

DISMANTLING DISCRIMINATION IN THE STAIRWAYS AND HALLS OF NYCHA USING LOCAL, STATE, AND NATIONAL CIVIL RIGHTS STATUTES

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This Note explores various national and New York civil rights statutes that may be used to combat abusive police tactics in New York City Housing Authority (“NYCHA”) buildings. This Note begins by providing a backdrop on how NYCHA buildings are policed in New York City and a description on how vertical patrols are conducted in NYCHA buildings. Additionally, this Note will trace the origin of police presence in NYCHA buildings. In the course of providing an overview of policing in NYCHA buildings, the Note will examine some of the legal challenges that have been made to challenge vertical patrols and aggressive police tactics in New York City. Ultimately, this Note will propose that in challenging the New York Police Department’s (“NYPD”) vertical patrols and policing in NYCHA buildings, residents should look to § 3617 of the Fair Housing Act and New York State and City Human Rights Laws.

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I. INTRODUCTION

On November 21, 2014, Akai Gurley was fatally shot on the seventh floor of the Louis Pink Housing projects in Brooklyn, New York.¹ As Gurley and his girlfriend exited their apartment and entered the stairwell, two New York City police officers were conducting a vertical patrol inside the building.² As the officers entered the dimly lit stairwell, one of the officers, patrolling with his gun drawn, fired his gun and killed Gurley.³ Gurley's death is not the first shooting of an unarmed Black man in a New York City Housing Authority ("NYCHA") residence. In 2004, nineteen-year-old Timothy Stansbury, Jr. was shot on the roof of a NYCHA building in the Bedford-Stuyvesant neighborhood of Brooklyn, New York.⁴ Ten years prior to the death of Stansbury, thirteen-year-old Nicholas Heyward was murdered while playing "cops and robbers" with friends in the hallway of the Gowanus Houses in Brooklyn, New York. An officer on a vertical patrol mistook the clicking of Heyward's orange plastic toy cork gun, and fired a shot at Heyward, which led to his death that same day.⁵

In all three of these unfortunate shootings, the police on duty were conducting vertical patrols in NYCHA residences. During vertical patrols, officers of the New York Police Department ("NYPD") conduct

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¹ Christopher Mathais, *NYPD Officer Shoots and Kills Unarmed Man in Brooklyn*, HUFFINGTON POST (Nov. 21, 2014), http://www.huffingtonpost.com/2014/11/21/akai-gurley-nypd-shooting-dead_n_6199428.html. On February 10, 2015, Peter Liang, the officer that shot Gurley, was indicted by a grand jury on manslaughter, assault, and other criminal charges. Chris Fuchs, *Former NYPD Cop Peter Liang's Guilty Verdict Leaves a Community Divided*, NBC NEWS (Feb. 13, 2016), <http://www.nbcnews.com/news/asian-america/former-nypd-cop-peter-liang-s-guilty-verdict-leaves-community-n518056>.

² *Id.*

³ Ray Sanchez, *Police: N.Y. Officer Fatally Shoots 'Innocent' Unarmed Man*, CNN NEWS (Dec. 8, 2014), <http://www.cnn.com/2014/11/21/us/new-york-police-shooting/>.

⁴ Robert D. McFadden & Ian Urbina, *Fatal Shooting Not Justified, The Police Say*, N.Y. TIMES, Jan. 25, 2004, <http://www.nytimes.com/2004/01/25/nyregion/fatal-shooting-not-justified-the-police-say.html>. Timothy Stansbury Jr. was one of twenty-five people to attend a birthday party for a teenage neighbor in a fourth-floor flat at 395 Lexington Avenue. At 1:30 a.m., Stansbury, who was the D.J., went next door to his friend's apartment to obtain more music. After picking up several CDs, Stansbury, along with several friends, climbed the apartment's stairs to the roof to return to the party. When Stansbury opened the door to the roof, he was shot and killed. *Id.*

⁵ NEW YORK LAWYERS FOR THE PUBLIC INTEREST, NO PLACE LIKE HOME: A PRELIMINARY REPORT ON POLICE INTERACTIONS WITH PUBLIC HOUSING RESIDENTS IN NEW YORK CITY 6 (2008), http://www.nylpi.org/wp-content/uploads/bsk-pdf-manager/170_2008_COPP_REPORT_WITH_NEW_COVER.PDF (last visited Apr. 17, 2016).

a top-down sweep, sometimes with their weapons drawn as they survey and patrol the premises of NYCHA buildings.⁶ Section 212-59 of the NYPD Patrol Guide, effective July 1, 2013, defines vertical patrolling as:

Tactically planned patrol[s] of the interior hallways, stairways and rooftops of multiple dwelling buildings [. . .] where officers are to conduct inspections of roof landing, elevator rooms and any other installations [. . .] Patrol each floor, staircase and hallway within the building from the top floor to the ground floor [. . .] be alert for persons who may be engaged in criminal activity, including potential trespassers.⁷

These patrols are aimed at assisting NYCHA in enforcing its rules, minimizing criminal activity, and providing a safe environment for residents and their guests.⁸

Despite their intended purpose, there have been longstanding concerns about the manner in which police conduct vertical patrols in communities of color⁹ across New York City, and specifically, NYCHA buildings. Vertical patrols and aggressive policing tactics have become a chronic nuisance for people of color living in NYCHA housing, where residents complain daily of discourtesy, constant harassment, and inappropriate stops by police officers.¹⁰ The presence of the NYPD in NYCHA buildings has not only brought unwelcome interactions and attention from police officers, but it has also brought many cases of frivolous arrests of residents and their guests for trespassing.¹¹

This Note argues that in challenging the discriminatory manner in which the NYPD utilizes vertical patrols and aggressive policing procedures in NYCHA buildings, individuals should look to national and local civil rights statutes, namely the Fair Housing Act, and New York State and City human rights laws. Bringing claims under these laws has been largely unexplored in the context of vertical patrolling, and in the context of abusive police tactics nationwide. This Note seeks to shed light on how these statutes may serve as alternative courses of action in combatting this growing problem facing people of color living in NYCHA housing.

Part II of this Note details the history of police presence in NYCHA housing and provides background on the patterns of vertical patrolling and aggressive police tactics in these buildings. Part III will examine recent litigation on this issue and discuss some of the limitations of the current legal tactics in combatting police misconduct and aggressive policing tactics in minority communities. The analysis in Part III will largely build on *Davis v. City of New York*, a class action lawsuit filed against the City of New York and NYCHA.¹² Although a settlement among the parties in *Davis* has been reached, this case raises important legal questions and issues that this Note seeks to address. Finally, Part IV advocates for the use of various civil rights statutes to challenge the discriminatory manner in which vertical patrols are used in NYCHA housing. This section will focus on § 3617 of the Fair Housing Act¹³ and New York State and New York City Human Rights Laws.

⁶ *Id.* at 4–5.

⁷ See NYPD, NEW YORK CITY POLICE DEPARTMENT PATROL GUIDE §§ 212-59, 212-60 (2013).

⁸ *Id.*

⁹ For the purposes of this Note, “communities of color” and “people of color” will be used to describe Black and Latino communities in New York City.

¹⁰ See Clair MacDougall, *NYPD Sued Over Housing Project: Vertical Patrols*, HUFFINGTON POST (July 15, 2010), http://www.huffingtonpost.com/clair-macdougall/nypd-sued-over-housing-pr_b_648259.html.

¹¹ See Fagan Declaration for Plaintiff at 1, *Davis v. City of New York*, 959 F. Supp. 2d 324 (S.D.N.Y. 2012).

¹² *Davis v. City of New York*, 902 F. Supp. 2d 405, 408 (S.D.N.Y. 2012) [hereinafter Fagan Declaration].

¹³ 42 U.S.C. § 3617 (2006).

II. HISTORY OF SECURITY AND POLICE SERVICES IN NYCHA HOUSING

The first NYCHA buildings were constructed in 1934.¹⁴ Just five years later, the State of New York passed the Public Housing Law of 1939, which led to the country's first subsidized public housing program and the construction of hundreds of housing developments for low-income families.¹⁵ Today, NYCHA is the largest public housing authority in North America.¹⁶ The residents of NYCHA are low-income individuals and families, composed primarily, but not exclusively, of people of color.¹⁷ The NYPD, under an umbrella unit known as the "housing bureau," currently provides police services to NYCHA buildings; however, prior to 1994, a special housing police force, known as Housing Authority Police Department, patrolled NYCHA housing.¹⁸ In 1994, the Housing Authority Police Department merged with the NYPD, forming the Housing Bureau.¹⁹ Today, the NYPD Housing Bureau is responsible for maintaining safety and providing security and police services to more than 400,000 residents, employees, and public housing guests throughout New York City.²⁰

A. The Birth Of Vertical Patrolling In NYCHA Housing

In 1989, the United States Department of Housing and Urban Development ("HUD") launched the Drug Elimination Program ("DEP") largely to eliminate drug-related crimes in public housing across the nation.²¹ HUD is responsible for administering federal aid to local housing agencies that manage low-income housing.²² In addition, HUD assists in the technical and professional planning, developing, and managing of these developments.²³ In fulfilling this role, HUD implemented DEP, and sought to strengthen formal and informal social control mechanisms in public housing developments through an increase in police presence and targeted prosecutions.²⁴

In 1990, NYCHA sought DEP funds from HUD and implemented its local DEP program known as Operation Safe Home ("OSH").²⁵ As part of the OSH policy, vertical patrols were one of the main procedures used in buildings with high-level drug crimes.²⁶ During these patrols, OSH teams comprised of five police officers and one sergeant would patrol indoor and outdoor areas of NYCHA housing, conducting systematic

¹⁴ *About NYCHA, THE NEW YORK CITY HOUSING AUTHORITY*, http://www.nyc.gov/html/nycha/html/about/nycha70_timeline.shtml (last visited Apr. 17, 2016).

¹⁵ *Id.*

¹⁶ *Facts about NYCHA, THE NEW YORK CITY HOUSING AUTHORITY*, <https://www1.nyc.gov/assets/nycha/downloads/pdf/factsheet.pdf> (last visited Apr. 17, 2016).

¹⁷ NEW YORK LAWYERS FOR THE PUBLIC INTEREST, *supra* note 5, at 4.

¹⁸ *See id.*

¹⁹ *Id.* The NYCHA and the NYPD entered into a Memorandum of Understanding, which required NYCHA to pay the city for NYPD police services. Following the merger, the New York City Police Department Housing Bureau was created to provide the security and delivery of police services to individuals using public housing throughout New York City. *Id.*

²⁰ *Housing Bureau, NEW YORK CITY POLICE DEPARTMENT*, http://www.nyc.gov/html/nypd/html/housing_bureau/housing.shtml (last visited Apr. 17, 2016).

²¹ Jeffrey Fagan, Garth Davies & Jan Holland, *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 GEO. J. POV. L. & POL'Y 415, 423 (2006).

²² HUD's *Public Housing Program*, The United States Department of Housing and Urban Development, http://portal.hud.gov/hudportal/HUD?src=/topics/rental_assistance/phprog (last visited June 2, 2016).

²³ *Id.*

²⁴ *Id.* at 423, 425.

²⁵ *See id.* at 417.

