing. If the rules and regulations are broken by a resident, it is grounds for termination of tenancy.[110]

In order to provide some level of procedural fairness, ban list policies usually include a provision to give notice to banned individuals before they may be arrested.[111] This notice is normally delivered in person by a police or security officer who encounters a banned visitor on the premises.[112] The provision in *Williams*, for example, required that individuals banned from the premises receive a notice served by the police or apartment management.[113] The notice provided that the recipient would be "prohibited from entering the premises . . . including the common areas and parking lots, and is subject to arrest for trespass if found on the property."[114] Some policies provide additional notice by mail.[115] The Knoxville policy discussed in *Thompson* gave notice by personal service of a letter.[116]

Notices sometimes do not contain much detail.[117] The Knoxville policy, for example, provided no notification of the reason for the ban or any mechanism to have oneself removed from the list.[118] The *Thompson* court still upheld this procedure as applied to the plaintiff, noting that he had received notice that his name was on the no-trespass list and met with the executive director of the housing authority about the matter, but had made no further effort to have his name removed.[119] In *Diggs*, the court found that no mechanism existed for informing tenants of the iden-

109. *See* Williams v. Nagel, 643 N.E.2d 816, 817 (Ill. 1994) (lease). *But see* Commonwealth v. Hicks, 563 S.E.2d 674, 677 (Va. 2002) (unwritten policy).

110. *Williams*, 643 N.E.2d at 817.

111. *See, e.g.*, *Hicks*, 563 S.E.2d at 677; *see also* City of Bremerton v. Widell, 51 P.3d 733, 736 (Wash. 2002) (informing recipients of barment notices that they are "prohibited from entering or remaining on the common areas of Westpark for any reason whatsoever" and that "entering or remaining on Westpark property may result in your arrest for Criminal Trespass").

112. *See, e.g.*, *Hicks*, 563 S.E.2d at 677.

113. *Williams*, 643 N.E.2d at 818.

114. *Id.*; Rinck, *supra* note 105 (describing Annapolis Housing Authority policy in which those banned must sign a written notice).

115. *See, e.g.*, *Hicks*, 563 S.E.2d at 677 (noting that the housing authority "forwards a letter to that individual informing him that he may not lawfully return to the property").

116. Thompson v. Ashe, 250 F.3d 399, 399 (6th Cir. 2001).

117. *Id.* at 404. *But see* City of Bremerton v. Widell, 51 P.3d 733, 736 (Wash. 2002) (providing notice of a right to appeal and a method for obtaining a temporary waiver).

118. *Thompson*, 250 F.3d at 404.

119. *Id.* at 408.

tity of the persons on the trespass log, and that "[o]nce on the log, a person's name remains there indefinitely."[120]

Trespass policies involve reciprocal relationships between police and housing administrators.[121] Police are primarily responsible for enforcing the bans by arresting those found to be in violation.[122] To facilitate their ability to accomplish this, some municipalities cede streets and sidewalks to the housing authority.[123] In *Hicks*, the housing authority put up no trespassing signs on the formerly public streets surrounding the housing complex.[124] It then authorized the Richmond Police Department to:

> serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority property.[125]

Police officials also often request that names be added to the ban list.[126] In *Williams*, the landlords of a federally funded apartment complex were "engaged in a joint enterprise [with the police] to systematically rid the premises of those they regarded as undesirable."[127] Under this system, "[t]he landlords decided whom they wanted to exclude, and the police used their arrest powers to exclude them."[128] The police department also suggested names of people to be banned, usually naming individuals suspected of being involved with drugs or other crimes.[129]

120. Diggs v. Housing Authority, 67 F. Supp. 2d 522, 526 (D. Md. 1999). Later, the housing authority "adopted a procedure for residents to follow to have a potential visitor's name removed from the trespass log," although the procedure had no written standards and was completely discretionary on the part of the housing authority management. *Id.* at 527. The court found the policy as enforced to be "a virtually permanent bar to a tenant's right to invite a guest into her own home, no matter how close a friend or relative that potential guest might be." *Id.* at 533.

121. *See, e.g., Widell*, 51 P.3d at 736 (noting that the housing authority had contracted with the local police department for enforcement of its no trespass policy); Cooper, *supra* note 7 (noting that the Richmond Redevelopment and Housing Authority "authorized the Richmond Police Department to enforce the trespassing law on its property").

122. *See, e.g.*, *Thompson*, 250 F.3d at 404.

123. *See, e.g.*, *id.* at 404 (noting that streets and sidewalks within the housing development were leased to the housing authority for one dollar per year); *In re* Jason Allen D., 733 A.2d 351, 366 (Md. Ct. App. 1999) (noting that the defendant was arrested on sidewalk outside public housing complex).

124. Commonwealth v. Hicks, 563 S.E.2d 674, 676 (Va. 2002).

125. *Id.*

126. *See, e.g.*, *Thompson*, 250 F.3d at 403.

127. Williams v. Nagel, 643 N.E.2d 816, 824 (Ill. 1994) (Harrison, J., dissenting).

128. *Id.* (Harrison, J., dissenting).

129. *Id.* at 818.

Because they are responsible for recommending names, police officers often know who has been banned from a particular property.[130]

Housing authorities use different standards to determine which names to put on the list. The trespass policy at issue in *Widell* listed eleven separate grounds for being barred from the property, including not only criminal activity, but "unreasonable noise," littering, fighting, damage to property, violations of curfew, and careless driving.[131] Similarly, in Asheville, North Carolina, housing records showed people banned for transgressions such as "[d]riving the wrong way on a one-way street," "[p]arking in front of a dumpster," "throwing water out the upstairs window on someone outside," "[i]mpeding traffic flow," speeding, "[g]ambling," "[l]ittering," "damaging a light fixture," "playing loud music," and "[u]sing loud and profane language."[132] One Maryland housing authority, which ended its program as part of the settlement of a tenant lawsuit, was alleged to use criteria including disturbances, lack of employment, and debts to the housing authority.[133]

Some housing authorities issue trespass notices against any nonresident found on the property.[134] In *In re Jason Allen D.*,[135] a police officer had arrested a juvenile on public housing property for just "standing there."[136] The officer did not know why the juvenile was on the premises and did not attempt to ascertain the identity of the people he was with.[137] On redirect, he admitted that no-trespass notices were "issued to all individuals who are on the property of the Frederick Housing Authority who do not live there."[138] Similarly, in *Diggs*, any nonresident on housing authority property for "no apparent legitimate reason" was issued a citation and entered into the authority's "trespass log."[139] The chief of police

130. One police department hoped to issue digital cameras and laptops to develop a database of those who had been banned. Nair, *supra* note 103. The Wilmington Police Department, "working with the Housing Authority to prevent crime in public housing developments," suggested a policy that required all residents to carry photo-ID badges at all times while on the property. Bettie Fennell, *ID Cards Required at Public Housing*, MORNING STAR, May 31, 2001, at 1B.

131. City of Bremerton v. Widell, 51 P.3d 733, 735 & n.1 (Wash. 2002).

132. Williams, *supra* note 23.

133. *State Courts Revisit Public Housing Trespass Policies*, *supra* note 22, at 170.

134. 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) (noting plaintiffs' allegations that they were banned from public housing property while visiting friends and family there). In Boynton Beach, *Accounts of Police Shooting Differ; Officer Fired as Suspect Backed Away, Witness Says*, SUN-SENTINEL, July 24, 2001, at 1B, a police officer is quoted as saying officers were allowed to approach people who were "sitting in front of a public housing project" and to "issue trespassing warrants if they don't live there." Residents of the housing project complained that they were frequently approached by police officers while sitting in their cars. *Id.*

The Wilmington Housing Authority, in order to "help identify tenants from trespassers so the Housing Authority can enforce its trespassing policy," required all residents to carry photo-identification badges with their social security numbers and birth dates. Fennell, *supra* note 131.

135. 733 A.2d 351 (Md. Ct. Spec. App. 1999).

136. *Id.* at 353. At the time, Jason was standing with his cousin. *Id.* at 356.

137. *Id.* at 353–55.

138. *Id.* at 353.

139. Diggs v. Hous. Auth., 67 F. Supp. 2d 522, 525–26 (D. Md. 1999).

admitted that some people's names had been put on the log while they were visiting friends.[140] The Whitcomb Court policy, examined in *Hicks*, also effectively banned all uninvited nonresidents.[141] Although the written policy allowed for visitation pursuant to a "legitimate business or social purpose,"[142] the court found that the housing authority's "unwritten policies" gave the manager of Whitcomb Court the unreviewable authority to determine what constituted such a legitimate purpose.[143] Therefore, any nonresident who sought access to the property, including the surrounding streets, needed to obtain the permission of the manager.[144]

Other policies require at least a suspicion of criminal activity before an individual can be banned. In Los Angeles, nonresidents are prohibited from entering housing authority property, even with the authorization of a resident, if they have been convicted within the past five years of crimes involving narcotics, prostitution, vandalism, weapons, disturbance of the peace, loitering, or violent acts on housing authority property.[145] In *Williams*, the local police department suggested names of people to be banned to the management, usually recommending individuals suspected of being involved with drugs or other crimes.[146] The Knoxville housing authority policy examined in *Thompson* also required that an individual be "involved in" drug activities or violent criminal activities before being put on the list.[147]

These stricter provisions are undercut, however, when no formal written criteria are maintained and, as in *Thompson*, the housing administrator needs only to receive "reliable information" of such criminal activity before putting a name on the ban list.[148] When such information was obtained from a police officer or housing manager, the administrator in *Thompson* "routinely [found] that the information contained in a request [was] sufficiently reliable to place an individual on the no-trespass

140. *Id.* at 528.

