

**Written Statement of the Sargent Shriver National Center on Poverty Law  
Before the United States Commission on Civil Rights**

*Hearing on  
Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effect on Communities  
May 19, 2017*

Submitted by:

Kate Walz  
Director of Housing Justice  
Director of Litigation  
Sargent Shriver National Center on Poverty Law  
katewalz@povertylaw.org

Marie Claire Tran-Leung  
Staff Attorney  
Housing Justice  
Sargent Shriver National Center on Poverty Law  
marieclairetran@povertylaw.org

On behalf of the Sargent Shriver National Center on Poverty Law, we would like to thank the U.S. Commission on Civil Rights for holding this important briefing on “Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effect on Communities.”

Based in Chicago, Illinois, the Sargent Shriver National Center on Poverty Law (Shriver Center) has for the past fifty years provided national leadership in advancing laws and policies that secure justice to improve the lives and opportunities of people living in poverty. We focus on issues that deeply affect their lives and upward mobility, such as housing, employment, education, healthcare and public benefits. We also connect and mobilize networks of lawyers, community organizers, activists, and allies across the country, providing them with resources and training to build their capacity and improve their effectiveness. Finally, we advocate for systemic change that has a broad impact by tracking strategies and tactics that worked in one state and modifying them for the battle in the next.

The Shriver Center has long understood how a person’s involvement with the criminal justice system can significantly impact his or her subsequent attempts to access housing, employment, public benefits and other important supports. For this reason, we have been engaged in a number of initiatives to reduce the collateral consequences that come with having a criminal record.

Our longstanding work at the intersection of housing and criminal justice in particular has had wide impact. In 2015, we published a report entitled *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*. In that report, we reviewed the admissions policies of over 300 public housing authorities (PHAs) and other federally subsidized housing providers and identified ways in which those policies hindered the efforts of people with criminal records to access affordable housing. Later that same year, in a notice to PHAs about their obligation to set reasonable criminal records policies under federal law, the U.S. Department of Housing and Urban Development encouraged them to review our report for a better understanding of these issues.

In this testimony, we will start by discussing the critical role that housing plays in helping people re-join their communities after leaving the criminal justice system. We will then describe the barriers that they face in federally subsidized housing and on the private rental market. Next, we will give an overview of governmental efforts at the federal, state, and local level to dismantle those criminal records barriers. Finally, we will end with a brief set of recommendations for the U.S. Commission on Civil Rights at it contemplates its next steps.

## **I. The Importance of Housing for People with Criminal Records**

Every year, more than 640,000 people – roughly equivalent to the population of the District of Columbia – leave state and federal prisons, while local jails process more than 11 million people.<sup>1</sup> For many, a common question emerges on the first night: “Where will I sleep?” But often, securing safe, decent and affordable housing will present a significant challenge for people long after they have left the criminal justice system. In a 2015 survey by the Ella Baker Center on Human Rights, nearly four out of five formerly incarcerated individuals reported that, because of their criminal history, they were denied admission or deemed ineligible for housing.<sup>2</sup> Formerly incarcerated men

---

<sup>1</sup> Press Release, Peter Wagner & Bernadette Dauby, Mass Incarceration: The Whole Pie 2017 (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>.

<sup>2</sup> SANETA DE VUONO-POWELL ET AL., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 27 (Sept. 2015), <http://whopaysreport.org/who-pays-full-report/>

are twice as likely to experience housing instability short of homelessness (*e.g.*, moving multiple times a year, relying on others for living expenses) than men who had never been incarcerated. Similarly, the risk of homelessness quadruples for men who have been incarcerated.<sup>3</sup> The limited employment prospects for people with criminal records and its impact on a person's ability to afford housing helps to explain these increased odds, but even assuming equal annual earnings, formerly incarcerated men remain more likely to experience housing instability than men who have never been incarcerated.<sup>4</sup>

Just as incarceration is a risk factor for homelessness,<sup>5</sup> a history of homelessness increases the risk of incarceration. Individuals in jails are seven to eleven times more likely to have recently experienced homelessness than the general population.<sup>6</sup> In a study in Georgia, a person on parole increased his chances of arrest by 25% each time he changed his address.<sup>7</sup> By contrast, providing housing to people with criminal records can help to reduce their risk of recidivism. The state of Washington, for example, designed a pilot program for individuals identified as high risk/high need who were being released from prison without a suitable place to live. Through the program, these individuals were provided with housing and supportive services, which ultimately reduced their odds of returning to the criminal justice system.<sup>8</sup>

Housing barriers for justice-involved individuals can also severely restrain their ability to reintegrate back into their communities by exacerbating other collateral consequences. Sustained employment and improved relationships with family, for example, are difficult to achieve in the absence of safe, decent and affordable housing, especially for people who have been formerly incarcerated.<sup>9</sup>

Indeed, living with family is one of the most affordable and stable housing options available to justice-involved individuals.<sup>10</sup> It is also one of the most commonly-used options.<sup>11</sup> In the Ella

---

<sup>3</sup> Amanda Geller & Marah A. Curtis, *A Sort of Homecoming: Incarceration and the Housing Security of Urban Men*, 40 SOC. SCI. RES. 1196, 1203 (2011).