²⁶ *Id.* at 427.

building patrols lasting from several weeks to several months.²⁷ OSH officers also encouraged residents to form tenant patrols, providing guidance and training to these resident-led patrols.²⁸

In 1991, the OSH program had forty-eight officers overall, with twelve officers assigned to each NYCHA service area.²⁹ By 1994, following the formation of the Housing Bureau, OSH grew to over 800 officers and nineteen sergeants.³⁰ In 2002, the Bush Administration withdrew funding from OSH; however, police presence and vertical patrol practice in NYCHA buildings continues today.³¹

B. The Negative Implications Of NYPD's Vertical Patrol Policy

Today, during a vertical patrol, NYPD officers systematically check and monitor numerous buildings by scanning roof landings, stairwells, and lobbies of various New York City housing projects.³² During the sweeps, officers observe and take note of any maintenance or safety issues, and survey the surroundings for any criminal activity, which includes trespassing.³³ This task generally falls to some of the least experienced officers in the Housing Bureau.³⁴ Although the NYPD has praised vertical patrol practices as a tactic that helps ensure the safety of NYCHA buildings,³⁵ many have criticized vertical patrols. Critics blame the tactic for the tragic deaths of innocent individuals, as well as the unconstitutional stops, frisks, and arrests of NYCHA residents.³⁶ On a routine basis, police have improperly detained or arrested individuals for trespass when they had legitimate reasons for being on NYCHA property. Residents also complain of excessive stop-and-frisk detentions during these patrols.³⁷

A survey conducted at the Thomas Jefferson Houses³⁸ revealed that NYPD officers routinely stopped the majority of the residents, as well as their invited guests.³⁹ Forty-one percent of surveyed residents and their visitors reported being stopped up to five times per year. Sixteen percent reported being stopped five to ten times per year. Nineteen percent reported being stopped ten to twenty times per year, and twenty-four percent claimed to be stopped more than twenty times per year.⁴⁰ The majority of the people surveyed reported that they were often stopped and asked for identification when they were merely entering or exiting their residence.⁴¹

²⁷ *Id.*

²⁸ HUD's *Public Housing Program*, *supra* note 22.

²⁹ *Id.* at 427–28. NYCHA service areas were administrative units that were very similar to police precincts. *See id.*

³⁰ *Id.*

³¹ NEW YORK LAWYERS FOR THE PUBLIC INTEREST, *supra* note 5, at 4. After 2002, NYCHA bore the brunt of payments to New York City for NYCHA policing. Despite this change, police staffing did not diminish. *Id.*

³² *Frequently Asked Questions*, NEW YORK CITY POLICE DEPARTMENT, http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml (last visited Apr. 17, 2016).

³³ NEW YORK CITY POLICE DEPARTMENT, *supra* note 7, at §§ 212-59, 212-60.

³⁴ *See* Tina Susman, *Fatal New York Police Shooting Stokes New Criticism*, L.A. TIMES (Nov. 22, 2014), <http://www.latimes.com/nation/la-na-nyc-shooting-20141123-story.html>. Twenty-seven-year-old Peter Liang, the officer responsible for shooting Akai Gurley, was a new police officer on the force. *Id.*

³⁵ *See* Michael Schwartz, *Public Housing Patrols Can Mean Safety or Danger*, N.Y. TIMES (Nov. 21, 2014), http://www.nytimes.com/2014/11/22/nyregion/housing-patrols-can-mean-safety-or-peril-to-residents.html?_r=0 (reporting that in a press conference on November 21, 2014, NYPD Commissioner William Bratton contended that vertical patrols have served an important role in the NYPD's ability to police housing projects in New York City).

³⁶ *See id.* The Civilian Review Board received an increase in police misconduct complaints by a magnitude of sixty-six percent between 2002 and 2006. *Status Report January-June 2007*, NEW YORK CITY CIVILIAN COMPLAINT REVIEW BD., June 2007, at 11, http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbsemi_2007_Jan_June.pdf.

³⁷ Complaint at 2, *Davis v. City of New York*, 902 F. Supp. 2d 405 (S.D.N.Y. 2012) [hereinafter *Davis Complaint*].

³⁸ The Thomas Jefferson Houses in Manhattan have eighteen buildings, with 1,487 apartment units for an estimated 3,729 residents. *See NYCHA Housing Developments: Jefferson Houses*, NEW YORK CITY HOUSING AUTHORITY, <http://www.nyc.gov/html/nycha/html/developments/manjefferson.shtml> (last visited Apr. 17, 2016).

³⁹ NEW YORK LAWYERS FOR THE PUBLIC INTEREST, *supra* note 5, at 10.

⁴⁰ *Id.*

⁴¹ *Id.* at 11.

Respondents reported stops, searches, arrests, and excessive force as frequent occurrences⁴² in the Thomas Jefferson Houses. Surveyors found similar results in a survey conducted with residents living at the Walt Whitman Houses.⁴³ While some may argue that suspicion likely prompted these alleged stops, residents reported being stopped by the same officer on routine vertical patrols, “which indicates that the officers likely recognize[d] them as residents of the building, and would have no reason to believe they were trespassing.”⁴⁴ Aside from the survey, several cases across New York have corroborated these systematic suspicionless stops, where courts have found that police officers detained individuals during vertical patrols when they lacked any objectively credible reason for doing so.⁴⁵

Vertical patrols are also extremely dangerous. Unlike street patrols, vertical patrols do not occur in an open view situation.⁴⁶ As a consequence, officers are not aware of what they may confront when walking up steep flights of steps or turning tight corners in NYCHA buildings. These patrols often require rookie officers to make split-second decisions that can be life threatening to themselves and others. These dangerous patrols have led to the fatal shootings of countless people of color and police officers alike.⁴⁷

The manner in which members of the NYPD conduct these patrols is not the only aspect of the policy under scrutiny. Critics assert that the NYPD’s policy overwhelmingly impacts Black and Latino communities.⁴⁸ According to an expert report, in 2012, Blacks and Latinos represented over ninety percent of all persons stopped in NYCHA buildings.⁴⁹ The report also found significant racial disparities in the context of trespass stops and arrests, even after controlling for crime conditions, patrol strength, socio-economic conditions, and other policy-relevant factors.⁵⁰

Considering that the vast majority of NYCHA residents are people of color, these figures are not surprising. However, the expert report also found that citywide, Blacks and Latinos account for over eighty percent of all persons stopped.⁵¹ Additionally, there are significantly more total stops and arrests in NYCHA public housing sites compared to the immediate surrounding areas.⁵² These disparities are consistent with many findings in the Thomas Jefferson Houses survey. In the survey, seventy-one percent of individuals who

⁴² *Id.* at 10.

⁴³ NEW YORK LAWYERS FOR THE PUBLIC INTEREST, *supra* note 5, at 12. Walt Whitman Houses in Brooklyn, NY consists of fifteen buildings, with 1,636 apartment units for about 4,276 people. Thomas Jefferson Houses in Manhattan has eighteen buildings, with 1,487 apartment units for an estimated 3,729 residents. *NYCHA Housing Developments: Jefferson Houses: Whitman, Walt Houses*, NEW YORK CITY HOUSING AUTHORITY, <http://www.nyc.gov/html/nycha/html/developments/bklynwhitmanhouses.shtml> (last visited Apr. 17, 2016).

⁴⁴ NEW YORK LAWYERS FOR THE PUBLIC INTEREST, *supra* note 5, at 11.

⁴⁵ *See* *People v. Taylor*, No. 54639C-2005, 2006 WL 1348745, at *3 (N.Y. Sup. Ct. May 12, 2006) (finding officers had no legal basis to approach and request information from defendant); *People v. Ventura*, 30 Misc. 3d 587, 590, 913 N.Y.S.2d 543 546 (Sup. Ct. 2010) (finding officer’s initial questioning, search, and arrest during a vertical patrol based solely on individual’s presence in the lobby unlawful).

⁴⁶ Barry Paddock, *NYPD’s ‘Vertical Patrols’ of Housing Project Stairwells Under Criticism After Shooting Death of Unarmed Man*, NEW YORK DAILY NEWS (Nov. 21, 2014), <http://www.nydailynews.com/new-york/nyc-crime/nypd-vertical-patrols-housing-projects-controversial-article-1.2019696>.

⁴⁷ *See supra* text accompanying notes 1–5. In 1988, Officer Anthony McClean was killed after observing a crack dealer during a vertical patrol. In 2012, NYPD officer Brian Groves was shot at close range, but was saved by his bullet-resistant vest, while patrolling a NYCHA building in the Lower East Side of Manhattan, New York. *Id.*

⁴⁸ Davis Complaint, *supra* note 37, at 3.

⁴⁹ Fagan Declaration, *supra* note 11, at 2.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

reported being stopped were African American, and twenty-eight percent were Latino.⁵³ Members of the NYPD have even corroborated the discriminatory nature of the NYPD's policing tactics.⁵⁴

III. REFORMING AND REVISING THE PATROL GUIDE

In 2009, the Civilian Complaint Review Board (“CCRB”) noticed an increase in the number of complaints it received from individuals across New York who alleged that they had been improperly stopped in and around NYCHA buildings.⁵⁵ After further investigation, the CCRB met with the NYPD to discuss the rise in allegations of improper stops in NYCHA buildings, and proposed a number of recommendations to curb the rising number of complaints.⁵⁶ In response to the CCRB's recommendations and data, the NYPD made several changes to Patrol Guide provisions governing vertical patrols in NYCHA buildings.⁵⁷ The NYPD revised Patrol Guide 212-60, entitled “Interior Vertical Patrol of Housing Authority Buildings,” in an effort to provide additional guidance to police officers patrolling NYCHA properties.⁵⁸

A year later, Interim Order Number 23, a program targeted at “assist[ing] the Housing Authority in enforcing its rules, limiting criminal activity, providing a safe and secure environment, and ensuring the habitability of its residential buildings for Housing Authority residents and their guests by performing interior vertical patrols,”⁵⁹ replaced Patrol Guide 212-60. Along with clearer guidelines, Interim Order Number 23 included a ninety-minute training curriculum that sought to explain: 1) the purpose of interior vertical patrols within NYCHA buildings; 2) the importance of proper interactions between officers and NYCHA residents; and 3) a full description of the new changes in the NYPD's policy in conducting interior vertical patrols of housing authority buildings.⁶⁰ The new order was implemented in 2010, and since its implementation, over ninety percent of the targeted NYPD personnel have been trained.⁶¹

At the time changes to the NYPD's vertical patrolling policies were contemplated, plaintiffs brought three lawsuits⁶² in federal court challenging the NYPD's discriminatory stop and frisk policy in NYCHA housing, private buildings, and various communities of color across New York City. In 2008, a class of minority New York City residents filed a complaint against New York City challenging the NYPD's practice of racial profiling, alleging that the NYPD's stop-and-frisk practices were unconstitutional.⁶³ Four years later, a class of minority citizens challenged the NYPD's stop-and frisk practices in thousands of private apartment buildings

⁵³ NEW YORK LAWYERS FOR THE PUBLIC INTEREST, *supra* note 5, at 12.