141. Commonwealth v. Hicks, 563 S.E.2d 674, 676 (Va. 2002).

142. *Id.*

143. *Id.*

144. *Id.*; *see also* Vasquez v. Hous. Auth. of El Paso, 271 F.3d 198, 201 (5th Cir. 2001) ("Persons refusing to identify themselves or those who cannot prove authority to be on the development premises are to receive a 'trespass warning' ordering them to leave or face arrest."); Daniel v. City of Tampa, 38 F.3d 546, 551 (11th Cir. 1994) (finding that any person not a lawful resident, an invited guest, or present on official business was subject to arrest).

145. LOS ANGELES, CAL., MUN. CODE § 41.23(4)(b), http://lacodes.lacity.org/NXT/gateway.dll?f=templates&fn=default.htm (last visited Feb. 10, 2004). The presence of "loitering" on the list of covered offenses, however, makes this provision much more problematic. *See infra* notes 242–50 and accompanying text.

146. Williams v. Nagel, 643 N.E.2d 816, 818 (Ill. 1994).

147. Thompson v. Ashe, 250 F.3d 399, 403 (6th Cir. 2001); *see also* State v. Blair, 827 P.2d 356, 357 (Wash. Ct. App. 1992) (describing a policy where police issue trespass warnings when they believe an individual "has engaged in illegal activity or who has been arrested on the premises"); Haynes, *supra* note 104 (describing Annapolis Housing Authority policy in which only those involved in serious drug or violent crimes are put on the ban list); Rinck, *supra* note 105 (describing policy banning people who were evicted, or arrested on the property for a felony, drug or firearm possession, or obstructing police).

148. *Thompson*, 250 F.3d at 403.

list without further investigation."[149] At another housing development, the property manager authorized police to arrest anyone they "recognize[d]" as a drug user or other criminal, telling a newspaper that "'[a]nybody that they don't want on the property, they're welcome to ban them.'"[150]

Sometimes this kind of broad discretion can result in people being banned for questionable reasons, such as when a Durham Housing Authority executive banned an Ohio woman who organized a public community meeting on housing authority property as part of a cross-country walk in favor of welfare rights.[151] Another example is *Hicks*, where the lower court found that Hicks was banned for no reason other than the fact that he was repeatedly visiting his family.[152]

D. The Effect of Ban Lists

The efficacy of ban lists has not been extensively studied, but some housing authorities that have implemented the programs—usually in combination with other crime-control policies—have demonstrated noticeable reductions in crime rates.[153] The Knoxville program, which included a no-trespass list along with other provisions, achieved a twenty-nine percent drop in crime in Knoxville's housing projects over a one-year period.[154] A Roanoke program that included a no-trespass rule, among others, was said to have reduced drug-related activity by fifty percent.[155] The Annapolis Housing Authority reported a drop from 500 crimes per year to 161 crimes per year in its public housing neighborhoods after implementing ban list procedures.[156]

149. *Id.*

150. Mary Moreno, *Police Begin North Side Manor Complex Cleanup*, CORPUS CHRISTI CALLER-TIMES, July 26, 2002, at B4.

151. Rah Binkley, *Public Housing Residents Get Edgy*, NEWS & OBSERVER, Nov. 13, 2001, at A1 (quoting one organizer as saying she was threatened with arrest if she spoke out about a proposed redevelopment project, and that "[a] lot of these ladies in this community are scared to speak out because they're scared of being harassed").

152. *See supra* note 6.

153. Daniel v. City of Tampa, 38 F.3d 546, 550 (11th Cir. 1994) (finding that enforcement of trespass statute "has decreased the number of non-residents engaging in criminal activity on Housing Authority property"); Brown v. Dayton Metro. Hous. Auth., No. C-3-93-037, 1993 U.S. Dist. LEXIS 21297, at *61 (S.D. Ohio Aug. 26, 1993) (finding that although its effect was "difficult to quantify," a ban list program had "decreased the street-level drug traffic . . . and increased residents' feelings of safety in and around their homes"); Holland v. Commonwealth, 502 S.E.2d 145, 146 (Va. Ct. App. 1998) (citing a resolution of the town counsel supporting the policy and stating that "the issuance of barment notices by the town police in this manner has been a successful procedure in discouraging criminal and drug related activity"); Williams, *supra* note 23 (quoting Asheville police chief as saying: "Since the bans, we've seen a tremendous drop in crime in public housing.").

154. Don Jacobs, *'One-Strike' Ruling Draws Different Reactions*, KNOXVILLE NEWS-SENTINEL, Mar. 29, 2002, at B1.

155. Nair, *supra* note 103.

156. Haynes, *supra* note 104.

Many residents of public housing appreciate the effect that these policies have had on the safety of their communities.[157] "It's a whole lot better," said one Roanoke public housing resident about life in her neighborhood after a ban list policy was implemented.[158] Some residents of Knoxville public housing also liked the strict rules that helped clean up their crime-ridden environments.[159] "I've seen a lot of stuff around here," said one resident.[160] "[D]rugs being sold on the corner. I've even seen drugs being sold and smoked on my porch, and I don't like it."[161] The executive director of the Knoxville housing authority agreed, saying that "[t]he residents of our housing areas want their neighborhoods to be safe and places where their children can play without fear."[162]

Residents are thus sometimes supportive of the ban list programs, as Professor Kimberly E. O'Leary found in her study of a Dayton, Ohio, ban list policy.[163] One Dayton resident said she would move if the ban list were repealed:[164]

> Now I can sit outside and watch my daughter play. . . . Before, back [before the ban list policy was initiated], I could not. Now I can have friends . . . come to my house in their cars or walk without being attacked by drug dealers. . . . Now I feel more comfortable, not as comfortable as I would like to be, but I do feel more comfortable now.[165]

Others, however, are not so happy with the policies.[166] One Dayton resident, who had the father of her children banned from the housing complex, was angry.[167] "It's just all the guys out here that I know . . . they all got [a notice of criminal trespass]," she said.[168] "[A]lmost all of the guys that have kids out here have one."[169]

In sum, ban lists can be useful tools for cleaning up drug- and crime-infested public housing properties. However, these policies often ignore HUD regulations[170] and common-law traditions that allow residents to

157. Cass Cliatt, *Violent Images Fade as Complex Cleans up Police, Residents, Owners Transform Burnham Schoolhouse*, CHI. DAILY HERALD, Apr. 14, 2000, at A1 (quoting one resident of a community where a ban list was implemented as saying: "The gangs would walk up and down the street all day long . . . . We don't see the gangs anymore. Now they're afraid of the police.").

158. Nair, *supra* note 103.

159. *See* Jacobs, *supra* note 154.

160. *Id.*

161. *Id.*

162. *Housing Project Ban OK'd on Appeal*, *supra* note 102.

163. O'Leary, *supra* note 108, at 142.

164. *Id.* at 144.

165. *Id.*

166. Williams, *supra* note 23 (quoting housing expert as saying: "The biggest sore thumb for residents is that they can't decide who can stay in their apartment, or if their boyfriend or girlfriend can move in.").

167. O'Leary, *supra* note 108, at 145.

168. *Id.* at 145–46 (alterations in original).

169. *Id.* at 146.

170. *See supra* text accompanying note 43.

entertain guests in their homes.[171] They also frequently lack procedural safeguards,[172] and are applied indiscriminately to people who do not appear to pose a significant threat to the community.[173] The remainder of this note examines whether these shortcomings render ban lists unconstitutional infringements of the freedom of movement or the freedom of intimate association.[174]

III. ANALYSIS

A. Standard of Review—Rational Basis or Strict Scrutiny?

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[175] Due process requires that, before the state can make certain determinations affecting a person's liberty, that person must first be given certain procedural protections such as notice and an opportunity to be heard.[176] Some housing authorities provide this kind of procedure, and some do not.[177] However, procedural due process requires only that a fair decision-making process is used—it does not require the law itself to be fair.[178] Thus, procedural due process would not prevent a housing authority from banning all nonresidents who entered the property, or from banning any visitor who committed a minor traffic violation.[179]

171. *See supra* notes text accompanying notes 46–59.

172. *See supra* text accompanying notes 111–33.

173. *See supra* text accompanying notes 134–44.

174. Another potential challenge based on the First Amendment public forum analysis in *Hicks* is beyond the scope of this note. *See supra* note 20.

175. U.S. CONST. amend XIV, § 1.

176. *See* Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971). For an analysis of procedural due process challenges to ban list policies, see Goldstein, *supra* note 25, at 234–36.