<sup>4</sup> *Id.* at 1206.

<sup>5</sup> See generally Stephen Metraux et al., *Incarceration and Homelessness*, 2007 NAT'L SYMP. ON HOMELESSNESS RES. 9-8 to 9-11, <https://www.huduser.gov/publications/pdf/p9.pdf> (2007); see also U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, REDUCING CRIMINAL JUSTICE INVOLVEMENT AMONG PEOPLE EXPERIENCING HOMELESSNESS 1 (August 2016), [https://www.usich.gov/resources/uploads/asset\\_library/Criminal\\_Justice\\_Involvement\\_08\\_2016.pdf](https://www.usich.gov/resources/uploads/asset_library/Criminal_Justice_Involvement_08_2016.pdf).

<sup>6</sup> Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness and Mental Health: A National Study*, 59 PSYCHIATRIC SERVS. 170, 175 (2008), <http://ps.psychiatryonline.org/doi/pdf/10.1176/ps.2008.59.2.170>.

<sup>7</sup> Faith E. Lutze et al., *Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State's Reentry Housing Program for High Risk Offenders*, 41 CRIM. JUST. & BEHAV. 471, 474 (2014), <https://wsicj.wsu.edu/wp-content/uploads/sites/436/2014/11/Criminal-Justice-and-Behavior-2014-Lutze-471-91.pdf>.

<sup>8</sup> *Id.* at 483; see also Jocelyn Fontaine, *The Role of Supportive Housing in Successful Reentry Outcomes for Disabled Prisoners*, 15 CITYSCAPE 53 (2013) (discussing the successful efforts to reduce recidivism through a similar program that offered housing and support services in Ohio).

<sup>9</sup> JOCELYN FONTAINE & JENNIFER BIESS, URBAN INST., HOUSING AS A PLATFORM FOR FORMERLY INCARCERATED PERSONS 8 (2012), <http://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF>.

<sup>10</sup> CLAIRE HERBERT ET. AL., NAT'L POVERTY CNTR., RESIDENTIAL INSTABILITY AMONG THE FORMERLY INCARCERATED 2-3 (2016), [http://www.npc.umich.edu/publications/policy\\_briefs/brief42/policybrief42.pdf](http://www.npc.umich.edu/publications/policy_briefs/brief42/policybrief42.pdf).

<sup>11</sup> URBAN INST., UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER REENTRY PORTFOLIO 8 (2006) (showing that the majority of respondents from studies in

Baker Center’s report, for example, two-thirds of formerly-incarcerated individuals surveyed relied on their families for support or a place to live.<sup>12</sup> Restrictions on where people with criminal records can live, however, mean that many of them are living in the shadows rather than out in the open, especially in federally subsidized housing. These illicit living arrangements pose a threat to the entire family’s housing because of the risk of eviction or subsidy termination, straining the family dynamic. A young father described his experience in this way: “I was living like I was on the run. The feeling that if I get caught there, my wife will lose her apartment, that she’s taking that risk for me – that weighed so heavy on my heart.”<sup>13</sup> Rather than dampen the strong family bonds that can help people leave the criminal justice system for good, it is time for policymakers to find ways to reinforce those bonds by reducing unreasonable criminal records barriers to housing.

## II. The Housing Barriers that People with Criminal Records Face

People with criminal records encounter barriers both in federally subsidized housing and on the private rental market. We will discuss each of these scenarios in turn.

### A. Federally Subsidized Housing

The shortage of affordable housing, especially in cities where many of the formerly incarcerated return to, is a significant barrier for a population whose prior interaction with the criminal justice system often limits their employment prospects.<sup>14</sup> Given this shortage, the need for federally subsidized housing becomes more acute for people with criminal records.

#### 1. Federal Law Governing Criminal Records Screening

The three major HUD-assisted programs are public housing, Housing Choice Voucher, and project-based Section 8. For these programs, federal law imposes only two narrow mandates related to criminal records screening. Public housing authorities and project owner must permanently ban two types of applicants: (1) applicants who have been convicted of manufacturing methamphetamine on federally assisted property,<sup>15</sup> and (2) applicants who are subject to a lifetime registration requirement because of a prior sex offense.<sup>16</sup>

Other than these narrow instances, PHAs and project owners have a certain amount of discretion over their criminal records policies. Federal law allows them to reject persons who have engaged in any of the following activities within a reasonable time before applying:

---

Illinois, Maryland, Ohio, and Texas reported living with families or intimate partners upon release from the criminal justice system), <http://www.urban.org/sites/default/files/publication/42981/411289-Understanding-the-Challenges-of-Prisoner-Reentry.PDF>.