⁵⁴ See Jean Shin, *Officer Accuses NYPD of Racial Profiling*, CNN NEWS (Dec. 31, 2009), <http://www.cnn.com/2009/CRIME/12/31/officer.racial.profiling/>. (Sergeant McReynolds alleged he was a victim of racial profiling when police officers stopped him during a vertical sweep in his girlfriend's apartment building in Bronx). See also Michelle Conlin, *Off Duty, Black Cops in New York Feel Threat from Fellow Police*, REUTERS (Dec. 23, 2014), <http://www.reuters.com/article/2014/12/23/us-usa-police-nypd-race-insight-idUSKBN0K11EV20141223>. (“Reuters interviewed [twenty-five] African American male officers on the NYPD, [fifteen] of whom are retired and [ten] of whom are still serving. All but one said that, when off duty and out of uniform, they had been victims of racial profiling” in various contexts).

⁵⁵ See Press Release, Civilian Complaint Review Bd., Based on CCRB Recommendation, NYPD Retrains Officers Who Patrol NYCHA Buildings (Oct. 27, 2010), http://www.nyc.gov/html/ccrb/downloads/pdf/Police_Retraining_10_27_2010.pdf (last visited Apr. 17, 2016).

⁵⁶ *Id.* (recommending retraining of NYPD officers, specifically emphasizing that stops in NYCHA buildings require reasonable suspicion).

⁵⁷ *Id.* at 2.

⁵⁸ *Davis v. City of New York*, 812 F. Supp. 2d 333, 335 (S.D.N.Y. 2011).

⁵⁹ *Id.* at 336.

⁶⁰ *Id.*

⁶¹ *Id.* at 336–37.

⁶² *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013); *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013); *Davis v. City of New York*, 902 F. Supp. 2d 405 (S.D.N.Y. 2012).

⁶³ *Floyd*, 283 F.R.D. 153.

across New York City.⁶⁴ Lastly, in *Davis v. City of New York*, a group comprised of NYCHA residents and visitors filed suit against the City of New York and NYCHA challenging the NYPD's practice of unlawful stops and arrests in NYCHA buildings.⁶⁵ In the complaint, the class challenged the NYPD's implementation of the vertical patrol and trespass arrest policy, alleging it resulted in a pattern and practice of illegal stops, seizures, questioning, searches, and false arrests.⁶⁶

As this Note aims to examine the potential remedial tools available to residents of NYCHA buildings, it will focus exclusively on *Davis*. Despite the NYPD's 2009 vertical patrol policy reform, which occurred in the backdrop of *Davis*, Judge Shira Scheindlin of the United States District Court for the Southern District of New York held in a summary judgment proceeding on July 5, 2011 that the City failed to establish the new police patrol guide, and that the patrol training curriculum had rendered moot the Plaintiffs' §1983 municipal⁶⁷ liability claim for equitable relief. Furthermore, Judge Scheindlin stated that the efficacy of the new policy guide and training curriculum were both unknown and disputed.⁶⁸

Since Judge Scheindlin's opinion, the New York Civilian Complaint Review Board has further reviewed and analyzed trespass-related complaints filed by tenants of NYCHA housing.⁶⁹ In its second review during a sixteen-month span, the agency found an overall decrease in the number of improper stop and question complaints, from seventy-six complaints in the agency's 2010 study to fifty-nine in its 2012 study.⁷⁰ However, despite the decrease in complaints, the CCRB analysis showed a large increase in the substantiation rate of complaints.⁷¹ Though the CCRB is still investigating data on complaints of police misconduct in NYCHA buildings, the statistics released in the monthly board meeting demonstrate that the NYPD's patrolling reform hasn't done enough to stop the practice of improper trespassing stops in NYCHA buildings.

A. Legal Tools With Limitations

To better understand the utility of housing laws in challenging vertical patrols and the NYPD's discriminatory policing practices, it is important to discuss *Davis*, a class action suit challenging these practices. On August 30, 2013, Judge Scheindlin granted class certification in *Davis*.⁷² The plaintiff class consisted of two subclasses, including the "Arrested Plaintiffs" and the "Resident Plaintiffs."⁷³ The "Arrested Plaintiffs" consisted of Black and Latino NYCHA residents and guests who have been, and who then were, at risk of being stopped, seized, questioned, searched or falsely arrested for trespass without any probable cause in or around NYCHA buildings.⁷⁴ The "Resident Plaintiffs" subclass consisted of Black and Latino NYCHA residents who live in buildings subject to the NYPD's vertical patrol policy and trespass arrest practices.⁷⁵

⁶⁴ *Ligon*, 925 F. Supp. 2d 478.

⁶⁵ *Case: Davis v. City of New York*, NAACP LEGAL DEFENSE FUND, <http://www.naacpldf.org/case/davis-vs-city-new-york> (last visited Apr. 17, 2016).

⁶⁶ *Davis* Complaint, *supra* note 37, at 408.

⁶⁷ *Davis*, 812 F. Supp. 2d at 333.

⁶⁸ *Id.* at 339–40.

⁶⁹ Memorandum from Bd. Members of Civilian Complaint Review Bd. to Marcos Soler & Denis McCormick (May 31, 2013), http://home2.nyc.gov/html/ccrb/pdf/patrolled_housing_memo.pdf.

⁷⁰ *Id.* at 2.

⁷¹ *Id.*

⁷² *Federal Judge Grants Class Certification in Case Challenging Discriminatory Use of Stop-and-Arrests for Trespass in New York City's Public Housing*, NAACP LEGAL DEFENSE FUND, <http://www.naacpldf.org/update/federal-judge-grants-class-certification-case-challenging-discriminatory-use-stops-and-arrest> (last visited Apr. 17, 2016).

⁷³ *Davis* Complaint, *supra* note 37, at 5. Rule 23(c)(5) of the FRCP authorizes dividing a class into subclasses that are each treated as a class under Rule 23 when appropriate. Fed. R. Civ. P. 23(c)(5); Fed. R. Civ. P. 23.

⁷⁴ *Davis* Complaint, *supra* note 37, at 6.

⁷⁵ *Id.*

In the *Davis* complaint, residents and visitors charged the City of New York and NYCHA with violating their Constitutional rights under the Fourth and Fifteenth Amendments, the Civil Rights Acts of 1964 and 1968, the Fair Housing Act, the United States Housing Act, and laws of the State of New York and New York City.⁷⁶ Though the case was not fully litigated,⁷⁷ this section will discuss the utility and limitations of two of the claims brought in *Davis*: § 3604(b) and § 1983 claims. In most lawsuits challenging police-officer misconduct, plaintiffs allege a violation of their civil rights under 42 U.S.C. § 1983.⁷⁸ Furthermore, § 3604(b) of the Fair Housing Act, a largely unused authority, has been the topic of recent scholarship in the context of challenging aggressive police enforcement tactics nationwide.⁷⁹

Examining challenges under these two provisions will not only provide a useful understanding of how individuals have challenged police misconduct, but also will demonstrate the usefulness of exploring new tactics under various civil rights laws. Following a discussion of these two provisions, this Note will provide a broad overview of the proposed preliminary settlement terms in *Davis*.

1. Section 1983 And Monell Claims

Section 1983 allows individuals to bring a private cause of action for violations of their constitutional rights against an actor acting under the color of state law.⁸⁰ Section 1983 is the most frequently used basis for federal police misconduct actions against state or local officers.⁸¹ Most lawsuits charging a police officer with misconduct will also include the municipality as a co-defendant, and in some cases supervisory personnel as well.⁸² However, holding municipalities liable for the unconstitutional acts of one of its officials remains difficult in actions for damages under § 1983.⁸³ In *Davis*, the class of residents brought § 1983 claims against NYCHA and the City of New York.⁸⁴

In *Monell v. New York City Department of School Services*,⁸⁵ the United States Supreme Court held that under certain circumstances a local government may be considered a person or actor, rendering it subject to suit under § 1983 of Title 42 of the United States Code.⁸⁶ Under a *Monell* claim, plaintiffs must prove that actions pursuant to official municipal policy caused the alleged constitutional violation.⁸⁷ One method of establishing municipal

⁷⁶ *Id.* at 1.

⁷⁷ The parties reached a preliminary settlement on January 7, 2015. See *Preliminary Settlement Reached in Federal Class Action Lawsuit Challenging Police Practices in NYC Public Housing: Major NYPD Reforms to be Implemented in Court-Ordered Monitoring Process*, NAACP LEGAL DEFENSE FUND, <http://www.naacpldf.org/update/preliminary-settlement-reached-federal-class-action-lawsuit-challenging-police-practices-nyc-> (last visited Apr. 17, 2016). See *infra* pp. 18–20.

⁷⁸ See Jim T. Priest & Reggie N. Whitten, *Defense of a Police Misconduct Suit*, 38 AM. JUR. TRIALS 493 (2016) (originally published in 1989).

⁷⁹ See Roberto Concepción, Jr., *The Untapped Potential of the Fair Housing Act in Addressing Aggressive Enforcement of “Walking While Black or Brown”*, 17 U. PA. J.L. & SOC. CHANGE 383, 385–86 (2014).

⁸⁰ 42 U.S.C. § 1983 (1996).

⁸¹ Lisa D. Hawke, *Municipal Liability and Respondeat Superior: An Empirical Study and Analysis*, 38 SUFFOLK U. L. REV. 831, 832 (2005).

⁸² 38 Am. Jur. Trials 493. Although a municipality cannot be liable under § 1983 on a theory of respondeat superior, persons can allege that decision of municipal policy maker, or approval from municipal decision maker, resulted in the police conduct in question. See, e.g., *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

⁸³ *Id.* (citing SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 1-4 (4th ed. 2002)).

⁸⁴ *Davis* Complaint, *supra* note 37, at 2.

⁸⁵ *Monell v. New York City Dep’t of School Services*, 436 U.S. 658 (1978).

⁸⁶ *Id.* at 690 (“Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.”).

⁸⁷ *Id.* at 691.

liability under *Monell* is showing that there is a deliberate indifference on the part of high-level officials.⁸⁸ This standard is stringent, and in the Second Circuit, plaintiffs are required to show that the policymakers' inaction or indifference was not just the result of mere negligence, but also a conscious choice.⁸⁹ This burdensome standard severely limits the liability of municipalities for unlawful police conduct. Proving conscious choice is extremely difficult for plaintiffs, which often results in fewer victorious claims under § 1983.⁹⁰

In many cases, municipalities indemnify officers if the alleged misconduct is within the line of duty.⁹¹ Indemnifying particular municipal officers generally fails to correct policies or patterns of abuse within a police unit, providing no incentive for officers not indemnified in the matter to correct their misconduct.⁹² Even if a plaintiff is able to prove a constitutional violation under § 1983, a defendant officer may still avoid liability by proving that he or she acted with a reasonable and good faith belief that the conduct in question was legal.⁹³ In practice, judges almost always find that an officer acted in good faith.⁹⁴

Notwithstanding these limitations, § 1983 plaintiffs are hampered by evidentiary and procedural difficulties, corroboration problems, the police "code of silence," and discovery battles to access confidential police documents.⁹⁵ Despite many limitations and criticisms against § 1983 claims, they remain an important tool for challenging police misconduct; however, plaintiffs may find greater utility under the civil rights statutes discussed later in this Note.