177. Reno v. Flores, 507 U.S. 292, 301–02 (1993).

178. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.06(a) (6th ed. 2000) (stating as an example that a law which imposed the death penalty on any person found guilty of double parking an automobile after a trial by jury and appellate review would clearly meet procedural due process requirements). Therefore, only the worst ban list policies—those that provide no adequate notice or hearing procedure—would implicate procedural due process rights. *See supra* notes 117–20 and accompanying text; Goldstein, *supra* note 25, at 234–36. These policies are also more likely to implicate principles of substantive due process as well because they may be seen as "overbroad defense[s] against remote dangers which could all have been combated in more direct and less intrusive ways." McKenna v. Peekskill Hous. Auth., 647 F.2d 332, 336 (2d Cir. 1981).

179. In *Connecticut Department of Public Safety v. Doe*, 123 S. Ct. 1160 (2003), the Supreme Court held that the state did not need to provide a hearing for convicted sex offenders whose names had been placed on a public sex offender registry. The Court wrote:

> Connecticut has decided that the registry information of *all* sex offenders—currently dangerous or not—must be publicly disclosed. Unless respondent can show that that *substantive* rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise . . . . States are not barred by principles of '*procedural* due process' from drawing such classifications . . . . Such claims 'must ultimately be analyzed' in terms of substantive, not procedural, due process.

Id. at 1164–65 (quoting Michael H. v. Gerald D., 491 U.S. 110, 120 (1989) (plurality opinion)).

Yet the Supreme Court has held that due process protects more than just fair process.[180] It includes a substantive component as well, which forbids the government from infringing certain rights, no matter what procedural process is provided.[181] As long as no fundamental rights are implicated and no protected class of people is singled out, however, the Court will uphold a law as long as it is "rationally related to legitimate government interests."[182]

For purposes of Fourteenth Amendment scrutiny, courts consider public housing authorities to be state actors.[183] Nevertheless, those courts that have examined trespass policies under the rational basis test have upheld the provisions.[184] The government purpose is considered legitimate because the laws are aimed at creating "a safe, drug-free environment" for the residents of public housing, and "[i]t cannot be questioned . . . that the prevention of crime in public housing is a legitimate governmental goal."[185] The policies have also been found to be rationally related to this goal, because "[b]y excluding nonresidents who engage in illegal or offensive conduct, [the housing authority] is merely furthering its legislative mandate by protecting the safety and well-being of [public housing] residents."[186] Congress has endorsed this view as well, finding

180. Washington v. Glucksberg, 521 U.S. 702, 719 (1997).

181. Reno v. Flores, 507 U.S. 292, 301–02 (1993).

182. *Glucksberg*, 521 U.S. at 728; *see also* Thompson v. Ashe, 250 F.3d 399, 407 (6th Cir. 2001) ("[T]he policy need only be rationally related to a legitimate governmental purpose."); NOWAK & ROTUNDA, *supra* note 178, § 14.38 ("When a law is challenged under the due process clause or the equal protection clause, the judiciary will uphold the law so long as it is rationally related to any legitimate end, unless the law substantially impairs a fundamental right or employs a classifying trait (such as race, ancestry, gender or illegitimacy) that justifies independent judicial review.").

183. Young v. Halle Hous. Assocs., 152 F. Supp. 2d 355, 362 (S.D.N.Y. 2001) (holding that "classic public housing project[s], operated directly by a state or municipal government . . . are clearly subject to constitutional scrutiny"); *cf.* Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 429 (1987) (holding that public housing tenants have a cause of action against housing authority landlords under § 1983). This is especially true where police are responsible for recommending people to be banned from a property. *See supra* notes 126–31 and accompanying text. *But see infra* notes 313–15 and accompanying text.

184. *Thompson*, 250 F.3d at 407; *see also* Johnson v. City of Cincinnati, 310 F.3d 484, 502 (6th Cir. 2002) (striking down ordinance under a strict scrutiny test and noting that "[t]o enhance the quality of life in drug-plagued neighborhoods and to protect the health, safety, and welfare of citizens in those areas—represents a compelling government interest"); Commonwealth v. Hicks, 563 S.E.2d 674, 685 (Va. 2002) (Kinser, J., dissenting).

185. *Hicks*, 563 S.E.2d at 685 (Kinser, J., dissenting); *see also Thompson*, 250 F.3d at 407 ("The suppression and prevention of crime in public housing is a legitimate goal.").

186. City of Bremerton v. Widell, 51 P.3d 733, 743 (Wash. 2002); *see also Thompson*, 250 F.3d at 407 ("Banning individuals with criminal histories from entering onto [housing authority] property reasonably advances that goal."); *Hicks*, 563 S.E.2d at 685 (Kinser, J., dissenting) ("The policy of banning individuals who are not residents or employees of the Authority, or who cannot demonstrate a legitimate business or social purpose for coming onto the premises . . . advances . . . the legitimate governmental goal of preventing crime in public housing."); *cf. Johnson*, 310 F.3d at 516 (Gilman, J., dissenting) ("[P]reventing individuals who are arrested for or convicted of committing drug offenses in drug-exclusion zones from entering those neighborhoods is, in my view, rationally related to achieving the City's interest.").

that public housing managers should work closely with police to discourage crime on their properties.[187]

When state laws interfere with "certain fundamental rights and liberty interests," however, the Supreme Court has held that due process "provides heightened protection against government interference."[188] Laws that implicate these rights will not survive constitutional scrutiny "unless the infringement is narrowly tailored to serve a compelling state interest."[189] The Supreme Court has enumerated a small number of these fundamental rights, but has expressed hesitation about finding new ones.[190] In *Bowers v. Hardwick*, the Court wrote that "[t]here should be . . . great resistance to . . . redefining the category of rights deemed to be fundamental," because "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[191] Thus, the Court will consider rights to be fundamental only when they are "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."[192]

Other than freedom of speech—which was partially rejected by *Hicks*[193]—courts have reviewed two other fundamental rights that might subject ban list policies to strict judicial review: freedom of movement[194] and freedom of intimate association.[195]

187. 42 U.S.C. § 11901 (2002) ("[C]loser cooperation should be encouraged between public and assisted housing managers, local law enforcement agencies, and residents in developing and implementing anti-crime programs.").

188. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

189. Reno v. Flores, 507 U.S. 292, 302 (1993); *see also Johnson*, 310 F.3d at 502; NOWAK & ROTUNDA, *supra* note 178, § 11.7. The standard of review used for laws that implicate fundamental rights may actually be closer to a middle level of scrutiny, meaning that the Court would uphold laws that are "supported by sufficiently important state interests" and are "closely tailored to effectuate only those interests." *Id.* § 14.28 (quoting Zablocki v. Redhail, 434 U.S. 374, 388 (1978)).

190. Bowers v. Hardwick, 478 U.S. 186, 194–95 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003). Among the fundamental rights recognized by the Supreme Court are the rights to marry, to have and rear children, to use contraception, and to have abortions. *See infra* notes 273–75 and accompanying text.

Although *Bowers* was overruled by *Lawrence*, 539 U.S. at 578, *Lawrence* was not based on the creation of a new fundamental right, but on the Court's view that the antisodomy law in question lacked any rational basis. *Id.* (holding that the Texas law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual"). As the dissent pointed out, *Lawrence* never overruled the holding of Bowers that homosexual sodomy was not a fundamental right. *Id.* at 594 (Scalia, J., dissenting).

191. *Bowers*, 478 U.S. at 194–95; *see also Johnson*, 310 F.3d at 508 (Gilman, J., dissenting) (stating that the Supreme Court has exercised "the utmost care" in expanding the range of fundamental rights protected by the due process clause, and criticizing the majority's recognition of a fundamental right to freedom of movement).

192. *Glucksberg*, 521 U.S. at 720–21.

193. Virginia v. Hicks, 123 S. Ct. 2191, 2199 (2003). The Court left open the possibility, however, that a ban list policy could violate the First Amendment as an infringement of a traditionally public forum. *See supra* note 20.

194. *See infra* Part III.B.

195. *See infra* Part III.C.

B. Freedom of Movement

Some ban lists have been challenged based on a constitutional right to freedom of movement—also called the right to travel.[196] Courts, however, have so far been mostly unsympathetic to this argument.[197] The Sixth Circuit in *Thompson* quickly dismissed it, holding that freedom of movement was "essentially a right of interstate travel" and that the "inability to visit twelve housing developments in Knoxville obviously does not burden [the] right to travel interstate."[198]

The *Thompson* court was correct that the Supreme Court's recognition of a right to travel has thus far been limited to a right of "free interstate migration."[199] In *Shapiro v. Thompson*,[200] for example, the Court struck down the laws of two states and the District of Columbia that denied welfare benefits to those who had resided in the jurisdiction for less than a year.[201] The Court recognized a "fundamental right of interstate movement"[202] inherent in "the nature of our Federal Union and our constitutional concepts of personal liberty."[203] Later cases identified the Equal Protection Clause as the origin of the right.[204] Because the right to travel is deemed to be fundamental, courts apply strict scrutiny to laws infringing this right, requiring that they be necessary to the achievement of a compelling governmental interest.[205]

196. Thompson v. Ashe, 250 F.3d 399, 406 (6th Cir. 2001); Brown v. Dayton Metro. Hous. Auth., No. C-3-93-037, 1993 U.S. Dist. LEXIS 21297, at *4 (S.D. Ohio Aug. 26, 1993); Williams v. Nagel, 643 N.E.2d 816, 819 (Ill. 1994) (discussing plaintiff's freedom of movement argument).