<sup>12</sup> See DEVUONO-POWELL, *supra* note 2.

<sup>13</sup> Casey Tolan, *NYCHA Stops Discriminating Against New Yorkers with Criminal Records*, VILLAGE VOICE (Dec. 13, 2016), <http://www.villagevoice.com/news/nycha-stops-discriminating-against-new-yorkers-with-criminal-records-9453843>.

<sup>14</sup> See FONTAINE & BIESS, *supra* note 9, at 6.

<sup>15</sup> 42 U.S.C. § 1437n(f)(1) (2016). Federal law also requires PHAs and project owners to deny admission if, within the past three years, a person has been evicted from federally assisted housing for drug-related activity unless either (1) that person has successfully completed drug rehabilitation or (2) the circumstances that led to the prior eviction no longer exist (e.g., the death or incarceration of the person who committed the drug-related criminal activity). 42 U.S.C. § 13661(a) (2016). Also prohibited are applicants who currently use illegal drugs or abuse alcohol. *Id.* at § 13661(b)(1).

<sup>16</sup> 42 U.S.C. § 13663(a) (2016).

1. Drug-related criminal activity,<sup>17</sup>
2. Violent criminal activity,<sup>18</sup>
3. Other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing employees.<sup>19</sup>

For the last category, HUD has advised that “there are a wide variety of other crimes that cannot be claimed to adversely affect the health, safety, or welfare of the PHA’s residents;”<sup>20</sup> therefore, it should not be regarded as a catch-all provision.

The discretion that PHAs and project owners is not unfettered. One significant limit is time. According to federal law, criminal activity is relevant only if it occurred within a “reasonable time” before the screening process take place.<sup>21</sup> In addition, a PHA or project owner’s criminal records screening policy must comply with federal civil rights laws, including the Fair Housing Act.

## 2. Barriers to Federally Subsidized Housing

In 2011, then-HUD Secretary Shaun Donovan emphasized the discretion that PHAs and project owners have in crafting their screening policies and encouraged them to use this discretion to give “second chances” to justice-involved individuals and to help them “gain access to one of the most fundamental building blocks of a stable life – a place to live.”<sup>22</sup> Yet, in our 2015 report, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, we found that many PHAs and subsidized housing providers were instead closing the door on applicants with criminal records through one of four practices.

The first practice of concern involved **arrest record screening**. A number of housing providers deny applicants on the basis of prior arrests, even if those arrests never resulted in a conviction. One policy even went to so far as to deny people on the basis of a single arrest within the past seven years.<sup>23</sup> Arrests, however, prove only that a person has been suspected of criminal activity, not that they have actually committed any crime.<sup>24</sup> Exacerbating this problem is the fact that arrest records are notoriously inaccurate and thus often provide an incomplete picture of a person’s

---

<sup>17</sup> 42 U.S.C. § 13661(c) (2016). “Drug-related criminal activity” is defined as the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute, or use the drug. 24 C.F.R. § 5.100 (2016).

<sup>18</sup> 42 U.S.C. § 13661(c) (2016). “Violent criminal activity” is defined as any criminal activity that has as one of its elements the use, attempted use or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage. 24 C.F.R. § 5.100 (2016).

<sup>19</sup> 42 U.S.C. § 13661(c) (2016).

<sup>20</sup> U.S. DEP’T. OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 96-97 (2003).

<sup>21</sup> 42 U.S.C. § 13661(c)(2) (2016)

<sup>22</sup> Letter from Shaun Donovan, Secretary, U.S. DEP’T. OF HOUS. & URBAN DEV., to Public Housing Authority Executive Directors (June 17, 2011), <http://nhlp.org/files/Rentry%20letter%20from%20Donovan%20to%20PHAs%206-17-11.pdf>. The next year, Secretary Donovan issued a similar letter to HUD’s multi-family project owners. Letter from Shaun Donovan, Secretary, U.S. DEP’T. OF HOUS. & URBAN DEV., to Owners and Agents (undated), <http://nhlp.org/files/HUD%20Letter%203.14.12.pdf>

<sup>23</sup> MARIE CLAIRE TRAN-LEUNG, WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 18, tbl. 1 (2015), <http://www.povertylaw.org/files/docs/WDMD-final.pdf>.

<sup>24</sup> *Schwabe v. Bd. of Bar Examiners*, 353 U.S. 232, 241 (1957).

interaction with the criminal justice system.<sup>25</sup> Given the unreliability of these records and the likelihood that a person will be denied housing for something that he or she did not do, arrest records should not play such a decisive role in the screening process.

Also of concern was the **failure to place reasonable time limits** on the use of criminal history despite the federal requirement to do so.<sup>26</sup> In extreme cases, the written policy explicitly denied admission to anyone who had been convicted in the last 99 or 200 years.<sup>27</sup> More commonly, subsidized housing providers did not indicate the point at which a criminal record would be too old to factor into the admissions analysis, thus leaving the impression that criminal history is an insurmountable barrier.