2. Section 3604(b) Claims Under The Fair Housing Act

In *Davis*, the Plaintiffs alleged that the City of New York, along with NYCHA, violated the rights of Resident-Plaintiffs and members of the class under the FHA.⁹⁶ The Plaintiffs alleged that the Defendants discriminated on the basis of race or national origin in the terms, conditions, or privileges of rental agreements, or in the provision of services or facilities in connection with the rental of a dwelling in violation of 42 U.S.C. § 3604(b).⁹⁷

Recent scholarship has discussed the utility of using § 3604(b) of the FHA as a means of challenging aggressive policing;⁹⁸ however, plaintiffs may find it particularly difficult to use this tactic to challenge vertical patrols and aggressive policing. One of the potential shortcomings is a lack of clarity regarding how the section applies to conduct occurring after the initial rental or sale of a dwelling when proof of constructive or actual eviction is absent. Circuit courts are split in determining whether the provision prohibits only discrimination

⁸⁸ *Davis v. City of New York*, 959 F. Supp. 2d 324, 338 (S.D.N.Y. 2013) ("One way to establish the existence of a municipal policy is through a showing of 'deliberate indifference' by high-level officials.").

⁸⁹ *Id.*

⁹⁰ See Hawke, *supra* note 81, at 849 ("Many of the city attorneys reasoned that the current doctrine makes it difficult for a plaintiff to prove a case against the city, resulting in fewer victorious claims for plaintiffs.").

⁹¹ *Revisiting Who is Guarding the Guardians, Chapter 5: Remedies and Legal Developments*, UNITED STATES COMM'N ON CIVIL RIGHTS, http://www.usccr.gov/pubs/guard/ch5.htm#_ftnref13 (last visited Apr. 17, 2016).

⁹² Concepción, *supra* note 79, at 391–92.

⁹³ See *Street v. Cherba*, 662 F.2d 1037, 1039 (4th Cir. 1981) ("[I]t is well-established that a police officer is entitled to qualified immunity from an assessment of damages against him if he acted with a reasonable and good faith belief that he had acted lawfully."). See also *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1341 (2d Cir. 1971) ("[I]t is a valid defense [. . .] to allege and prove that the federal agent or other federal police officer acted in the matter complained of in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted.").

⁹⁴ Marshall Miller, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 156 (1998).

⁹⁵ *Id.* at 155.

⁹⁶ *Davis* Complaint, *supra* note 37, at 44.

⁹⁷ *Davis* Complaint, *supra* note 37, at 44.

⁹⁸ See, e.g., Concepción, *supra* note 79, at 397.

prior to and at the time of the sale or initial rental, or if the provision applies to conduct after acquisition or during the term of the lease.⁹⁹ Section 3604 of the FHA Act states that:

To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.¹⁰⁰

The root of this disagreement lies in conflicting statutory interpretation, namely the meaning of “therewith” in the phrase “in connection therewith.”¹⁰¹

One of the competing interpretations of this language is that the word “therewith” solely references the “sale or rental of a dwelling” clause. Thus, any discriminatory act, including the provision of police services after an individual has purchased or rented his or her dwelling, would fall outside of the scope of the provision.¹⁰² Another interpretation is that the language refers to a dwelling generally, whereby a claim challenging police services following an acquisition or rental would fall within the scope of § 3604(b).¹⁰³ Though the latter interpretation of the Act would enable a plaintiff challenging vertical patrols to state a cognizable claim under § 3406(b), many courts have adopted the narrower interpretation.¹⁰⁴ This narrow reading could prevent plaintiffs from bringing claims challenging discriminatory police services in NYCHA because the conduct alleged would have occurred “post-acquisition.” In a summary judgment motion in *Davis*, Judge Scheindlin held that § 3604(b) is best understood to prohibit post- and pre-acquisition discrimination in the provision of housing related services.¹⁰⁵ While Judge Scheindlin’s decision provided insight into how the *Davis* Court viewed the plaintiffs’ claims, the United States Court of Appeals for the Second Circuit has not addressed this issue.¹⁰⁶

Despite the lack of clarity on this issue, a plaintiff bringing a claim in the rental context may still have a strong claim under § 3604(b). In *Richards v. Bono*, the Court held that the narrow reading of § 3604(b) did not extend to cases of post-acquisition rental discrimination because unlike a sale, a rental arrangement involved an ongoing relationship between a landlord and tenant, whereby the landlord typically retains obligations such as the duty to make repairs or provide services and facilities.¹⁰⁷ Though no other courts have adopted this rationale when applying § 3604(b) to post-acquisition claims, *Richards* may serve as persuasive authority for resident-plaintiffs in NYCHA housing, who as tenants have an ongoing relationship with NYCHA as their landlord.

While disagreements regarding § 3604(b)’s applicability to post-acquisition claims may be an issue of concern for future plaintiffs challenging vertical patrolling, most courts have held that this subsection applies to housing-related services generally provided by governmental units, such as police and fire protection or

⁹⁹ Compare *Cox v. City of Dallas*, 430 F.3d 734, 745-6 (5th Cir. 2005) (holding that the law does not prohibit post-acquisition discrimination unless there has been constructive eviction), with *Committee Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 711 (9th Cir. 2009). See also *Bloch v. Frischholz*, 587 F.3d 771, 779 (7th Cir. 2009) (declaring Fair Housing Act can reach post-acquisition-discrimination).

¹⁰⁰ 42 U.S.C. § 3604(b) (1988).

¹⁰¹ Benjamin A. Schepis, *Making the Fair Housing Act More Fair: Permitting Section 3604(b) to Provide Relief for Post-Occupancy Discrimination in the Provision of Municipal Services—A Historical View*, 41 U. TOL. L. REV. 411, 425 (2010) (citing *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 20004 U.S. Dist. LEXIS 18220, at *21–22 (N.D. Tex. Sept. 9, 2004)).

¹⁰² See *id.*

¹⁰³ *Id.*

¹⁰⁴ See *Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005) (holding that the city’s allegedly racially discriminatory failure to prevent illegal dumping in predominantly African American neighborhoods across Dallas was not connected to sale or rental of any dwelling, and thus was not a cognizable claim under § 3604(b) of the FHA). See also *Halprin v. Prairie Single Family Homes*, 388 F.3d 327, 329 (7th Cir. 2004).

¹⁰⁵ *Davis v. City of New York*, 902 F. Supp. 2d 405, 436 (S.D.N.Y. 2012).

¹⁰⁶ *Id.* at 435.

¹⁰⁷ *Richards v. Bono*, No. 5:04-CV484-OC-10GRJ, 2005 WL 1065141, at *3 (M.D. Fla. May 2, 2005).

garbage collection.¹⁰⁸ Additionally, this interpretation has been extended not only to cases where plaintiffs have alleged a refusal to provide police protection,¹⁰⁹ but also in instances where plaintiffs have alleged abusive police services.¹¹⁰ Despite the circuit split, § 3604(b) remains an important tool to consider in the effort to combat aggressive policing policies in New York City and across the nation.

B. A Preliminary Settlement

On January 7, 2015, both parties to the *Davis* litigation announced that they reached a preliminary settlement agreement to resolve the five-year-old federal class-action suit.¹¹¹ Though the parties have not released a detailed settlement agreement, the preliminary summary of the settlement includes a revision of the NYPD's patrol guide 212-60.¹¹² The revisions include an instruction to officers on how to conduct vertical patrols, a requirement that NYPD officers must complete "Trespass Crime Fact Sheets" after making arrests in or around NYCHA residences, and greater clarification on procedures an officer must follow when he or she observes criminal and non-criminal violations.¹¹³ Additionally, the NYPD has agreed to comply with the Court-ordered monitoring process in the *Floyd v. City of New York* litigation.¹¹⁴

An ineffective settlement reached by parties in *Daniels v. City of New York*¹¹⁵ prompted the *Floyd* litigation.¹¹⁶ *Floyd* was a case which challenged the NYPD's policy and practice of stopping-and-frisking people of color without reasonable suspicion, as required by the Fourth Amendment. In *Daniels*, the parties reached a settlement in 2003 that required retraining of police and court monitoring; however, updated data revealed that there was a demonstrable increase in stop-and-frisks from 2002 to 2006, including extreme disparities in "stop" rates based on race, ethnicity, or national origin.¹¹⁷ The settlement in *Daniels* led to few changes in the manner in which the NYPD conducted stop-and frisks, and as mentioned above, failure to fully comply with the consent decree and the increase in unconstitutional stop-and-frisks ultimately prompted the Center for Constitutional Rights to file *Floyd*, a class action against the NYPD just five years after the initial settlement.

Though the *Davis* settlement is surely a step in the right direction, it is unclear whether this agreement can erase the deeply entrenched legacy of aggressive policing in and around NYCHA buildings. The *Daniels* settlement demonstrates that extensive court monitoring and police retraining may not remedy improper police tactics that target individuals of color. Furthermore, this settlement does not rid NYCHA of vertical policing, but merely retrains and clarifies permissible and impermissible procedures that may be used during vertical

¹⁰⁸ Southend Neighborhood Imp. Ass'n v. St. Clair Cnty., 743 F.2d 1207, 1210 (7th Cir. 1984).

¹⁰⁹ See The Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690 699 (9th Cir. 2009) (Plaintiffs brought a claim regarding law enforcement response time).

¹¹⁰ See Concepción, *supra* note 79, at 397. See Doe v. County of Kankakee, No. 03 C8786, 2004 U.S. Dist. LEXIS 12740, at *14–17 (N.D. Ill. July 6, 2004) (plaintiffs alleged that the city and county selectively applied law enforcement tactics to the detriment of the complex's predominately African American residents).

¹¹¹ Preliminary Settlement Reached in Federal Class Action Lawsuit Challenging Police Practices in NYC Public Housing: Major NYPD Reforms to be Implemented in Court-Ordered Monitoring Process, NAACP LEGAL DEFENSE FUND, <http://www.naacpldf.org/update/preliminary-settlement-reached-federal-class-action-lawsuit-challenging-police-practices-nyc> (last visited Apr. 17, 2016).

¹¹² *Id.*

¹¹³ See Preliminary Settlement at 1, *Davis v. City of New York*, DOCKET NO. 1:10-CV-00699 (S.D.N.Y. Jan. 28, 2010).

¹¹⁴ See *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013). See *supra* text accompanying notes 50–58.

¹¹⁵ *Daniels v. City of New York*, No. 99-1695 (S.D.N.Y. 1999).

¹¹⁶ *Id.*

¹¹⁷ *Id.* (citing Report: Racial Disparity in NYPD Stop and Frisks, CENTER FOR CONSTITUTIONAL RIGHTS (Feb. 3, 2009), <http://ccrjustice.org/home/get-involved/tools-resources/publications/report-racial-disparity-nypd-stop-and-frisks>).

patrols, a revision allegedly made in 2010 that had little impact on the substantiation of complaints of police misconduct.¹¹⁸

Considering the continued disparities in stop-and-frisk arrests and the dramatic impact this policy, along with vertical patrols, continues to have on Black and Latino residents in NYCHA buildings, it is clear that the culture of violence and discriminatory nature of these policies are deeply entrenched and not limited to misconduct of just a few officers. Until these policies are removed, or alternative policing models are implemented, the housing rights of individuals in NYCHA buildings will likely continue to be violated. For this reason, individuals should consider utilizing housing laws to challenge racialized policing.