197. *Thompson*, 250 F.3d at 406; *Brown*, 1993 U.S. Dist. LEXIS 21297, at *4. *But see* State v. Holiday, 585 N.W.2d 68, 71 (Minn. Ct. App. 1998).

198. *Thompson*, 750 F.2d at 406..

199. Zobel v. Williams, 457 U.S. 55, 66 (1982) (Brennan, J., concurring). In contrast, the Court has not recognized a fundamental right to international travel, in part because of the broad powers available to the federal government in the area of foreign affairs. NOWAK & ROTUNDA, *supra* note 178, § 14.37 (noting that the Court has upheld government restrictions on international travel except where the restrictions are totally arbitrary or endanger specific constitutional rights).

200. 394 U.S. 618 (1969).

201. *Id.* at 638.

202. *Id.*

203. *Id.* at 629.

204. *See, e.g.*, *Zobel*, 457 U.S. at 60. However, in *Saenz v. Roe*, 526 U.S. 489 (1999), the Court located at least part of the right in the privileges and immunities clauses of Article IV and the Fourteenth Amendment. *Id.* at 502–03. In *Saenz*, the Court struck down a state law limiting maximum welfare benefits for the first year of residency to the amount of benefits the residents would have received in their previous state of residency. *Id.* at 492, 510–11. In doing so, it divided the right to travel into three separate elements:

> It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Id. at 500. The Court did not identify the origin of the first component. *Id.* at 495. The second was located in the Privileges and Immunities Clause of Article IV. *Id.* The third component, the one implicated in *Saenz*, originated in the Privileges and Immunities Clause of the Fourteenth Amendment. *Id.* at 502–03.

205. *Shapiro*, 394 U.S. at 634. Some commentators see the Court's test as more of an ad hoc balancing of the degree of deterrence to migration against the nature of the state interests. NOWAK & ROTUNDA, *supra* note 178, § 14.38.

A state law restricting interstate movement but not discriminating against those seeking to establish residency in the state, however, would not clearly be unconstitutional under any of the Court's cases thus far.[206] Similarly, the Court has not struck down any laws limiting travel within the borders of one state.[207] Nevertheless, some Supreme Court dicta support the view that a right to intrastate movement may exist.[208] In *City of Chicago v. Morales*,[209] Justice Stevens, joined by Justices Souter and Ginsburg, wrote:

> We have expressly identified this 'right to remove from one place to another according to inclination' as 'an attribute of personal liberty' protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage,' or the right to move 'to whatsoever place one's own inclination may direct' identified in Blackstone's Commentaries.[210]

Based on similar dicta, several lower courts have found that a right to travel locally does in fact exist.[211] In *Johnson v. City of Cincinnati*,[212] the Sixth Circuit held that "the Constitution protects a right to travel lo-

206. NOWAK & ROTUNDA, *supra* note 178, § 14.38.

207. The Supreme Court expressly declined to consider the right to intrastate travel in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255–56 (1974). *See also* Johnson v. City of Cincinnati, 310 F.3d 484, 501 (6th Cir. 2002) (noting that "neither this court nor the Supreme Court has formally recognized a limited right to intrastate travel," but cautioning that "such a statement is quite apart from saying that this court or the Supreme Court has rejected" such a right).

208. *See* City of Chicago v. Morales, 527 U.S. 41, 53–54 (1999) (Stevens, J., joined by Souter & Ginsburg, JJ.) ("[T]he freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."); Papachristou v. Jacksonville, 405 U.S. 156, 164 (1972) ("'[T]hese activities [wandering and strolling from place to place] are historically part of the amenities of life as we have known them."); Aptheker v. Secretary of State, 378 U.S. 500, 505–06 (1964) ("'Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage . . . . Freedom of movement is basic in our scheme of values.'" (quoting Kent v. Dulles, 357 U.S. 116, 126 (1958))); Williams v. Fears, 179 U.S. 270, 274 (1900) (discussing a person's freedom to "remove from one place to another according to inclination"); Smith v. Turner, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting) ("We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states.").

209. 527 U.S. 41 (1999).

210. *Id.* at 54 (citations omitted).

211. Nunez v. City of San Diego, 114 F.3d 935, 944 (9th Cir. 1997); Lutz v. City of York, Pa. 899 F.2d 255, 268 (3d Cir. 1990) (recognizing a "right to move freely about one's neighborhood or town, even by automobile"); King v. New Rochell Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971) ("It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."); Willis v. Town of Marshall, No. 1:02CV217-C, 2003 U.S. Dist. LEXIS 16967, at *32–34 (W.D.N.C. 2003); Schleifer v. Charlottesville, 963 F. Supp. 534, 542–43 (W.D. Va. 1997); State v. Burnett, 755 N.E. 2d 857, 865 (Ohio 2001) ("[T]he right to travel within a state is no less fundamental than the right to travel between the states.").

Other courts have gone the other way. *See* Wardwell v. Bd. of Educ., 529 F.2d 625, 627–28 (6th Cir. 1976); Wright v. City of Jackson, Miss., 506 F.2d 900, 902–03 (5th Cir. 1975); Townes v. City of St. Louis, 949 F. Supp. 731, 734–35 (E.D. Mo. 1996), *aff'd*, 112 F.3d 514 (8th Cir. 1997) (expressing doubt that the Eighth Circuit would recognize a right to intrastate travel).

212. 310 F.3d 484 (6th Cir. 2002).

cally through public spaces and roadways."[213] Cincinnati had designated certain areas of the city, which suffered from a "'significantly higher incidence of conduct associated with drug abuse than other areas of the City,'" as "drug-exclusion zones."[214] Anyone arrested for certain drug-related crimes within the exclusion zone was banned for up to ninety days from the "'public streets, sidewalks, and other public ways'" of all drug-exclusion zones in the city.[215]

Patricia Johnson lived with her two adult children in Over the Rhine, one of the designated drug-exclusion zones.[216] She also helped care for five of her grandchildren, and she regularly took two of them to and from school.[217] When she was arrested for marijuana trafficking, she was automatically banned from the neighborhood.[218] Even when a grand jury failed to return an indictment against her, her exclusion remained in force.[219] When she was later found in the neighborhood, she was charged with criminal trespass.[220]

Despite the Sixth Circuit's earlier holding in *Thompson* that the freedom of movement protects only a right of interstate migration,[221] it found the statute in *Johnson* to be an unconstitutional violation of the freedom of intrastate movement.[222] Although the court accepted the city's compelling interest in "enhanc[ing] the quality of life in drug-plagued neighborhoods,"[223] it held that the "general evidence that individuals arrested and/or convicted for drug activity . . . typically return to the neighborhood and repeat their offenses" was "insufficient to override an individual's interest in localized travel."[224]

The Sixth Circuit might have distinguished *Thompson* on the ground that that case involved only specific housing complexes instead of "an entire metropolitan neighborhood."[225] Yet *Johnson* did not make that distinction. Instead, the court wrote that *Thompson* "did not present a right to travel claim"[226] and "did not discuss whether the Constitution protects a limited right of intrastate travel."[227] This was a question-

213. *Id.* at 498.
214. *Id.* at 487 (quoting Cincinnati ordinance).
215. *Id.* (quoting ordinance). Exceptions were allowed for those who lived or worked in the drug-exclusion zone. *Id.* at 488. Those convicted of the drug crimes faced an extension of their exclusion for a year. *Id.*
216. *Id.* at 488–89.
217. *Id.* at 489.
218. *Id.* at 488–89.
219. *Id.* at 489.
220. *Id.*
221. Thompson v. Ashe, 250 F.3d 399, 406 (6th Cir. 2001).
222. *Johnson*, 310 F.3d at 505.
223. *Id.* at 502.
224. *Id.* at 503–04.
225. *See id.* at 503.
226. *Id.* at 494.
227. *Id.* at 495.

able reading of *Thompson*[228] that the dissent vigorously disputed.[229] But by failing to distinguish *Thompson* on the ground that the policy there affected only relatively small areas of the city and instead viewing itself as bound by its holding,[230] the court implicitly recognized that housing authority trespass policies may also implicate the right to freedom of movement. Furthermore, the court suggested that even if it were to apply a lesser standard of review to narrower place restrictions, it still might apply at least intermediate scrutiny.[231]

Many housing authorities in themselves approximate large, urban neighborhoods. The metropolitan neighborhood of Over the Rhine houses about 10,000 people,[232] and the Knoxville public housing at issue in *Thompson* houses approximately 9000 residents.[233] The New York City Housing Authority, in contrast, houses more than 400,000 residents;[234] and the Chicago Housing Authority houses almost five percent of the city's population,[235] or 134,000 residents.[236] Housing authority properties also often include streets and sidewalks—some of them formerly open to public travel.[237] Distinctions between Over the Rhine and many housing developments may therefore be difficult for courts to justify.[238]

Trespass policies also implicate the same constitutional concerns raised by the *Johnson* court. Like trespass policies, the Over the Rhine ordinance "broadly exclude[d] individuals . . . without regard to their

228. 250 F.3d 399, 406 (6th Cir. 2001). The *Thompson* court held that the right to travel was "essentially a right of interstate travel." *Id.* at 406. The *Johnson* court, however, interpreted this statement as "say[ing] only that neither this court nor the Supreme Court has formally recognized a limited right to intrastate travel." *Johnson*, 310 F.3d at 495. The court continued:

> While we have no quarrel with this statement of law, we emphasize that such a statement is quite apart from saying that this court or the Supreme Court has rejected a right to intrastate travel. Under these circumstances, we conclude that the existence of a right to intrastate travel remains an open question in this circuit.