The third major barrier facing people with criminal records is the use of **overbroad categories of criminal activity**. Some housing providers, for example, bar anyone with a past criminal conviction without regard to whether the underlying activity was minor or irrelevant to a person's ability to be a good tenant. Even where a screening policy offers a more limited universe of prohibited criminal activity, the end result can still be too broad. Many housing providers, for example, only limit felony convictions, but given how state legislatures have increasingly been ratcheting up the punishments for crimes, the "felony" label does not necessarily indicate the level of seriousness that would justify denying a person housing. A felony ban would apply to a person in Virginia who once shoplifted a \$200 item as well as a person in Illinois who twice shoplifted household goods at the local drugstore.<sup>28</sup> Additionally, some housing providers use vague categories of criminal activity, such as "civil disobedience" in a state where such a crime does not exist<sup>29</sup> or criminal activity that indicates a person will be a "negative influence on other residents."<sup>30</sup>

The fourth and last practice of concern was the **underuse of mitigating evidence** in the criminal records screening process. In public housing, PHAs must consider the time, nature and extent of the applicant's conduct. In addition, PHAs may consider evidence of rehabilitation, such as substance abuse treatment, education, and employment, in order to mitigate the effects of a criminal record in the admissions process.<sup>31</sup> Instead, some housing providers either neglected to inform applicants of this right or refused to give due consideration to the evidence presented by the applicants, thus depriving the applicant of a meaningful opportunity to show how they were more than the four corners of their criminal background check.<sup>32</sup>

---

<sup>25</sup> NAT'L EMP'T LAW PROJECT, FAULTY FBI BACKGROUND CHECKS FOR EMPLOYMENT: CORRECTING FBI RECORDS IS KEY TO CRIMINAL JUSTICE REFORM 1-3 (2015), <http://www.nelp.org/content/uploads/NELP-Policy-Brief-Faulty-FBI-Background-Checks-for-Employment.pdf>.

<sup>26</sup> 42 U.S.C. § 13661(c) (2016).

<sup>27</sup> MARIE CLAIRE TRAN-LEUNG, WHEN DISCRETION MEANS DENIAL: THE USE OF CRIMINAL RECORDS TO DENY LOW-INCOME PEOPLE ACCESS TO FEDERALLY SUBSIDIZED HOUSING IN ILLINOIS 12 (2011), <http://povertylaw.org/files/docs/when-discretion-means-denial.pdf>.

<sup>28</sup> VA. CODE ANN. § 18.2-103 (2016); 720 ILL. COMP. STAT. 5/16-25(f)(1) (2016). In Illinois, a person's second conviction for retail theft of items valued at less than \$300 classifies as a Class 4 felony.

<sup>29</sup> GALVESTON HOUS. AUTH., PUBLIC HOUSING ADMISSIONS AND CONTINUED OCCUPANCY POLICY 116 (2016), <http://www.ghatx.org/documents/PH%20ACOP%20FINAL%20with%20Links%202016%20March%2028.pdf>.

<sup>30</sup> See, e.g., NACOGDOCHES COMMUNITIES LLC, SANDY OAKS & PARKCREST TENANT SELECTION AND OCCUPANCY PLAN 8, <http://www.nacogdoches-ha.org/NACForms/Tenant%20Selection%20Plan.pdf>.

<sup>31</sup> 24 C.F.R. § 960.203(d)(1) (2016).

<sup>32</sup> See TRAN-LEUNG, *supra* note 23, at 29.

## B. *The Private Rental Market*

While our report focused on federally subsidized housing, we have found that the private rental market is afflicted with similar problems around criminal records screening. Examples abound across the country. In Austin, Texas, a survey of local affordable housing providers found identical issues arising their use of arrests, unreasonable lookback periods, overbroad categories of criminal activity, and negligible opportunities to present evidence of rehabilitation.<sup>33</sup> According to researchers conducting a study in Baltimore, Dallas, and Cleveland, few of the 130 landlords being studied would admit an applicant with a felony record.<sup>34</sup> In New York City, a 900+ unit housing development has a policy of denying housing to anyone who has ever been convicted of a crime, even if the person is likely to be a good tenant.<sup>35</sup> Finally, earlier this year, the Washington State Attorney General investigated a number of Washington-based multi-family housing providers and identified five that banned anyone with a prior felony conviction. Subsequently, the parties entered into consent decrees that required the housing providers to, among other things, adopt a policy of non-discrimination against people with criminal records and attend relevant fair housing trainings.<sup>36</sup>

Discrimination exists not only in the way admissions policies are written, but also in how they are administered, as demonstrated by fair housing audits in New Orleans, Louisiana, and Washington, D.C. In these audits, African-American and white testers attempted to apply for rental units with identical criminal histories and explanations for those histories. Both audits showed that, more often than not, landlords and property managers treated the white testers more favorably than African-American testers. Some leasing agents portrayed the criminal background check policy as more flexible and forgiving for a white tester while telling the African-American tester that the same criminal record would result in an automatic denial.<sup>37</sup> One agent, for example, told the white tester, “I really don’t think you will have an issue with [your criminal record] because it was so long ago.” The African-American applicant, however, did not receive such reassurances.<sup>38</sup> Leasing agents were also more likely to express sympathy with the white tester than the African-American tester, selectively making comments such as “everyone has a past” and minor drug charges are “not a big deal.”<sup>39</sup> Scenarios like these show how criminal records can often stand in a proxy for race.