IV. NEW REMEDIES

Though both parties have reached a preliminary settlement regarding this issue, the *Davis* settlement does not undermine this Note's proposed remedies or the private right of action they may offer if proposed reforms are not effective. Additionally, many of the proposed civil rights and housing law claims may provide a useful means of thinking about remedying aggressive police tactics in communities of color outside New York State.

The Fair Housing Act,¹¹⁹ enacted by Congress in 1968, the New York State Human Rights Law,¹²⁰ and the New York City Human Rights Law¹²¹ all provide alternative causes of action to NYCHA residents who encounter discrimination during their tenancy. All three laws are similarly structured and provide both private and administrative mechanisms to investigate and challenge alleged acts of discrimination. Despite the similarities, these three statutes vary in coverage and enforcement procedure. This section will provide background information and discuss the practical utility of these three laws in addressing future problems in public housing regarding vertical patrolling both in New York City and across the nation.

A. Section 3617 Of The Fair Housing Act

On April 11, 1968, President Lyndon B. Johnson signed the Civil Rights Act of 1968 into law.¹²² The Civil Rights Act of 1968 expanded previous protections against discrimination and created a new prohibition against discrimination in the context of housing.¹²³ Title VIII of the Act, also known as the Fair Housing Act, prohibited discrimination concerning the sale, rental, and financing of housing based on race, color, religion, national origin, or sex. Congress amended the law in 1988, extending protections to handicap and family status.¹²⁴

There are a number of FHA provisions that seek to remedy discrimination in varying housing contexts; however, for the purposes of this Note, this section will discuss the utility of 42 U.S.C. § 3617. Section 3617 of the FHA states that:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person

¹¹⁸ See *supra* text accompanying notes 60–64.

¹¹⁹ 42 U.S.C. §§ 3601 et seq. (1968).

¹²⁰ N.Y. Exec. Law §§ 290-301 et seq. (McKinney 1974).

¹²¹ N.Y.C. Admin. Code 8-101 et seq. (2015).

¹²² *History of Fair Housing*, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/aboutfheo/history (last visited Apr. 17, 2016).

¹²³ *Id.*

¹²⁴ *Id.*

in the exercise or enjoyment of, any right granted or protected by § 3603, 3604, 3605, or 3606 [of the FHA].¹²⁵

Under the terms of § 3617, two distinct groups are protected.¹²⁶ The provision protects members of a protected class from coercion, intimidation, threats, or interference in the exercise or enjoyment of their Fair Housing Act rights.¹²⁷ Additionally, § 3617 protects those who aid or encourage protected class members in the exercise or enjoyment of fair housing rights.¹²⁸

Section 3617 of the FHA has been the topic of much debate in scholarship and among courts seeking to discern whether a cause of action under § 3617 can exist independent of a claim under § 3604, § 3605, or § 3606.¹²⁹ The language of § 3617 may suggest that for a § 3617 claim to be valid, a plaintiff must possess a separate and valid claim under §§ 3603-06 of the statute. For example, an individual who is threatened, intimidated, or harassed in relation to the occupation of his home would presumably only have a cause of action under § 3617 if it is also found that he was denied access to his home because of his race in violation of § 3604(a).¹³⁰

In *Stackhouse v. DeSitter*,¹³¹ a district court held that an individual may bring a § 3617 claim absent a violation of § 3603, 3604, 3605, or 3606.¹³² In *Stackhouse*, the Plaintiff, a Black resident who had moved in to a predominately White neighborhood, alleged that his White neighbor had interfered and intimidated him with respect to his housing rights in violation of § 3617. The Plaintiff claimed that after he exercised his right to rent an apartment free of racial discrimination, his neighbor attempted to frighten him by firebombing his vehicle and conducting other acts of violence and property damage against the Plaintiff and his family.¹³³ The Court permitted a § 3617 claim independent of other FHA provisions, explaining that reading a § 3617 claim as dependent on a violation of enumerated sections would render § 3617 superfluous.¹³⁴ Furthermore, the court reasoned that the statute itself indicated that a violation of § 3617 could be brought absent a violation of §§ 3603-3606.¹³⁵

¹²⁵ 42 U.S.C. § 3617 (2011).

¹²⁶ *Frazier v. Rominger*, 27 F.3d 828, 833 (2d Cir. 1994).

¹²⁷ *Id.* See also *Stackhouse v. DeSitter*, 620 F. Supp. 208, 209-10 (N.D. Ill. 1985) (holding claim alleging firebombing Black family's car in an effort to drive them away from an all-White neighborhood fell squarely within the scope of § 3617). For example, individuals who are denied access to a home because of their race would have a remedy under § 3604(a).

¹²⁸ *Id.* See also *Smith v. Stechel*, 510 F.2d 1162, 1164 (9th Cir. 1975) (Providing employees of apartment complex brought suit charging that employer's decision to terminate employment on grounds they rented apartments to minorities violated the FHA).

¹²⁹ Compare *City of Hayward*, 36 F.3d at 836 (9th Cir. 1994), with *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 330 (7th Cir. 2004), *Frazier v. Rominger*, 27 F.3d 828, 834 (2d Cir. 1994), and *Sofarelli v. Pinellas County*, 931 F.2d 718, 722 (11th Cir. 1991).

¹³⁰ See *Evans v. Tubbe*, 657 F.2d 661 (5th Cir. 1981) (The plaintiff, who was Black, purchased land from the defendant. Following the purchase, plaintiff alleged that the defendant erected a gate across a road, which served as the only access point to plaintiff's land, thereby preventing plaintiff from reaching and using his property. Additionally, plaintiff alleged that defendant gave a key to the gate to all the White people who owned property along the road, but refused to give plaintiff a key. The plaintiff also alleged that the defendant had threatened, intimidated, and harassed the plaintiff, preventing plaintiff from enjoying her property in violation of § 3617. The court held that Plaintiff stated an arguably valid claim under § 3617 because a § 3604 claim was also brought challenging the plaintiff's access to her land.).

¹³¹ 620 F. Supp. at 210.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* (finding that the two circumstances outlined by the § 100.400 (specifically that it should be unlawful to coerce, intimidate, threaten, or interfere with any person: 1) on account of the person's having exercised or enjoyed such a right; and 2) on account of his having aided or encouraged any other person in the exercise or enjoyment of such a right) would generally occur after the enumerated rights have been exercised, and that in these cases, the enumerated rights

The standard set in *Stackhouse* has been cited with approval by several district courts within the Second Circuit.¹³⁶ Moreover, the Second Circuit has recognized that a claim under § 3617 could involve circumstances beyond those contemplated or brought under §§ 3603-3606.¹³⁷ The Second Circuit's recognition of § 3617 claims would permit NYCHA tenants to bring claims under § 3617 against NYCHA and the City of New York without alleging a violation of § 3604(b). Additionally, this interpretation comports with HUD's implementation of the Fair Housing Amendments Act in 1988.¹³⁸ Section 3617's implementing regulation § 100.400 states that:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this part.¹³⁹

The regulation defines five types of conduct that are impermissible under § 3617.¹⁴⁰ Though the list is not exhaustive, the regulation states that "threatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status or national origin of such persons, or of visitors or associates of such person," is prohibited under § 3617.¹⁴¹

B. Making A § 3617 Claim

Using § 3617 could be an effective means of combatting aggressive tactics used by the NYPD during vertical patrolling, as the current manner in which these patrols are conducted arguably interferes with residents' ability to exercise and enjoy their fair housing rights. In order for a plaintiff to prevail on a § 3617 claim involving police misconduct, a plaintiff must show that: 1) she is a member of a protected class under the FHA; 2) she was engaged in the exercise or enjoyment of her fair housing rights as a NYCHA tenant; 3) plaintiff's race and national origin motivated the defendant's decision to implement vertical patrols and aggressive police

would not be violated themselves. In explaining this finding, the Court alluded to a situation in which an apartment building owner fires, or otherwise retaliates against, a building manager who has rented a unit to a Black person (or other minority) against the owner's wishes. Even though, in this example, §§ 3603-3606 rights have not been violated, the Court stated that several courts have had no difficulty finding a § 3617 violation.)

¹³⁶ *Ohana v. 180 Prospect Place Realty Corp.*, 996 F. Supp. 238, 242 (E.D.N.Y. 1998). *See, e.g.*, *Puglisi v. Underhill Park Taxpayer Ass'n*, 947 F. Supp. 673, 696 (S.D.N.Y. 1996); *New York ex rel Abrams v. Merlino*, 694 F. Supp. 1101, 1103-04 (S.D.N.Y. 1988); *Frazier v. Rominger*, 27 F.3d 828, 833 (2d Cir. 1994).

¹³⁷ *Id.*

¹³⁸ *See* Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232-3317 (proposed Jan. 23, 1989), available at http://www.fairhousing.com/index.cfm?method=page.display&pagename=regs_52fr3232.

¹³⁹ 24 C.F.R. § 100.400 (2015).

¹⁴⁰ *Id.* § 100.400(c) ("Conduct made unlawful under this section includes, but is not limited to, the following: (1) [c]oercing a person, either orally, in writing, or by other means, to deny or limit the benefits provided that person in connection with the sale or rental of a dwelling or in connection with a residential real estate-related transaction because of race, color, religion, sex, handicap, familial status, or national origin; (2) [t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons; (3) [t]hreatening an employee or agent with dismissal or an adverse employment action, or taking such adverse employment action, for any effort to assist a person seeking access to the sale or rental of a dwelling or seeking access to any residential real estate-related transaction, because of the race, color, religion, sex, handicap, familial status, or national origin of that person or of any person associated with that person; (4) [i]ntimidating or threatening any person because that person is engaging in activities designed to make other persons aware of, or encouraging such other persons to exercise, rights granted or protected by this part; or (5) [r]etaliating against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act.").

¹⁴¹ *Id.* § 100.400(c)(2).

tactics in NYCHA buildings; and 4) when implementing this policy, the defendants coerced, threatened, intimidated, or interfered with the Plaintiff's exercise or enjoyment of fair housing rights.¹⁴²

1. Proving That One Is A Protected Class Member Engaged In The Exercise Or Enjoyment Of His Or Her Fair Housing Rights

Black or Latino tenants challenging the NYPD's vertical patrol and aggressive policing practices in NYCHA buildings would have no difficulty in proving that they are members of a protected class. Furthermore, tenants in NYCHA buildings subject to discriminatory policing and vertical patrols may have several claims satisfying the second prong of the test. A plaintiff may claim that the right to entertain guests¹⁴³ in her apartment constitutes the "exercise or enjoyment" of one of her rights under the Fair Housing Act. Although many NYCHA residents have complained about the NYPD's interference with their right to entertain guests, plaintiffs may also claim that the NYPD interferes with their right to quiet enjoyment and use of their apartment.¹⁴⁴

2. Demonstrating That The NYPD Has Interfered With The Rights Of Black And Latino NYCHA Tenants

Proving the fourth prong—that the NYPD's policies have interfered with the exercise of one's right to entertain guests or to quiet enjoyment—would not be a difficult threshold to satisfy. The Sixth Circuit held in *Michigan Protection and Advocacy Service, Inc. v. Babin* that to establish interference under § 3617, a plaintiff was not required to show a "potent force or duress," but that interference could be triggered by "less obvious, but equally, illegal, practices," such as sending threatening notes or exclusionary zoning.¹⁴⁵

Improperly stopping or arresting residents' guests would establish an "interference" with the right to entertain guests. In *Davis*, the Plaintiffs alleged that the "pattern and practice of police activity in NYCHA buildings is so aggressive and well known that some people are afraid to visit NYCHA residents."¹⁴⁶ Kelton Davis, one of the named Plaintiffs in the case, alleged that on repeated occasions police unjustifiably stopped, seized, questioned, searched, or arrested his friends and visitors for trespass, even though they were lawfully present. As a direct result, Mr. Davis, who is confined to a wheelchair, currently receives few visits from friends and is largely unable to socialize.¹⁴⁷

In addition, tenants of NYCHA buildings could allege they are unable to use and enjoy their homes because patrols are conducted in such a consistently unlawful and discriminatory manner, that they are prevented from coming and going as they wish.¹⁴⁸ Improper arrests, constant harassment, excessive force, and in some cases deaths resulting from over-policing during NYPD vertical patrols would likely satisfy the fourth

¹⁴² *Lachira v. Sutton*, No. 3:05CV1585PCD, 2007 WL 1346913, at *18 (D. Conn. May 7, 2007).