Id.

229. *Johnson*, 310 F.3d at 514 (Gilman, J., dissenting).

230. *Id.* at 501.

231. *Id.* at 502 n.7.

232. *Id.* at 503.

233. *Thompson*, 250 F.3d at 403.

234. NEW YORK CITY HOUSING AUTHORITY, FACT SHEET, *at* http://www.nyc.gov/html/nycha/html/factsheet.html (last visited Jan. 20, 2004).

235. CHICAGO HOUSING AUTHORITY, OUR RESIDENTS, *at* http://www.thecha.org/aboutus/our_residents.html (last visited Jan. 20, 2004).

236. CHICAGO HOUSING AUTHORITY, *at* http://www.thecha.org (last visited Mar. 1, 2002).

237. *See supra* notes 123–24 and accompanying text. In holding that the housing authority's formerly public sidewalks constituted a public forum for First Amendment purposes, the lower court in *Hicks* wrote that "the City can no more 'close' the streets in Whitcomb Court and leave them open to the public . . . than it could declare 'closed' all streets in [the city's] troubled neighborhoods and residential areas, thereby denying access to all citizens except the residents and their invitees and others specifically approved." Hicks v. Virginia, 548 S.E. 2d 249, 256 (Va. Ct. App. 2001). Neither the Virginia Supreme Court nor the U.S. Supreme Court passed judgment on this holding on review. *See supra* notes 14, 20.

238. *See* State v. Holiday, 585 N.W.2d 68, 71 (Minn. Ct. App. 1998) (narrowly construing a public housing trespass law to avoid the "sweeping restriction" of banning an individual from housing authority properties "covering significant sections of the city").

reason for travel in the neighborhood," thus prohibiting "an array of not only wholly innocent conduct, but socially beneficial action such as caring for . . . grandchildren and walking them to school."[239] In fact, ban lists often go even further because they do not require an initial arrest to trigger exclusion[240] and are not limited to ninety-day periods as was the statute in *Johnson*.[241]

Housing authority policies like the one at issue in *Hicks*[242] that "vest[] virtually complete discretion in the hands of the police"[243] and outlaw a significant amount of innocent local travel also risk being declared unconstitutional on the ground that they are overly vague.[244] In *City of Chicago v. Morales*,[245] the Supreme Court held unconstitutional a Chicago ordinance allowing police to order suspected gang members to "disperse and remove themselves from the area" when they are seen "remain[ing] in any one place with no apparent purpose."[246] The Court held that the law left enforcement decisions to the standard less discretion of the police, allowing them to enforce the law against people who may be "simply . . . enjoy[ing] a cool breeze on a warm evening."[247] "It matters not," wrote the Court, "whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark."[248] The ordinance, which potentially outlawed a "substantial amount of innocent conduct," was therefore held to be unconstitutional.[249] Similarly, ban list policies that do not adequately define prohib-

239. Johnson v. City of Cincinnati, 310 F.3d 484, 503 (6th Cir. 2002).

240. *See supra* notes 131–47 and accompanying text.

241. *See Johnson*, 310 F.3d at 487.

242. Commonwealth v. Hicks, 563 S.E.2d 674, 681 (Va. 2002) (striking down a policy on First Amendment grounds because it vested unfettered discretion in the hands of police).

243. Kolender v. Lawson, 461 U.S. 352, 358 (1983); *see also supra notes* 148–50 and accompanying text.

244. In *Kolender*, the Supreme Court struck down a California antiloitering ordinance because, under it, "[a]n individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets 'only at the whim of any police officer' who happens to stop that individual." *Kolender*, 461 U.S. at 358 (quoting City of Shuttlesworth v. Birmingham, 382 U.S. 87, 90 (1965)). The Court expressed concern that this unlimited enforcement discretion would allow police to infringe the "constitutional right to freedom of movement." *Id.* In addition to requiring standards for enforcement, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Id.* at 357. Policies that vest unfettered enforcement discretion in police and housing authority managers may violate this prong of the doctrine as well by failing to adequately define prohibited conduct.

The void-for-vagueness doctrine should be distinguished from the First Amendment doctrine of overbreadth, not discussed in this note. *See supra* notes 14–16 and accompanying text.

245. 527 U.S. 41 (1999).

246. *Id.* at 47 n.2.

247. *Id.* at 62.

248. *Id.* at 60.

249. *Id.* at 60, 64; *id*. at 70 (Breyer, J., concurring) (calling the antigang ordinance unconstitutional because it "grant[s] to a policeman virtually standardless discretion to close off major portions of the city to an innocent person"); *see also* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (holding

ited conduct risk being declared unconstitutionally vague.[250] Whether a court would strike down a ban list policy as a violation of the fundamental right to freedom of movement would thus depend on whether the court recognizes the existence of such a right, whether it would consider restrictions on travel in public housing complexes to be a significant enough infringement, and whether the policy provides standards adequate to prevent arbitrary enforcement. While many courts would probably uphold the trespass policies, the Sixth Circuit and other courts have at least suggested that they might reach a different result.

C. Freedom of Intimate Association

In July of 1996, Larry Blunt was banned from Westpark, a seventy-four-acre property operated by the Bremerton Housing Authority in Bremerton, Washington.[251] Police issued Blunt a "trespass warning" as the result of an "incident involving assault and lewd conduct."[252] The warning advised Blunt that he was "prohibited from entering or remaining on the common areas of [Westpark] for any reason whatsoever" and that "enter[ing] or remain[ing] on [Westpark] property may result in [his] arrest for Criminal Trespass."[253]

Blunt, however, continued to visit Westpark because his fiancée resided on the property.[254] As a result, Blunt was charged with trespass six times between February and August of 1997.[255] On three of these occasions, he was caught walking through common areas of the property.[256] On another occasion, he was charged with trespass after exiting a cab with his fiancée outside of her apartment.[257] He was also charged once after being seen in a vehicle on a public street in Westpark, and another time when he was found at his fiancée's home.[258]

Blunt challenged his trespass convictions, arguing that they violated his right to privacy.[259] In *City of Bremerton v. Widell*, the Washington

unconstitutional a vagrancy statute that outlawed "wandering . . . from place to place without any lawful purpose"); Johnson v. City of Cincinnati, 310 F.3d 484, 484 (6th Cir. 2002).

In contrast, laws that "directly prohibit[] . . . intimidating conduct," *Morales*, 527 U.S. at 51–52, and that provide "'minimal guidelines to govern law enforcement,'" *Kolender*, 461 U.S. at 357–58, would be held constitutional. *See* Daniel v. City of Tampa, 38 F.3d 546, 550–51 (11th Cir. 1994) (holding that a ban list policy was not unconstitutionally vague because it gave police "virtually no discretion" about who to ban from public housing property).

250. Police under the law at issue in *Morales* were at least limited to targeting individuals they reasonably suspected of being gang members. *Morales*, 527 U.S. at 47 n.2. In contrast, ban list policies sometimes require no minimum level of suspicion. *See supra* notes 134–50 and accompanying text.

251. City of Bremerton v. Widell, 51 P.3d 733, 735–36 (Wash. 2002).

252. *Id.* at 736.

253. *Id.* (first four alterations in original).

254. *See id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *See id.*

Supreme Court rejected this argument and upheld four of the eight convictions.[260] *Widell* held that the policy did not violate Blunt's freedom of association because "the Supreme Court has never extended constitutional protection to nonfamilial relationships."[261]

As defined by the Supreme Court, the constitutional right to freedom of association includes two distinct rights: the freedom of "expressive association," protected by the First Amendment rights of speech and assembly, and the freedom of "intimate association," protected by the Due Process Clause of the Fourteenth Amendment.[262] The First Amendment right to freedom of association is only violated if the activity being regulated is protected First Amendment speech.[263] Therefore, this right would rarely be threatened by trespass policies, especially after the Supreme Court's ruling in *Hicks*.[264]

Trespass laws may, however, implicate the second kind of freedom of association: the right to "enter into and maintain certain intimate relationships."[265] This right is part of the larger right of privacy,[266] and "is a fundamental element of liberty protected by the Bill of Rights."[267] The Supreme Court has described relationships worthy of constitutional protection as those "personal bonds that have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs . . . thereby foster[ing] diversity and act[ing] as critical buffers between the individual and the power of the State."[268] The Court has noted certain distinguishing characteristics of these relationships holding that "[a]mong other things . . . they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[269]

The relationships most likely to receive protection "are those that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives."[270] Thus, in *Moore v. City of East Cleveland*,[271] the Court struck

260. *Id.* at 743.