---

<sup>33</sup> AUSTIN/TRAVIS COUNTY REENTRY ROUNDTABLE, LOCKED OUT: CRIMINAL HISTORY BARRIERS TO AFFORDABLE RENTAL HOUSING IN AUSTIN & TRAVIS COUNTY, TEXAS 4 (2016), [http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final\\_.pdf](http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final_.pdf).

<sup>34</sup> Phillip ME Garboden & Eva Rosen, *How Landlords Discriminate*, TALKPOVERTY (May 17, 2016), <https://talkpoverty.org/2016/05/17/when-landlords-discriminate/>.

<sup>35</sup> Amended Complaint at 2, *Fortune Society v. Sandcastle Towers Hou. Dev’t Fund Corp. et al.*, No. 1:14-cv-6410 (E.D.NY. May 1, 2015), <http://www.relmanlaw.com/docs/FortuneSocietyAmendedComplaint.pdf>.

<sup>36</sup> Press Release, Wash. State Office of Att’y Gen., AG Takes on Discriminatory Blanket Housing Bans on Renters with Criminal Histories (Jan. 23, 2017) (including links to the individual consent decrees), <http://www.atg.wa.gov/news/news-releases/ag-takes-discriminatory-blanket-housing-bans-renters-criminal-histories>.

<sup>37</sup> EQUAL RIGHTS CENTER, UNLOCKING DISCRIMINATION: A DC AREA TESTING INVESTIGATION ABOUT RACIAL DISCRIMINATION AND CRIMINAL RECORDS SCREENING IN HOUSING 24-26 (2016), <https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf>.

<sup>38</sup> *Id.* at 26.

<sup>39</sup> GREATER NEW ORLEANS FAIR HOUS. ACTION CNTR., LOCKED OUT: CRIMINAL BACKGROUND CHECKS AS A TOOL FOR DISCRIMINATION 26 (2015), [http://www.gnofairhousing.org/wp-content/uploads/2015/09/Criminal\\_Background\\_Audit\\_FINAL.pdf](http://www.gnofairhousing.org/wp-content/uploads/2015/09/Criminal_Background_Audit_FINAL.pdf).

Two developments have contributed to the overall increase in criminal records screening on the private rental market. In recent years, the number of tenant screening companies has proliferated, as has the technical ease with which they can provide criminal background checks to housing providers. As a result, landlords are able to access an applicant's criminal record more quickly and cheaply than ever before. Taking notice, many municipalities are increasingly adopting crime-free rental ordinances, which often require landlords to conduct criminal background checks on prospective and current tenants in a misguided attempt to control crime in their cities. Because these ordinances are usually silent on the type of screening criteria landlords should adopt, however, landlords looking to preserve their ability to do business in a given jurisdiction will often be overly cautious and take an overly broad approach to their screening practices, thus contributing to an increasingly harsh housing environment for people with criminal records.<sup>40</sup>

### **III. Governmental Efforts to Reduce Housing Barriers for People with Criminal Records**

#### *A. Actions by the U.S. Department of Housing & Urban Development*

To help combat housing barriers for people with criminal records, HUD has taken two important steps: (1) reminding public housing authorities and project owners of their obligations under federal law, and (2) issuing guidance on the fair housing implications of the use of criminal records by federally subsidized housing providers as well as landlords on the private rental market. These developments are encouraging in their capacity to help increase housing opportunities for justice-involved individuals, but more work remains to be done on the federal level.

##### 1. HUD Notice PIH 2015-19/H 2015-10

In late 2015, HUD issued Notice PIH 2015-19/H 2015-10, which reminded PHAs and project owners of the procedural and substantive protections that federal law gives to applicants and residents with criminal records in the public housing and voucher programs.

Most notably, the Notice clarified that an arrest record was not a permissible basis for denying admission or taking other adverse actions. Noting that one-third of all felony arrests in the 75 largest counties in the country never result in a conviction, the Notice explained that an arrest proved simply that a person had been suspected of committing a crime, not that he had actually committed the crime.<sup>41</sup>

Moreover, the Notice noted that PHAs and project owners are not required to adopt “one-strike” policies that terminate housing assistance or evict residents who commit criminal activity. Instead, PHAs and project owners should use their discretion to consider all the relevant circumstances, such as the seriousness of the offending action, the effect that eviction of the entire household would have on family members not involved in the criminal activity, and the extent to

---

<sup>40</sup> See EMILY WERTH, THE COST OF BEING “CRIME-FREE”: LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 15 (2013), <http://povertylaw.org/files/docs/cost-of-being-crime-free.pdf>; see also Los Angeles Times Editorial Board, *Housing Discrimination Isn't a Crime-Fighting Tool*, L.A. TIMES (May 16, 2016), <http://www.latimes.com/opinion/editorials/la-ed-0516-hesperia-20160516-story.html>.