¹⁴³ Federal law requires reasonable accommodation for guests in public housing. HUD's implementing regulation requires that public housing leases "shall" provide for "reasonable accommodation" for tenants' guests. 24 CFR § 966.4(d)(1)(2016). Additionally, "the Second Circuit has held that this right is constitutional, not merely statutory: The Constitution protects public housing residents' "freedom to have whomever they want[] visit their homes [. . .]" *Davis v. City of New York*, 902 F. Supp. 2d 405, 435 (S.D.N.Y. 2012).

¹⁴⁴ There is an implied covenant of "quiet enjoyment" in every lease. *See Mack v. Patchin* 42 N.Y. 167, 171 (N.Y. 1870) (holding as a general rule in New York State that a covenant for quiet enjoyment is implied in every mutual contract for leasing and devising of land).

¹⁴⁵ *Michigan Prot. & Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 347 (6th Cir. 1994) (citing *Sofarelli v. Pinellas Cnty.*, 931 F.2d 718 (11th Cir. 1991)); *United States v. City of Birmingham*, 727 F.2d 560 (6th Cir. 1984).

¹⁴⁶ *Davis Complaint*, *supra* note 37, at 4.

¹⁴⁷ *Id.* at 13–14.

¹⁴⁸ *Id.* at 56.

prong under § 3617 for a claim that the NYPD has interfered with the right to quiet enjoyment and use of one's home.

3. Proving Intent To Discriminate

A plaintiff may bring a claim under a disparate treatment theory of liability (also referred to as intentional discrimination) to satisfy the third factor.¹⁴⁹ As direct evidence of discriminatory intent is often not available, a plaintiff may provide circumstantial evidence to support a finding of intentional discrimination. In *Arlington Heights v. Metropolitan Housing Development Corporation* (“*Arlington Heights*”), the United States Supreme Court set forth a number of factors to consider in the absence of direct evidence of intent.¹⁵⁰ Under what has become known as the “*Arlington Heights* factors,” intentional discrimination can be inferred through the following: 1) the impact of the challenged action, whether it bears more heavily on one race than another; 2) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes; 3) the specific sequence of events leading up to the decision; 4) any procedural and substantive departures from the norm; and 5) the legislative or administrative history of the decision, especially where there are contemporary statements made by members of the decision-making body, minutes of its meetings, or reports.¹⁵¹

The Court in *Arlington Heights* indicated that not every factor must be proven to support a case of intentional discrimination. In fact, courts have routinely upheld intentional discrimination claims where plaintiffs have offered evidence satisfying only a few factors.¹⁵² If a court finds that a plaintiff has provided sufficient proof showing that a racially discriminatory purpose, in part, motivated the policy behind vertical patrols and policing more generally, the policy is not automatically invalidated.¹⁵³ The burden would then shift to the City of New York or NYCHA to establish that the same decision would have resulted even if race had not been considered.¹⁵⁴

As mentioned above, direct proof of discriminatory intent is rarely available. Thus evidence showing that the NYPD's practice of vertical patrolling and aggressive police tactics bear more heavily on Blacks and Latinos may provide an important starting point.¹⁵⁵ Evidence supporting such a claim typically involves statistical data showing a disproportionate impact.¹⁵⁶ For example, in *Jim Sowell Constitutional Co., Inc. v. City of*

¹⁴⁹ Though the United States Supreme Court has not yet determined whether disparate impact theory applies under the FHA, all circuit courts that have addressed this issue have determined that plaintiffs may bring claims under a disparate treatment (intentional discrimination) and disparate impact theory under the FHA. See, e.g., *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 937-38 (2d Cir. 1998), *aff'd*, 488 U.S. 15 (1988) (per curiam); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290-91 (7th Cir. 1977); *Hallmark Developers, Inc. v. Fulton Cnty.*, 466 F.3d 1276, 1286 (11th Cir. 2006). However, under an independent § 3617 claim, a disparate impact claim would likely be unsuccessful. It is unlikely that a party can innocently and unintentionally “coerce, intimidate, threaten, or interfere with” a person's rights protected by §§ 3603-3606. Thus, for the purposes of proving intent under § 3617, this section will rely on a claim made under a disparate treatment theory. The Seventh Circuit and Eleventh Circuit have explicitly held that “a showing of intentional discrimination is an essential element of a § 3617.” *East-Miller v. Lake Cty. Highway Dep't*, 421 F.3d 558, 563 (7th Cir. 2005). See, e.g., *Sofarelli v. Pinellas County*, 931 F.2d 718, 721-23 (11th Cir. 1991); *Simoes v. Wintermere Pointe Homeowners Assoc., Inc.*, No. 6:08-CV-01384-LSC, 2009 WL 2216781, at *6 (M.D. Fla. July 22, 2009), *aff'd*, 375 F. App'x 927 (11th Cir. 2010).

¹⁵⁰ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977).

¹⁵¹ *Id.*

¹⁵² See *Hidden Village, LLC v. City of Lakewood, Ohio*, 867 F. Supp. 2d 920 (N.D. Ohio 2012), *aff'd in part, rev'd in part*, 734 F.3d 519 (6th Cir. 2013) (upholding intentional discrimination claim after plaintiff was able to provide circumstantial evidence showing disparate impact, a deviation from procedural and substantive practices, and racially charged conduct on the part of city officials).

¹⁵³ See *Vill. of Arlington Heights*, 429 U.S. at 271 n.21.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 266.

¹⁵⁶ *MHANY Mgmt. Inc. v. Inc. Vill. of Garden City*, 985 F. Supp. 2d 390, 414 (E.D.N.Y. 2013), *aff'd*, No. 14-1634-CV L, 2016 WL 1128424 (2d Cir. 2016).

Coppel, the court found that expert testimony demonstrating that African American families were much more likely to reside in apartment complexes than Caucasian families was sufficient to demonstrate that rezoning tracts of land from multifamily to single family use and decreasing the number of apartment available to new residents, statistically had a greater adverse impact on African American families than on Caucasian families.¹⁵⁷ Black and Latino families are more likely to live in NYCHA buildings than Caucasian families. As demonstrated in *Jim Sowell*, this evidence is likely to illustrate that vertical patrolling and over-policing in NYCHA buildings has a statistically greater adverse impact on Black and Latino families than on Caucasian families.

Furthermore, in *Davis*, the Plaintiffs' expert set forth statistical data establishing that the NYPD's practice more adversely impacted Blacks and Latinos.¹⁵⁸ The data revealed that citywide, Blacks and Latinos represented over eighty percent of all persons stopped, and over ninety percent of all persons stopped in NYCHA buildings.¹⁵⁹ The expert also found that race and ethnicity played a significant role in the rate of trespass stops and arrests in public housing, even after controlling for other policy-relevant factors, crime conditions, patrol strength, and socio-economic conditions.¹⁶⁰

Though residents of NYCHA buildings are primarily people of color, NYCHA residents are not exclusively minorities.¹⁶¹ The legacy of racial steering and other discriminatory practices in NYCHA buildings¹⁶² have left many buildings racially segregated, and as a result, White residents tend to be clustered in some of the more desirable buildings.¹⁶³ In the early 1990s, the United States and a class of plaintiffs brought parallel actions alleging that NYCHA discriminated in violation of, *inter alia*, 42 U.S.C. §§ 1981, 1982, and 1983 and the Fair Housing Act, by assigning applicants for public housing to particular housing projects on the basis of race.¹⁶⁴ In urging the district court to accept the ultimate settlement, NYCHA admitted to engaging in a number of policies and practices including racial steering that had effectively discriminated against Black and Latino applicants.¹⁶⁵ Years later, in a suit against NYCHA, Latino and Black individuals residing in eligible public housing challenged NYCHA's implementation of a preference for working-families, which the court ultimately found to significantly perpetuate segregation at various NYCHA developments.¹⁶⁶ NYCHA was also found to be responsible for promoting racial quotas in the Williamsburg area of Brooklyn, New York.¹⁶⁷ Comparative data may show a difference between policing in majority-White NYCHA buildings and buildings predominately comprised of Black and Latino residents, which would further strengthen a claim that NYPD's policy more adversely impacts people of color.¹⁶⁸

Though no current research has been conducted on this question, demographics may indicate that the NYPD's policy is less likely to impact White NYCHA residents. Not only do Whites make up a small

¹⁵⁷ *Jim Sowell Const. Co., Inc. v. City of Coppel*, 61 F. Supp. 2d 542, 547 (N.D. Tex. 1999).

¹⁵⁸ Fagan Declaration, *supra* note 11, at 2.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ In 2008, ninety-one percent of public housing residents were African American or Latino, and only 4.3 percent were White. Jeffrey Fagan, Garth Davies & Adam Carlis, *Race and Selective Enforcement in Public Housing*, 9 J. EMPIRICAL LEGAL STUD. 697, 702 (2012) (citing NEW YORK CITY HOUSING AUTHORITY, COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE YEAR ENDED DECEMBER 31, 2008 (2009)).

¹⁶² *Davis v. New York City Hous. Auth.*, 278 F.3d 64 (2d Cir. 2000).

¹⁶³ Fagan, Davies & Carlis, *supra* note 161, at 702.

¹⁶⁴ *See generally* *Davis v. New York City Hous. Auth.*, 1992 WL 420923 (S.D.N.Y. 1992).

¹⁶⁵ *Id.*

¹⁶⁶ *Davis v. New York City Hous. Auth.*, 166 F.3d 432 (2d Cir. 1999).

¹⁶⁷ *Williamsburg Fair Hous. Comm. v. New York City Hous. Auth.*, 439 F. Supp. 1225 (S.D.N.Y. 1980) (finding that NYCHA used a rigid quota by renting 75 percent of units to Whites, 20 percent to Hispanics, and five percent to Blacks, and finding that when defendants deviated from the quota, or otherwise cooperated more fully with one group, they did so in favor of Whites).