261. *Id.* at 741.

262. *See* Roberts v. United States Jaycees, 468 U.S. 609, 617–18 (1984); *see also* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544 (1987).

263. Commonwealth v. Hicks, 563 S.E.2d 674, 684 (Va. 2002) (Kinser, J., dissenting).

264. Virginia v. Hicks, 123 S. Ct. 2191, 2199 (2003); *see also* Thompson v. Ashe, 250 F.3d 399, 406 (6th Cir. 2001); *cf.* Johnson v. City of Cincinnati, 310 F.3d 484, 510 (6th Cir. 2002) (Gilman, J., dissenting) ("The thrust of the plaintiffs' freedom-of-association challenge—that the ordinance interfered with their abilities to maintain interpersonal relationships—does not relate to these First Amendment rights.").

265. Commonwealth v. Hicks, 563 S.E.2d at 684 (Kinser, J., concurring and dissenting).

266. *Id.*

267. *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 545.

268. Roberts v. United States Jaycees, 468 U.S. 609, 618–19 (1984).

269. *Id.* at 620.

270. *Id.* at 619.

271. 431 U.S. 494 (1977).

down a zoning regulation that prevented a grandmother from living with her two grandsons. The Constitution, wrote the Court, "protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[272]

Moore is just one of many Supreme Court cases recognizing the right to freedom and autonomy in family relationships.[273] In *Washington v. Glucksberg*,[274] the Supreme Court catalogued those familial rights so far deemed to be fundamental: the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, and to abortion.[275]

Nontraditional and nonfamilial relationships, however, have received less constitutional protection from the Court.[276] In *Village of Belle Terre v. Boraas*,[277] for example, the Court upheld a zoning ordinance that restricted land use to one-family dwellings and defined the term "family" in a way that prohibited a group of unrelated college students from living together.[278] Despite Justice Marshall's objection that the Village was regulating "the way people choose to associate with each other within the privacy of their own homes,"[279] the Court did not find a violation of a fundamental right and therefore analyzed the statute under a mere rationality test.[280] Similarly, in *City of Dallas v. Stanglin*[281] the Court unanimously held that relationships between dance-hall patrons were not "the sort of 'intimate human relationships'" protected by the Fourteenth Amendment.[282] Incest and bigamy—relationships traditionally banned by states—would also be unlikely to receive constitutional protection.[283]

272. *Id* at 503.

273. M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (citation omitted) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society . . . .'").

274. 521 U.S. 702 (1997).

275. *Id.* at 720.

276. This is one reason that Goldstein, *supra* note 25, at 219, 230–33, concludes that a right to privacy challenge is among the weakest challenges to ban list policies. This view, however, does not take into account the frequency with which even close family members are prohibited from visiting each other on public housing property. *See supra* note 23. The Supreme Court's recent willingness to recognize privacy rights in *Lawrence v. Texas* casts additional doubt on this conclusion. *See infra* notes 287–93 and accompanying text; s*ee also infra* note 297 and accompanying text.

277. 416 U.S. 1 (1974).

278. *Id.* at 2–3, 7–8.

279. *Id.* at 17 (Marshall, J., dissenting).

280. *Id.* at 7–8.

281. 490 U.S. 19 (1989).

282. *Id.* at 24; *see also* Rode v. Dellarciprete, 845 F.2d 1195, 1205 (3d Cir. 1988) (holding that a relationship with a brother-in-law was not constitutionally protected); Flaskamp v. Dearborn Pub. Sch., 232 F. Supp. 2d 730, 740 (E.D. Mich. 2002) ("[A] 'close friendship' . . . does not constitute the type of relationship that has played a 'critical role' in shaping the Nation's culture.").

283. Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (Powell, J., concurring); Marcum v. McWhorter, 308 F.3d 635, 640–42 (6th Cir. 2002) (finding no fundamental right to commit adultery); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (leaving open the question of whether same-sex marriage could be constitutionally required). *But see id.* at 590, 600 (Scalia, J., dissenting) (arguing that laws against bigamy, adultery, same-sex marriage, and incest, among other things, are threatened by the Court's *Lawrence* opinion).

And in *Michael H. v. Gerald D.*,[284] the Supreme Court refused to recognize as fundamental the parental right of a father whose daughter was conceived while the woman was married to another man.[285]

Nevertheless, some nontraditional relationships have received constitutional protection.[286] In *Lawrence v. Texas*,[287] the Supreme Court struck down a Texas law that outlawed homosexual sex, writing that it sought "to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[288] The *Lawrence* Court overruled *Bowers v. Hardwick*,[289] in which the Court had upheld the criminalization of homosexual activity on the ground that there was no fundamental right to engage in homosexual sex.[290] These laws, the Court wrote in *Lawrence*, "touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home."[291] *Lawrence*, however, was decided on the basis that the law in question lacked a rational basis,[292] and it therefore may not provide much protection against laws designed for the purpose of combating violence in public housing.[293]

284. 491 U.S. 110 (1989).

285. *Id.* at 127 (plurality opinion) ("This is not the stuff of which fundamental rights qualifying as liberty interests are made."); *see also* Mullins v. Oregon, 57 F.3d 789, 794 (9th Cir. 1995) (finding no fundamental right to the adoption of grandchildren).

286. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987) ("Of course we have not held that constitutional protection is restricted to relationships among family members."); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977) ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."); Henley v. Tullahoma City Sch. Sys., 84 Fed. Appx. 534, 543 (6th Cir. 2003) (noting that "highly personal" friendships might receive constitutional protection). In his concurring opinion to *Moore*, Justice Brennan explained the importance of the extended family in some communities:

> In today's America, the "nuclear family" is the pattern so often found in much of white suburbia. The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. The "extended family" that provided generations of early Americans with social services and economic and emotional support in times of hardship, and was the beachhead for successive waves of immigrants who populated our cities, remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society. For them compelled pooling of scant resources requires compelled sharing of a household.

Moore, 431 U.S. at 508 (Brennan, J., concurring) (citations omitted).

287. 539 U.S. 558 (2003).

288. *Id.* at 567. Even before *Lawrence*, the Supreme Court had recognized a right to at least some degree of privacy in nonmarital sexual relationships. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried people. *Id.* at 453–55. The Court wrote: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453. *Eisenstadt*, however, was decided on the basis of Equal Protection, so its privacy analysis was dicta. *Id.* at 453–54.

289. 478 U.S. 186 (1986).

290. *Id.* at 192.

291. *Lawrence*, 539 U.S. at 567.

292. *See supra* note 190.

293. *See supra* notes 184–87 and accompanying text.

Because of these potential limits to familial privacy, the court in *Widell* held that Larry Blunt did not have a right to visit his fiancée in the Westpark housing facility.[294] The court, citing the now-overruled *Bowers* decision,[295] concluded that "an engaged couple who is not cohabitating is not entitled to constitutional protection."[296] This result may well have been different, however, if Blunt had been visiting a parent, child, or spouse instead of a fiancée. The court in *Johnson*, for example, struck down a law that prevented a grandmother from visiting and caring for her grandchildren, holding that the right of a grandmother "to participate in the upbringing of her grandchildren" was constitutionally protected.[297] Ban lists that frustrate traditional nuclear family relationships—such as husband-wife or especially parent-child relationships—are therefore likely to be found unconstitutional by the courts.[298] Policies that interfere with child rearing[299] are especially risky, since "a family member's right to participate in child rearing and education is one of the most basic and important associational rights protected by the Constitution."[300]

Like *Widell*, other cases that upheld trespass policies against privacy challenges similarly did not squarely confront the issue of traditional nuclear family relationships. In *Thompson*, Albert Thompson was arrested for trespass while in the apartment of a resident of the housing authority,[301] in the same complex where his brother, two cousins, and at least one friend resided.[302] Thompson claimed that he was on the property

294. City of Bremerton v. Widell, 51 P.3d 733, 741 (Wash. 2002).

295. *Id*.

296. *Id*.

297. Johnson v. City of Cincinnati, 310 F.3d 484, 501 (6th Cir. 2002); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977); *supra* note 286 and accompanying text.

298. *See* State v. Holiday, 585 N.W.2d 68, 70–71 (Minn. Ct. App. 1998) (narrowly construing a trespass ordinance to avoid "seriously imping[ing] upon the freedom of association of persons such as Holiday, who testified that he had friends and family living in [Minneapolis Public Housing Authority] property.").