<sup>41</sup> OFFICE OF PUBLIC & INDIAN HOUS., U.S. DEP'T. OF HOUS. & URBAN DEV., NOTICE PIH 2015-19, GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 3-4 (2015) [hereinafter HUD NOTICE PIH 2015-19] (citing BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009, at 22 tbl. 21 (2013)), <https://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf>

which the leaseholder has taken all reasonable steps to prevent or mitigate the criminal activity.<sup>42</sup> In addition, the Notice reiterated the procedural protections to which applicants and tenants are entitled, such as notice and an opportunity to dispute the accuracy and relevance of a criminal record before the PHA denies admission or assistance.<sup>43</sup>

The Notice also offered examples of best practices by PHAs to help people with criminal records.<sup>44</sup> Beyond the Notice, HUD's Office of Public and Indian Housing also made efforts to educate PHAs and encourage them to adopt more reasonable criminal records policies. In July 2016, HUD PIH released a toolkit for PHAs that included a catalog of PHAs with forward-thinking reentry programs and policies.<sup>45</sup> Furthermore, in partnership with the U.S. Department of Justice, HUD implemented the Juvenile Reentry Assistance Program demonstration, which provided grants to PHAs and legal aid providers to help youth expunge their records and assist them in addressing the collateral consequences caused by their criminal records.<sup>46</sup>

One outstanding issue that the Notice failed to address concerns reasonable time limits on the use of criminal records. By federal law, subsidized housing providers may only consider criminal activity that took place within a "reasonable time" before screening. Yet, as our report showed, for a number of housing providers who either impose no time limits or use overly long lookback periods, criminal history factors into the admissions analysis long after outgrowing its relevance. Without further guidance from HUD on this issue, these practices are likely to continue.

While the Notice was a welcome step in improving the housing opportunities for people with criminal records, especially those with arrest records, implementation and enforcement of the Notice has fallen short of expectation. For example, although HUD stated clearly that arrest records are not a proper basis for denying housing, it has muddied the water by subsequently stating that police reports describing the circumstances of the arrest are a suitable alternative.<sup>47</sup> Like arrest records, police reports indicate nothing more than suspicions, and they do not provide reliably probative evidence about whether the person actually committed the crime. Police reports, therefore, suffer the same deficiency as arrest records and should play only a very limited role in the screening process.

Also of concern are HUD's efforts to enforce the Notice. Although HUD has "encourage[d] PHAs to revise their [written admissions policies] as they relate to criminal records in order to better facilitate access to HUD-assisted housing for applicants who, despite their criminal history, do not pose a threat to the health or safety of residents or staff," it is unclear whether HUD will take affirmative steps to ensure that these written policies include all the protections laid out in the

---

<sup>42</sup> *Id.* at 2-3.

<sup>43</sup> *Id.* at 4-5.

<sup>44</sup> *Id.* at 5-7.

<sup>45</sup> U.S. DEP'T. OF HOUS. & URBAN DEV., IT STARTS WITH HOUSING: PUBLIC HOUSING AGENCIES ARE MAKING SECOND CHANCES REAL (2016) [hereinafter IT STARTS WITH HOUSING], [https://portal.hud.gov/hudportal/documents/huddoc?id=HUD\\_It\\_Starts\\_with\\_Housing.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_It_Starts_with_Housing.pdf).

<sup>46</sup> Press Release, U.S. Dep't. of Hous. & Urban Dev., HUD and Justice Department Award \$1.75 Million to Help Justice-Involved Youth Find Jobs and Housing (Apr. 25, 2016), [https://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2016/HUDNo\\_16-056](https://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2016/HUDNo_16-056)

<sup>47</sup> U.S. DEP'T. OF HOUS. & URBAN DEV., FAQs: EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 2 (2016), <https://portal.hud.gov/hudportal/documents/huddoc?id=faqexcludearrestrec33116.pdf> [hereinafter ARREST RECORDS FAQs].

Notice.<sup>48</sup> If not, then these protections are very unlikely to help all the applicants and residents with criminal records in the HUD-assisted programs.

## 2. Ensuring Fair Housing for People with Criminal Records

The Notice also warned PHAs and project owners that their criminal records policies must comply with civil rights laws, including the federal Fair Housing Act.<sup>49</sup> Five months later, HUD's Office of General Counsel issued important guidance that outlined the fair housing rights of people with criminal records.<sup>50</sup> Unlike the Notice, the guidance applied to both the private rental market as well as federally subsidized housing.