¹⁶⁸ *See id.*

percentage of NYCHA residents, the White NYCHA population contains a disproportionately high number of individuals over the age of 62, a population that is generally not targeted during a vertical patrol and less likely to be in common areas of the building where many of the arrests and interactions take place.¹⁶⁹ Furthermore, because the use of vertical patrols is not implemented uniformly, but largely based on the discretion of the NYPD,¹⁷⁰ it may be that many White NYCHA residents are not impacted by the policy.¹⁷¹

Additionally, the expert in *Davis* found that racial disparities in trespass and total police enforcement increased with the magnitude of the differences in racial composition between NYCHA properties and surrounding neighborhoods, after controlling for local crime conditions, policing activity, population size, and socioeconomic and demographic composition of NYCHA sites and surrounding areas.¹⁷² Essentially, when predominately minority NYCHA residences are located in White or gentrifying neighborhoods, the racial disparities in trespass arrest rates increase even further.¹⁷³ Despite being located in the same vicinity as White residents, this data demonstrates that Blacks and Latinos in NYCHA buildings are still more adversely impacted by the NYPD's over-policing policies than their White neighbors.

The historical background of the NYPD's decision to implement vertical patrolling and over-policing in NYCHA buildings may serve as another evidentiary source for an *Arlington Heights* analysis. This type of evidence would be particularly useful if it can demonstrate or reveal that a series of official actions were taken for invidious purposes.¹⁷⁴ For example, any historical background from the period when OSH and vertical patrols were first implemented in NYCHA buildings that indicate that patrols were racially biased may be strong evidence under this factor.

Additionally, a plaintiff may also point to the legacy of racial segregation and discrimination in NYCHA buildings as evidentiary support for proving intentional discrimination. In *Davis v. NYCHA*, class plaintiffs alleged that NYCHA had engaged in discrimination in violation of a number of statutes, including the Fair Housing Act, by assigning applicants for public housing to particular housing projects on the basis of race.¹⁷⁵ NYCHA ultimately acknowledged its racially discriminatory practices and conceded that it had engaged in racial steering, among other things.¹⁷⁶ Similarly, in *Williamsburg Fair Housing Committee v. New York City Housing Authority*, members of the Black, Puerto Rican, and other Latino communities living within the Williamsburg area of Brooklyn, New York brought suit.¹⁷⁷ The plaintiffs alleged that NYCHA had used racial quotas to allocate publicly assisted housing units at various housing projects within the Williamsburg area.¹⁷⁸

For example, one privately owned housing development, Bedford Gardens, was rented out under a quota that called for each building to be comprised of seventy-five percent Whites, twenty percent Latinos, and

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* In the NYPD's 2005 Patrol Guide, under § 212-59, the guide grants the commanding officer discretion to determine and maintain lists of potential vertical patrol locations, and to update this list as necessary. No further specifications were listed with regards to the criteria for determining potential vertical patrol locations. See *New York City Police Department Patrol Guide* § 212-59, NYPD (2005). The current Patrol Guide omits this section, but does not specify an individual responsible for determining locations nor any criteria for determining what buildings vertical patrols are conducted in. See *New York City Police Department Patrol Guide* § 212-59, 212-60, NYPD (2013).

¹⁷¹ Fagan, Davies & Carlis, *supra* note 161, at 702.

¹⁷² Fagan Declaration, *supra* note 11, at 3.

¹⁷³ Davis Complaint, *supra* note 37, at 3.

¹⁷⁴ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

¹⁷⁵ *Davis v. New York City Hous. Auth.*, 278 F.3d 64 (2nd Cir. 2002).

¹⁷⁶ *Id.* at 66.

¹⁷⁷ 439 F. Supp. 1225 (S.D.N.Y. 1980).

¹⁷⁸ *Id.*

five percent Blacks.¹⁷⁹ NYCHA leased apartments from Bedford Gardens under the § 23 leasing program,¹⁸⁰ and had a prepared list of NYCHA apartments in the development, along with the designated ethnicity of each apartment unit.¹⁸¹ The Plaintiffs presented evidence that NYCHA rented according to these designations of ethnicity, and ultimately NYCHA agreed to a consent decree to end the quotas and adjust the racial and ethnic distribution of its buildings.¹⁸² Lastly, in *Floyd*, the court found that the NYPD had engaged in a policy and practice of stop-and-frisks that was racially discriminatory against minorities living in New York City.¹⁸³ All three of these cases illustrate various policies implemented to discriminate against minorities both in access to NYCHA buildings and across New York City. Furthermore, these cases illustrate how race has historically played a role in the decision making of NYCHA, the NYPD, and the City of New York.

A plaintiff may provide evidence of the third *Arlington Heights* factor using specific antecedent events leading up to implementation of the vertical policing policy in NYCHA. The Supreme Court has explicitly distinguished between the “historical background” of a decision and the “specific antecedent events” leading up to it, indicating that the latter is a separate factor to examine under the *Arlington Heights* analysis.¹⁸⁴ In addition, departures from the normal procedural and substantive sequence may also indicate that improper purposes are playing a role in the decision to implement aggressive police tactics in NYCHA buildings and would satisfy the fourth *Arlington Heights* factor.¹⁸⁵ Atypical meetings conducted to discuss implementation of vertical patrolling in NYCHA buildings, or a rush to implement the policy in violation of procedures, would be circumstantial evidence supporting a claim of intentional discrimination under this factor.¹⁸⁶

For example, in *Hidden Village, LLC v. City of Lakewood, Ohio*,¹⁸⁷ the Plaintiff, an owner of an apartment complex occupied by an independent living program for at-risk youth (and had eighty percent African American clientele), presented evidence that the apartment’s unannounced visits from both police and fire inspectors deviated from the City’s typical procedure of notifying individuals in advance. The district court found this to be compelling evidence of a substantive and procedural deviation that could support the claim that the City had intentionally discriminated against the apartment building residents.¹⁸⁸ Differences in rates of stops and arrests between minority-occupied NYCHA buildings located in White neighborhoods, and the White neighborhoods that surround them, may indicate that the NYPD is policing communities differently based on race. Like the case made in *Hidden Village*, a plaintiff may point to this procedural departure as an indication of intentional discrimination. Additionally, evidence revealing that predominately White NYCHA buildings are policed differently may also be admissible under this *Arlington Heights* factor.

Lastly, “the legislative or administrative history may also be highly relevant in proving intentional discrimination, especially where there are contemporary statements made by members of the decision making body, minutes of its meetings, or reports.”¹⁸⁹ Finding statements, notes, or minutes that demonstrate intent to discriminate could be difficult to obtain. Furthermore, obtaining testimony from individual officials may be even more difficult. Though legislative members might be individually questioned concerning the intent of

¹⁷⁹ *Id.* at 1230.

¹⁸⁰ Under § 23, “leased housing” refers to dwelling units whose tenants receive the benefit of rental subsidies pursuant to § 103(a) of the Housing and Urban Development Act of 1974, 88 Stat. 672, as amended, 12 U.S.C. § 1715z-1 (2000).

¹⁸¹ *Williamsburg*, 439 F. Supp. at 1232.

¹⁸² *Williamsburg Fair Hous. Comm. v. New York City Hous. Auth.*, 450 F. Supp. 602, 605 (S.D.N.Y. 1978).

¹⁸³ *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013). *See supra* text accompanying notes 50–58.

¹⁸⁴ *MHANY Mgmt Inc. v. Inc. Vill. of Garden City*, 985 F. Supp. 2d 390, 415 (E.D.N.Y. 2013) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 318 (1977)).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 415 (citing *Reitman v. Mulkey*, 387 U.S. 369, 373–76 (1967); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)).

¹⁸⁷ 867 F. Supp. 2d 920, 944 (N.D. Ohio 2012).

¹⁸⁸ *Id.*

¹⁸⁹ *Vill. of Arlington Heights*, 429 U.S. at 268.

vertical patrols, the Supreme Court noted in *Arlington Heights*, “even then such testimony frequently will be barred by privilege.”¹⁹⁰ Notwithstanding evidentiary restrictions, a plaintiff may also be limited by legislative immunity,¹⁹¹ the police “code of silence,” and possible clandestine actions by members of the decision making process.

Recently, former Mayor of New York City, Michael Bloomberg, made a series of comments affirming the dispatch of more police in minority neighborhoods, contending that “[ninety-five] percent of murders” in New York can be attributed to minorities.¹⁹² Without much more, such statements would likely not be given much weight by a court under an *Arlington Heights* analysis. Racially charged individual comments or general statements made by individuals involved in the decision making process are generally given little weight when ascertaining intent from the entire legislative body.¹⁹³ However, courts have found that thinly veiled statements (consistent with many of the comments made by Bloomberg) of prejudice made by several city officials can be compelling evidence of discriminatory intent, when viewed as a whole.¹⁹⁴

Actions or omissions on behalf of decision makers may also be indicative of discriminatory intent. In *Inclusive Communities Project v. Town of Flower Mound, Texas*, a district court found that evidence a town manager who agreed to submit a proposal for affordable housing to the town council failed to do so could be sufficient for a reasonable jury to find that race was a significant factor in the town’s decision not to respond to the plaintiff’s request for affordable housing.¹⁹⁵ In proving racial intent, a plaintiff may present evidence of the NYPD’s failure to act on the published reports it received from the NY CCRB, which documents the influx of complaints regarding improper stops and arrests. Although minor changes were made to the patrol guide following notice, vertical patrolling and aggressive tactics persisted and the CCRB later reported an increase in the substantiation rate of complaints.

The mere fact that the problem persisted following notice may be evidence upon which a reasonable fact finder may find that race was an important factor motivating how vertical patrolling and other policing tactics in NYCHA buildings were conducted. Additionally, any complaints that contained specific racial statements made by officers during vertical patrols or policing may also serve as circumstantial evidence of discriminatory intent. During the discovery phase of litigation, a plaintiff may be able to find additional

¹⁹⁰ *Id.*

¹⁹¹ See *Buonauvo v. City of Berwyn*, No. 08 C 6687, 2011 WL 116870, at *10 (N.D. Ill. Jan. 10, 2011) (finding that plaintiffs were not entitled to inquire into deliberations, thoughts, or motives of the Mayor or City Council members, and that testimonial privilege protected these persons from responding to deposition questions).

¹⁹² See Karl Herchenroeder, *Michael Bloomberg blocks footage of Aspen Institute appearance*, THE ASPEN TIMES (Feb. 13, 2015), <http://www.aspentimes.com/news/15037917-113/michael-bloomberg-blocks-footage-of-aspen-institute-appearance>. Though no footage was officially released, a recording from the event has been posted on several sites. Numerous media outlets scrutinized Bloomberg for several of his comments. See *id.* In one part of the discussion, Bloomberg suggested that one way to deal with young persons of color engaged in criminal activity was for the NYPD to “throw them up against the wall and frisk them.” *Id.* Bloomberg’s comments seem to be relevant considering that he implemented the stop-and-frisk policy; however, as mentioned in the paper, comments from one individual of authority will generally not satisfy the last *Arlington Heights* factor.

¹⁹³ See *Florida v. United States*, 885 F. Supp. 2d 299, 354 (D.D.C. 2012) (“The purpose of a single legislator is normally too slim a reed upon which to rest a determination regarding the legislator as a whole.”) (citing *Castaneda-Gonzalez v. INS*, 564 F. 2d 417, 424 (D.C.C. 1977)).