299. *See, e.g.*, Editorial, *Housing Policy Must Be Tough? and Also Sensible and Fair*, ASHEVILLE CITIZEN-TIMES, Aug. 16, 2002, at 6A (discussing a ban list policy that barred minor children, "in some instances leaving their parents to choose between homelessness or trying to find a home for the child with a friend or relative").

300. *Johnson*, 310 F.3d at 499; *see also* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that a state could not prevent parents from educating their children in private schools); Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (holding that the parental right to choose how to educate children meant that a state could not prohibit the teaching of foreign languages in private schools). The Court has also limited state power to terminate the parent-child relationship. *See* Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (requiring at least clear and convincing evidence of an overriding state interest before severing the relationship); *Troxel*, 530 U.S. at 72 (holding that a judicial order granting visitation rights to the grandparents of two children was "an unconstitutional infringement on [the] fundamental right to make decisions concerning the care, custody, and control of [the children]").

301. Thompson v. Ashe, 250 F.3d 399, 404 (6th Cir. 2001).

302. *Id.* at 406. Thompson had been arrested a total of twenty-three times on the property. *Housing Project Ban OK'd on Appeal*, *supra* note 102.

looking for his brother, and had asked the owner of the apartment to use his phone.[303] The *Thompson* court held that the Supreme Court "has not extended constitutional protection to mere visitation with family members" and therefore "Thompson [had] no fundamental right to visit his family members on [housing authority] property."[304] Yet the case did not directly implicate the right to intimate association because Thompson was not in the apartment of a family member and could not demonstrate that any member of his family even wanted him on the premises.[305]

The Sixth Circuit in the later case of *Johnson* cast further doubt on the continuing validity of its statement in *Thompson* that no right of family visitation exists.[306] According to *Johnson*:

> *Thompson* concluded that the plaintiff had no fundamental right to visit his family members because the Supreme Court had not yet articulated such a right. That the Supreme Court's recognition of a right establishes that right's existence for lower courts, however, tells us nothing about the existence of rights that the Court has not yet addressed.[307]

While considering itself bound by *Thompson*'s holding,[308] the *Johnson* court nevertheless upheld the right of a grandmother to visit and care for her grandchildren.[309] The distinguishing fact to the court was that "Johnson has been an active participant in the lives and activities of her grandchildren."[310] The result is thus an uneasy balance—Johnson had no right to visit her grandchildren in Over the Rhine, but she did have "a fundamental associational right to participate in the education and rearing of her grandchild."[311] This holding was criticized by the dissent, which wrote that "[n]one of the pertinent Supreme Court cases . . . involve the right of *nonresident grandparents* to contribute to the raising of their grandchildren."[312]

In *Williams*, the Illinois Supreme Court upheld a ban list policy against the freedom of association challenges of visitors who alleged that resident friends and family had "extended open and permanent invita-

303. *Thompson*, 250 F.3d at 404.

304. *Id.* at 407.

305. *Id.* at 406 (noting that Thompson "acknowledged that none of his family members or friends have ever actually invited him to visit them in their [housing authority] apartments . . . and it is noteworthy that Thompson failed to produce even one affidavit from a friend or family member expressing a desire to have him visit"); *see also* Collins v. Commonwealth, 517 S.E.2d 277, 279, 282 (Va. Ct. App. 1999) (finding no freedom of intimate association problem because the defendants failed to present any evidence of why they were on the premises).

306. Johnson v. City of Cincinnati, 310 F.3d 484, 501 (6th Cir. 2002).

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* The court also found that the other plaintiff in the case had a right to visit his attorney in Over the Rhine. *Id.* at 505–06.

311. *Id.* at 501.

312. *Id.* at 514.

tions to them to visit at their apartments."[313] The *Williams* court did not directly confront the constitutional claims, instead deciding that the subsidized housing in the case was not a state actor because it was not truly public housing.[314] This holding is questionable because police were responsible both for recommending names to put on the list and for enforcing the policy.[315] In contrast, in cases involving traditional public housing, state action would be much more obvious, forcing courts to confront the constitutional issues on their merits.[316]

The right of intimate association, however, is not absolute even among close family members.[317] In *Lyng v. Castillo*,[318] the Supreme Court upheld a federal law providing more food stamp benefits to unrelated persons living together in the same household than to cohabiting nuclear families.[319] Because the law did not "'directly and substantially' interfere with family living arrangements," the Court wrote, it did not burden a fundamental right.[320] Similarly, in *FW/PBS, Inc. v. Dallas*,[321] the Supreme Court held that regulating motels renting rooms for periods less than ten hours did not burden the freedom of association.[322]

Some courts have thus suggested that ban list policies may withstand constitutional scrutiny because they do not "intrude[] upon a nonresident's ability to intimately associate in an alternative locale."[323] The

313. Williams v. Nagel, 643 N.E.2d 816, 818 (Ill. 1994). The court in Carey v. Edgewood Management. Corp., 754 A.2d 951 (D.C. 2000), entered a similar holding, finding that the management of a federally subsidized private property was not a state actor. *Id.* at 956–57.

314. *Williams*, 643 N.E.2d at 819–20. The apartment complex was a private corporation receiving federal rent subsidies from HUD. *Id.* at 817. The court arrived at this holding despite the fact that it found that the police "did occasionally provide recommendations to private property owners concerning individuals who had been involved in criminal activity," served notices of barment, and "enforce[d] the criminal trespass laws." *Id.* at 820. The court reasoned that the role of the police department was "purely advisory," and "the pivotal inquiry . . . focuses upon the placement of an individual's name on the 'no trespass' list." *Id.* at 820–21.

The dissent criticized this holding, noting that the "real basis" for the alleged state action was not the "practice of putting persons' names on a 'no trespass' list," but rather "the abuse of the criminal trespass statute to assist the landlords in managing their property." *Id.* at 824 (Harrison, J., dissenting). According to the dissent, in "cases where the defendant is a private party whose conduct has received the imprimatur of the State or where private motives have triggered the enforcement of State laws by governmental officials who are themselves named as defendants," the plaintiff need only show that "the person charged with the deprivation is a State official or has acted together with or obtained significant aid from State officials, or that the conduct at issue is otherwise chargeable to the State." *Id.; see also* Howerton v. Gabica, 708 F.2d 380, 384–85 (9th Cir. 1983).

315. *Williams*, 643 N.E.2d at 818, 820.

316. *See supra* note 183.

317. City of Bremerton v. Widell, 51 P.3d 733, 742 (Wash. 2002).

318. 477 U.S. 635 (1986).

319. *Id.* at 643.

320. *Id.* at 638 (quoting Zablocki v. Redhail, 434 U.S. 374, 386–87 & n.12 (1978)).

321. 493 U.S. 215 (1990).

322. *Id.* at 237.

323. City of Bremerton v. Widell, 51 P.3d 733, 743, 743 (Wash. 2002); Brown v. Dayton Metro. Hous. Auth., No. C-3-93-037, 1993 U.S. Dist. LEXIS 21297, at *70 (S.D. Ohio Aug. 26, 1993) (rejecting a privacy challenge to a ban list policy because the plaintiffs did not "show that the law *targets* family relationships" instead of merely having an "incidental affect on those relationships") (emphasis

fact that intimate relationships could continue outside the property was noted by the *Johnson* dissent, which wrote that the grandmother in that case could "continue to participate in the upbringing of her grandchildren" by "meet[ing] outside Over the Rhine, communicat[ing] on the telephone, and correspond[ing] through the mail."[324] According to the dissent, "[t]he fact that such participation became less convenient during her exclusion is not a factor in determining whether Johnson's asserted right is a fundamental liberty interest."[325]

But by excluding family members from the home, a state certainly seems to "directly and substantially"[326] interfere with freedom of association—even if a continued relationship is still technically possible. Restrictions on visitation in one's residence are much harsher than, for example, the restrictions on temporary motel rental in *FW/PBS, Inc.* And unlike *Lyng*, where the Supreme Court relied on the fact that the federal food stamp policy did "not order or prevent any group of persons from dining together,"[327] ban list policies can in fact disrupt family meals and other associations. The fact that trespass policies intrude into the privacy of the home makes them even more constitutionally suspect.[328] To use the words of the Second Circuit in *McKenna*, "[i]t would be ignoring the realities of human nature and relationships" to conclude that requiring families to meet outside of the home did not impinge on their freedom of association.[329]

Therefore, although ban lists have survived several forays in the courts on the freedom of association issue, they are not immune from attack.[330] Banning family members from visitation can drastically interfere with a family's ability to associate. The primary reason why these policies have survived is because the lawsuits have been brought by the wrong plaintiffs. If a husband, wife, or child were to challenge a ban list provision instituted by a traditional housing authority, their likelihood of success would dramatically increase. For example, if Hicks—who was arrested for bringing diapers to his baby[331]—were to continue to press his

added); *see also* Goldstein, *supra* note 25, at 231–32 (concluding for this reason that "intimate association claims are generally unlikely to succeed.").

324. Johnson v. City of Cincinnati, 310 F.3d 484, 514 (6th Cir. 2002) (Gilman, J., dissenting).

325. *Id.* at 514–15; *see also* State v. Burnett, 755 N.E.2d 857, 863 (Ohio 2001) (examining the same statute at issue in *Johnson*, but finding no freedom of association violation because the "the ordinance prohibits access only to a particular area of the city").