The Fair Housing Act prohibits housing discrimination on the basis of protected classes, such as race, national origin, sex, and familial status.<sup>51</sup> Although criminal records status is not a protected class, the Guidance clarified that a housing provider's criminal records policies may nonetheless give rise to a FHA violation under the theories of discriminatory treatment or disparate impact.

In cases of **discriminatory treatment**, a housing provider uses a person's criminal record intentionally to treat a person differently on the basis of race, national origin, or other protected class.<sup>52</sup> Examples of discriminatory treatment can be found in the audits from New Orleans and Washington, D.C., where leasing agents described more flexible criminal records policies for white testers than for African-American testers.<sup>53</sup> In these relatively straightforward cases, the criminal record serve as a proxy for protected classes.

In cases of **disparate impact**, criminal records policies that are neutral on their face may nonetheless violate the FHA if they have an unjustified, disparate impact on a protected class. In the first part of this three-step analysis, the question is whether the policy has a disparate impact. Here, the Guidance notes that local, state, and national statistics may be sufficient to establish disparate impact and highlights pertinent national statistics. For example, while the number of African Americans in prison in 2014 was triple their share of the general population nationwide, non-white Hispanics, who comprised more than 60% of the general population, accounted for approximately one-third of the prison population in the same time frame.<sup>54</sup> Given that studies have shown racial disparities to mar the criminal justice system from arrest to sentencing,<sup>55</sup> most criminal records policies will be vulnerable under this first prong.

---

<sup>48</sup> *Id.* at 3.

<sup>49</sup> See HUD NOTICE PIH 2015-19, *supra* note 41, at 5.

<sup>50</sup> U.S. DEP'T. OF HOUS. & URBAN DEV, OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016), [hereinafter HUD FAIR HOUSING GUIDANCE] [https://portal.hud.gov/hudportal/documents/huddoc?id=hud\\_ogcguidappfhastandcr.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastandcr.pdf).

<sup>51</sup> 42 U.S.C. § 3604(a)-(b) (2016).

<sup>52</sup> See HUD FAIR HOUSING GUIDANCE, *supra* note 50, at 8-10.

<sup>53</sup> See *supra* notes 37-39 and accompanying text.

<sup>54</sup> See HUD FAIR HOUSING GUIDANCE, *supra* note 50, at 3-4.

<sup>55</sup> See generally SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2013), <http://www.sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf>.

The second question is whether the policy is justified, *i.e.*, whether it is necessary to achieve a substantial, legitimate and nondiscriminatory interest of the housing provider. Recognizing that housing providers have an interest in protecting the safety of their residents and others, the Guidance nevertheless stressed that “bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient” to satisfy this question.<sup>56</sup> In analyzing this second question, the Guidance set forth three broad principles:

1. Policies that deny housing on the basis of **arrests that have not resulted in a conviction** are unlikely to satisfy this prong. Since arrests by themselves are not proof of criminal activity, arrest records screening cannot reliably protect resident safety and/or property.<sup>57</sup>
2. Policies that deny housing on the basis of any conviction – essentially, **blanket bans on convictions** – are also unlikely to satisfy this prong because such policies will capture individuals with old, minor, or irrelevant criminal records whose exclusion will not protect resident safety and/or property.<sup>58</sup>
3. Finally, even if a policy denies housing on the basis of **a more narrowly tailored set of convictions**, housing providers must still show that the policy is necessary to achieve a substantial, legitimate, and non-discriminatory interest. Housing providers that fail to consider the nature, severity, or recency of the underlying criminal conduct are unlikely to satisfy this standard.<sup>59</sup>

The last question in the three-step analysis asks whether a less discriminatory alternative to the criminal records policy in question exists. According to the Guidance, a policy that includes an individualized assessment of a person’s relevant mitigating information was likely to meet this standard. Examples of relevant mitigating information includes the circumstances surrounding the criminal activity, the age at the time of the criminal activity, the person’s tenant history, and any evidence of rehabilitation. The Guidance also advised that a less discriminatory alternative may include a policy that requires the housing provider to determine a person’s qualification before analyzing any criminal history information, which resembles the “ban-the-box” policies more commonly found in the context of employment and criminal records.<sup>60</sup>

The U.S. Department of Justice affirmed the legal framework set forth in the Guidance in a Statement of Interest filed last fall in *Fortune Society v. Sandcastle Housing Development Fund Corp. et al.* The plaintiff, the Fortune Society, is a non-profit organization based in New York City that provides services to over 5000 formerly incarcerated individuals every year, 95% of whom are African American or Latino. Helping its clients to find and secure housing, the Fortune Society attempted to place clients at the Sand Castle, a 900-plus-unit property in an affordable part of the city close to

---

<sup>56</sup> See HUD FAIR HOUSING GUIDANCE, *supra* note 50, at 5.

<sup>57</sup> *Id.* at 5-6.