¹⁹⁴ See, e.g., *Reg’l Econ. Cmty. Action Program v. City of Middletown*, 294 F.3d 35, 49–51 (2d Cir. 2002).

¹⁹⁵ *Inclusive Cmty. Project v. Town of Flower Mound*, No. 8-CV-433, 2010 WL 2635292 (E.D. Tex. June 4, 2010) (Plaintiff challenged the Town of Flower Mound’s refusal to participate in their low-income housing programs and refusal to identify property where the Town would support the location of Low Income Housing Tax Credit eligible multi-family housing units. The Plaintiff contended that the town undertook such conduct as part of a strategy to prevent the development of low-income housing in Flower Mound for the purpose of excluding racial minorities from residing there.).

evidence of intent by examining NYPD and NYCHA board materials, minutes of meetings, and other public records.¹⁹⁶

The foregoing discussion identifies the *Arlington Heights* factors and potential subjects of inquiry that may be useful for proving that racial discriminatory intent existed with respect to the implementation of vertical patrols and over-policing in NYCHA buildings. Within this framework, challenging vertical patrolling and the NYPD's stop-and-frisk tactics in NYCHA under § 3617 has much utility and may be used as an alternative theory to § 3604(b) claims. Section 3617 utilizes much broader language than § 3604(b) and may prove to be more effective in circumstances where a court refuses to apply § 3604(b) to a "post-acquisition claim." Additionally, a plaintiff may name the NYPD, NYCHA, or the City of New York as defendants under the FHA.

C. New York State Human Rights Law And New York City Human Rights Law

1. New York State Human Rights Law

A plaintiff may also bring a claim under the New York State Human Rights Law ("NYSHRL"), the primary anti-discrimination statute under New York State Law.¹⁹⁷ New York was the first state in the nation to enact a Human Rights Law that prohibits discrimination in employment, housing, credit, places of public accommodations, or non-sectarian educational institutions based on age, race, national origin, sex, sexual orientation, marital status, disability, military status, and other specified classes.¹⁹⁸

Under the NYSHRL, a Black or Latino tenant may bring a claim if he or she can prove housing discrimination on the basis of race or national origin "in the furnishing of facilities or services in connection therewith."¹⁹⁹ Additionally, the NYSHRL has a specific provision which makes it illegal to discriminate on the basis of race in the terms, conditions, or privileges of publicly-assisted housing accommodations, or in the furnishing of facilities or services in connection therewith.²⁰⁰ NYCHA public housing units fall within the NYSHRL's definition of "publicly-assisted housing accommodation."²⁰¹

Under § 296 of the NYSHRL, "the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed or any agent or employee thereof" is liable for violating the statute.²⁰² Consequently, a tenant would only have a legally cognizable claim against NYCHA as the owner of the tenant's apartment. Since the City of New York does not have apparent authority to lease or manage NYCHA units, it would not be a proper defendant under this NYSHRL provision. A tenant may allege that through NYCHA's agreement with the NYPD, NYCHA has discriminated against her in the furnishing of services, namely through over-policing and aggressive police tactics.

¹⁹⁶ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977). (Court permitted to question board members during discovery phase and trial about board materials and other available information at the time of its challenged decision).

¹⁹⁷ N.Y. UNCONSOL. LAW §290 et seq. (McKinney 2000).

¹⁹⁸ *Mission Statement*, NEW YORK STATE DIVISION OF HUMAN RIGHTS, <http://www.dhr.ny.gov/mission-statement>.

¹⁹⁹ N.Y. UNCONSOL. LAW §290 et seq. (McKinney 2000).

²⁰⁰ *Id.*

²⁰¹ N.Y. UNCONSOL. LAW §292(11)(a) (McKinney 2000) ("The term 'publicly-assisted housing accommodations' shall include all housing accommodations within the state of New York in (a) public housing.").

²⁰² N.Y. UNCONSOL. LAW §292(5)(a) (McKinney 2000).

2. New York City Human Rights Law

A plaintiff may also bring a claim under the New York City Human Rights Law (“NYCHRL”). New York City’s human rights law is one of the most comprehensive civil rights laws in the nation.²⁰³ The NYCHRL²⁰⁴ prohibits discrimination in employment, housing and public accommodations based on race, color, creed, age, national origin, alienage or citizenship status, gender sexual orientation, disability, marital status, and partnership status.²⁰⁵ Additionally, in the context of housing, the City Human Rights Law affords additional protections based on lawful occupation, family status, and any lawful source of income.²⁰⁶

Under the NYCHRL, violations concerning these provisions may be filed with the Human Rights Commission; however, the NYCHRL also grants individuals a private right of action.²⁰⁷ Also, successful complainants are entitled to an award of attorney fees.²⁰⁸ Challenging the NYPD’s practice of vertical patrols and aggressive policing in NYCHA buildings under the NYCHRL has great utility. In 2005, the New York City Council enacted the Local Civil Rights Restoration Act (the “Restoration Act”) as a means of expanding the scope of the NYCHRL, which the council believed “had been construed too narrowly to ensure protection of the civil rights of all persons covered by the law.”²⁰⁹ “The Restoration Act provides that similarly worded federal and state civil laws are a floor below which the NYCHRL cannot fall, rather than a ceiling above which the local law cannot rise.”²¹⁰ The Restoration Act asserts that the provisions of NYCHRL “shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.”²¹¹

3. Aiding And Abetting Liability

Like the NYSHRL, the NYCHRL limits liability to an owner of a tenant’s apartment. However, both statutes contain provisions specifying that, “it shall be an unlawful discriminatory practice for any person to aid [or] abet [...] the doing of any acts forbidden under this chapter, or to attempt to do so.”²¹² Persons may sue the City of New York under the NYSHRL and NYCHRL for aiding and abetting discrimination against NYCHA tenants in the furnishing of police services.²¹³ Since both statutes contain similar language regarding liability, courts apply the same standard when analyzing claims under these two provisions.²¹⁴

A tenant must first prove a violation of the NYSHRL or NYCHRL against NYCHA, before he or she can make an aiding or abetting claim against the City of New York.²¹⁵ To prove a claim against NYCHA, a

²⁰³ Patricia L. Gatling, *Discrimination is Illegal in New York City*, NEW YORK CITY COMMISSION ON HUMAN RIGHTS, http://www.lawhelpny.org/files/B23B29BF-0DED-F7B9-2149-1DB14E1A7DE5/attachments/305EB86A-1FCA-4619-8787-54BCF44221CA/bluebook_2013_finaleng.pdf.

²⁰⁴ N.Y.C. Admin. Code § 8-101 (2008).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ N.Y.C. LOCAL LAW No. 39 (June 18, 1991) (codified in N.Y.C. Admin. Code § 8-126 (2008)).

²⁰⁸ *Id.*

²⁰⁹ N.Y.C. LOCAL LAW No. 85 (2005).

²¹⁰ *Short v. Manhattan Apartments, Inc.*, 916 F. Supp. 2d 375, 395 (S.D.N.Y. 2012).

²¹¹ N.Y.C. 396 Admin. Code § 8-130.

²¹² *Id.* (citing Code N.Y. Exec. L. § 296; N.Y.C. Admin. Code § 8-107(6)).

²¹³ *See Fair Hous. Justice Ctr., Inc. v. Broadway Crescent Realty*, No. 10 Civ. 34, 2011 WL 856095, at *8 (S.D.N.Y. Mar. 9, 2011).

²¹⁴ *See Dunson v. Tri-Maint. & Contractors*, 171 F. Supp. 2d 103, 113-14 (E.D.N.Y.2001). *See also* *Mohamed v. Marriott Int’l*, 905 F. Supp. 141, 157 (S.D.N.Y. 1995).

²¹⁵ *See Strauss v. New York State Dep’t of Educ.*, 26 A.D.3d 67, 73, (3d Dep’t 2005) (denying plaintiff’s aiding or abetting claim because plaintiff had not established a Human Rights law violation by another party). *See also DeWitt v. Lieberman*, 48 F. Supp. 2d 280, 294 (S.D.N.Y. 1999).

tenant is required to satisfy the same elements necessary to bring a claim under the FHA.²¹⁶ However, tenants may bring either a NYSHRL or NYCHRL claim under a disparate treatment or disparate impact theory of liability.²¹⁷ The NYSHRL and NYCHRL's embrace of the disparate impact theory is especially crucial given the United States Supreme Court's grant of certiorari.²¹⁸

After establishing a violation under NYCHA, a plaintiff must demonstrate that the other defendants in question "actually participated in the conduct giving rise to the discrimination claim."²¹⁹ Proving that the NYPD participated in vertical patrolling and over-policed NYCHA buildings would not be difficult because the NYPD has conducted the actual conduct giving rise to the claim.

V. CONCLUSION

The Fair Housing Act, New York State Human Rights Law, and New York City Human Rights Law provide useful and powerful legal tools in dismantling housing discrimination at a national, statewide, and local level, but the battle is not over. The legacy of housing segregation and discrimination has permitted the evolution of racialized policing. Also, where one lives can often determine how they are policed. The discriminatory and aggressive tactics used in public housing are not unique to New York City. Cities and towns across the nation have implemented similar programs in public housing and communities of color. As we continue the fight against housing discrimination, these remedies may serve as a useful way to not only challenge overt and covert forms of housing discrimination, but the racialized policing that often comes along with the racially segregated landscape that housing discrimination has produced.

²¹⁶ See *Johnson v. Levy*, 812 F. Supp. 2d 167, 179 (E.D.N.Y. 2011) (holding elements necessary to prove discrimination under FHA are applicable to claims for housing discrimination under the NYSHRL).

²¹⁷ *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 489 (N.Y. 2001). See also N.Y.C. ADMIN. CODE § 8-107(17)(a)(2) (1996). Under a disparate impact analysis, a prima facie case would be established by showing that the vertical patrols and aggressive policing in NYCHA buildings actually or predictably results in racial discrimination. A tenant would not need to show that the decision to use vertical patrols and other policing tactics was made with discriminatory intent. See *NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1998). ("Once a [tenant] has made a prima facie showing of discriminatory effect, a defendant [NYCHA, the NYPD, or the city of New York], must present bona fide and legitimate justifications for its action with no less discriminatory alternatives available.")

²¹⁸ *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 46 (2014). Disparate impact is arguably one of the FHA's most effective provisions for addressing contemporary forms of discrimination. The disparate impact approach has helped plaintiffs identify and confront discrimination that results from hidden, unconscious biases and practices that perpetuate the effects of past intentional discrimination. See *From the Fair Housing Act to Ferguson: Where You Live Impacts How You're Policed*, ACLU, <https://www.aclu.org/blog/speakeasy/fair-housing-act-ferguson-where-you-live-impacts-how-youre-policed> (last visited Apr. 17, 2016).

²¹⁹ See *Elmowitz v. Executive Towers at Libo, LLC*, 571 F. Supp. 2d 370, 377 (E.D.N.Y. 2008) (citation omitted). See also *Tomka v. Seiler Corp.* 66 F.3d 1295, 1317 (2d Cir. 1995) (holding that defendant who actually participates in the conduct giving rise to discrimination claim may be held personally liable under the HRL).