326. *See* Zablocki v. Redhail, 434 U.S. 374, 387 (1978).

327. Lyng v. Castillo, 477 U.S. 635, 638 (1986).

328. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969); Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."). *But see* Bowers v. Hardwick, 478 U.S. 186, 195 (1986) ("*Stanley* did protect conduct that would not have been protected outside the home. . . . [But] otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home."), *overruled by Lawrence*, 539 U.S. at 578.

329. McKenna v. Peekskill Hous. Auth., 647 F.2d 332, 335 (2d Cir. 1981).

330. *See supra* note 24.

331. Hicks v. Commonwealth, 535 S.E.2d 678, 680 (Va. Ct. App. 2000).

case in the Virginia courts on due process instead of First Amendment grounds, he would have a strong chance of prevailing.

IV. RESOLUTION

The Supreme Court's holding in *Virginia v. Hicks* does not mean that ban lists are immune from constitutional scrutiny. Although the Supreme Court has established that these policies will not be struck down as overbroad infringements of protected First Amendment speech,[332] ban lists still potentially implicate the fundamental rights to freedom of movement and freedom of association. Housing authority managers should therefore use caution to ensure that their policies survive judicial scrutiny.

Whether a court would accept a freedom of movement challenge to a ban list is uncertain. However, many circuits have recognized a fundamental right to freedom of intrastate movement.[333] Furthermore, *Johnson* strongly hinted that ban lists could in fact implicate the freedom to travel.[334] A significant possibility therefore remains that a court would find ban lists unconstitutional on freedom of movement grounds, especially in cases where the ban results in exclusion from all housing developments in the city.[335]

Freedom of intimate association is even more clearly implicated by ban list policies, especially in light of the Supreme Court's solicitude toward private rights in *Lawrence v. Texas*. Where housing authorities have prevailed in court on freedom of association grounds, they have done so only because the claim has not been raised by the right parties. *Thompson* involved a plaintiff who was not on the property to visit family members.[336] *Widell* involved visitation with a nontraditional family member.[337] And the apartment complex at issue in *Williams* was not owned by the state.[338] If a ban list policy were challenged by a person who had been prevented by a traditional public housing authority from visiting a spouse or blood relative, then the result likely would be different.

Assuming that a court were to find that a housing authority policy infringed one of these fundamental rights, the housing authority would then have to prove that the policy was "narrowly tailored to serve a compelling state interest."[339] To prepare for this risk, housing authority managers should carefully mold their policies to achieve their goals,

332. *Virginia v. Hicks*, 123 S. Ct. 2191, 2199 (2003).
333. *See supra* note 211.
334. *See supra* notes 306–12 and accompanying text.
335. *See supra* notes 225–31 and accompanying text.
336. *See supra* note 305 and accompanying text.
337. *See supra* notes 294–96 and accompanying text.
338. *See supra* notes 313–15 and accompanying text.
339. Johnson v. City of Cincinnati, 310 F.3d 484, 502 (6th Cir. 2002) (citation omitted).

while trammeling the rights of residents and guests as little as possible. Otherwise, the policies risk being struck down by courts as "overbroad defense[s] against remote dangers which could all have been combated in more direct and less intrusive ways."[340]

There are several methods that housing authorities can use to help ensure that their policies are upheld. First, the policies should provide at least basic procedural protections to those banned from properties, including "notice and an opportunity to be heard."[341] The written notice should include the reasons for the ban and procedures for appeal.[342] Ideally, trespass policies should also avoid the features that doomed the ordinance in *Johnson*, which provided for no individualized consideration, no neutral arbiter, and "no particularized finding that the arrested or convicted individual is likely to repeat his or her . . . crime."[343]

Policies without these protections risk erroneously excluding innocent individuals, an outcome which would not at all advance the state's interest in crime control. Like the Over the Rhine ordinance, a statute without sufficient procedural safeguards "restricts a substantial amount of innocent conduct"[344] by mistakenly targeting innocent people, and is therefore "not narrowly tailored to restrict only those interests associated with illegal drug activity."[345]

Second, nobody should be banned from public housing properties without a sufficiently strong justification. Most disturbing to the *Johnson* court was the fact that the ordinance curtailed constitutional rights even after the drug charge had been dropped or abandoned.[346] This concern is only multiplied by many ban list provisions, which do not even require an initial arrest to trigger exclusion.[347] Furthermore, the state's compelling interest in crime control is also reduced when people are banned from public housing properties not for committing crimes, but for nuisance activity, such as excessive noise or littering.[348]

Therefore, mere presence on the property should never be enough to get oneself banned,[349] nor should suspicion alone be a sufficient reason.[350] Minor offenses, such as littering, unreasonable noise, minor traffic violations, or curfew violations likewise do not justify the severe penalty of permanent banishment.[351] At a minimum, police should have probable cause of criminal activity before banning anyone. Ideally, no person

340. McKenna v. Peekskill Hous. Auth., 647 F.2d 332, 336 (2d Cir. 1981).
341. Dusenbery v. United States, 534 U.S. 161, 167 (2002) (citation omitted).
342. *See* Thompson v. Ashe, 250 F.3d 399, 404 (6th Cir. 2001).
343. *Id.*
344. State v. Burnett, 755 N.E.2d 857, 866 (Ohio 2001).
345. *Id.*
346. Johnson v. City of Cincinnati, 310 F.3d 484, 504 (6th Cir. 2002).
347. *See supra* notes 131–33 and accompanying text.
348. *Id.*
349. Hicks v. Commonwealth, 535 S.E.2d 678, 686 (Va. Ct. App. 2000).
350. *See* Thompson v. Ashe, 250 F.3d 399, 403 (6th Cir. 2001).
351. City of Bremerton v. Widell, 51 P.3d 733, 735 (Wash. 2002).

should be banned unless a previous arrest for criminal activity on the property has been made.[352] Housing authorities that ban visitors for trivial reasons do not advance the goal of preventing crime on their properties, and risk violating fundamental rights for reasons that are not even rational, much less compelling.[353]

Third, by specifically enumerating the offenses that are sufficient to invoke the ban policy, housing authorities can avoid giving too much discretion to police and management.[354] The Supreme Court has written that a "direction . . . to the police to arrest all 'suspicious' persons would not pass constitutional muster."[355] Similarly, broad standards in ban list policies are a sign that they are not narrowly tailored. Police and management, therefore, should not be allowed to selectively enforce ban list policies. As the Supreme Court wrote in *Morales*: "The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'"[356]

Finally, ban list policies should recognize an exception for invitees.[357] While an invitation may not give a visitor the right to unrestricted access to the premises, it should at least allow visitation to the tenant's apartment and access to all the common areas necessary for ingress and egress.[358] Exceptions to this policy could be made for persons who a landlord reasonably believes pose a danger to residents or property.[359] Allowing visitation is especially important as applied to family members, since the Supreme Court gives association between family members a special place in its jurisprudence.[360] With this exception in place, no father should have to face arrest for bringing diapers to his baby.[361]

In *Frisby v. Schultz*,[362] the Supreme Court wrote that "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[363] By carefully crafting ban list policies and reigning in overzealous enforcement, housing authorities can continue to combat the evil of crime in public housing without striking at other conduct that is innocent and protected by the Constitution.

352. *See, e.g.,* LOS ANGELES, CAL., MUN. CODE § 41.23(4)(b) (2003).

353. State v. Burnett, 755 N.E. 2d 857, 867 (Ohio 2001) (holding that the Over the Rhine exclusion ordinance was not narrowly tailored because it was not limited to illegal activity, but "also attacks conduct that is completely innocent").

354. *See supra* notes 148–52 and accompanying text.

355. Papachristou v. Jacksonville, 405 U.S. 156, 169 (1972).

356. Chicago v. Morales, 527 U.S. 41, 60 (1999).

357. *See, e.g.,* State v. Dixon, 725 A.2d 920, 922 (Vt. 1999). Another example is reviewed in State v. Blair, 827 P.2d 356, 359 n.4 (Wash. Ct. App. 1992), where police were authorized to arrest only those entering public housing property without a "legitimate purpose."

358. *See* City of Bremerton v. Widell, 51 P.3d 733, 739 (Wash. 2002).

359. *See* RESTATEMENT (SECOND) OF TORTS § 189 cmt. c (1965).

360. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

361. Hicks v. Commonwealth, 535 S.E.2d 678, 680 (Va. Ct. App. 2000).

362. 487 U.S. 474 (1988).

363. *Id.* at 485.

V. CONCLUSION

Public housing ban lists can be useful tools for improving the lives of public housing residents. Yet they also pose a significant risk of infringing fundamental rights of movement and association. Housing authorities should therefore ensure that their ban lists survive constitutional scrutiny by narrowly tailoring them to the important state interest of fighting crime in public housing. Policies that ban visitors for trivial or arbitrary reasons, or that fail to make reasonable allowances for the privacy of their residents and guests, do not advance these goals and run the risk of being struck down.