<sup>58</sup> *Id.* at 6. A significant exception applies to this principle: these fair housing protections do not extend to convictions for “the illegal manufacture or distribution of a controlled substance as defined under Section 102 of the Controlled Substances Act.” 42 U.S.C. § 3607(b)(4) (2016). Note, however, that this exception only applies to disparate impact claims. A housing provider that intentionally discriminates against persons who have been convicted of manufacturing or distributing drugs on the basis of race, national origin, or other protected class may still found to be in violation of the Fair Housing Act under the theory of discriminatory treatment.

<sup>59</sup> See HUD FAIR HOUSING GUIDANCE, *supra* note 50, at 6-7.

<sup>60</sup> *Id.* at 7.

public transportation.<sup>61</sup> In one of the first federal cases to challenge a criminal records policy under the disparate impact theory of the FHA, the Fortune Society is challenging the Sand Castle’s practice of denying admission to anyone with a prior criminal conviction, regardless of how minor the crime was or how much progress a person has made since leaving the criminal justice system.<sup>62</sup> The case is currently pending in the Eastern District of New York.

Like the Notice and the Guidance, much of HUD’s efforts to help people with criminal records took place before the current presidential administration began. We are hoping that HUD will continue its work in this area, but whether this will happen is uncertain. On the one hand, during his confirmation process, HUD Secretary Ben Carson described his desire to help people coming home from the criminal justice system and to learn more about the role HUD could play in this process, signaling a possible openness to addressing these issues.<sup>63</sup> On the other hand, much of HUD’s progress resulted from its participation in the Federal Interagency Reentry Council, a Cabinet-level working group focused on advancing reentry and convened by the U.S. Department of Justice.<sup>64</sup> With the change in leadership at DOJ and the uncertain future of the Federal Interagency Reentry Council, advances in the reentry sphere may not receive the same priority as before. Until HUD makes its intentions known around reentry, progress may have to come from other federal actors as well as state and local governments.

### ***B. Legislative Responses from Federal, State, and Local Governments***

While waiting for HUD to take concrete actions, legislators at the federal, state and local level have attempted to strengthen housing protections for people with criminal records on their own. In April 2016, U.S. Representative Maxine Waters introduced in Congress the Fair Chance at Housing Act (H.R. 5085), a bill aimed at dismantling various barriers that people with criminal records face when trying to access and maintain federally subsidized housing. In particular, the bill attempted to limit the types of criminal activity that could lead to an adverse housing decision. It also sought to increase the standards by which PHAs and project owners could deny admission, terminate assistance, or evict a person for criminal activity, requiring that the decision-maker consider all the mitigating evidence that a person had to offer.<sup>65</sup>

Efforts to increase housing opportunities for people with criminal records have become law in only two states. **Oregon** prohibits landlords from considering arrests that have not resulted in a conviction. As for convictions and pending charges, they may consider the following types of criminal activity: drug-related crimes; person crimes; sex offenses; crimes involving financial fraud (including identity theft and forgery); and other crimes where the underlying conduct “would adversely affect property of the property of the landlord or a tenant or the health, safety, or right to

---

<sup>61</sup> Press Release, Fortune Society, *New Lawsuit Challenges Landlord’s Ban on Renting to Those with Criminal Records* (Oct. 31, 2014), <https://fortunesociety.org/2014/10/31/press-release-new-lawsuit-challenges-landlords-ban-on-renting-to-those-with-criminal-records/>

<sup>62</sup> See Amended Complaint, *supra* note 35.

<sup>63</sup> U.S. Senator Sherrod Brown, *Questions for Dr. Benjamin Carson, Secretary-Designate, U.S. Department of Housing and Urban Development from Ranking Member Brown* (Jan. 12, 2017), *available at* <https://www.brown.senate.gov/newsroom/press/release/brown-statement-on-banking-committees-approval-of-carson-for-hud-secretary>.

<sup>64</sup> FEDERAL INTERAGENCY REENTRY COUNCIL, *A RECORD OF PROGRESS AND A ROADMAP FOR THE FUTURE* 49-52 (2016), <https://csgjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry-Report.pdf>

<sup>65</sup> Fair Chance at Housing Act, H.R. 5085, 114<sup>th</sup> Cong. (2016).

peaceful enjoyment of the premises of residents, the landlord or the landlord's agent."<sup>66</sup> **Texas** took a different tack: instead of creating an additional basis of liability, state law instead limits the liability of landlords who lease to people with criminal records, as long as the underlying criminal activity is not defined as "violent" or "sexually violent" under state law.<sup>67</sup>

A small number of states have instead turned to administrative efforts. In **California**, the Fair Employment and Housing Council has proposed regulations that, if promulgated, would govern the use of criminal history records in both private and publicly subsidized housing.<sup>68</sup> In **North Carolina**, the state's housing finance agency developed a model criminal background check policy that it strongly encouraged landlords in its housing programs to adopt.<sup>69</sup> And last year, **New York State Homes and Community Renewal** issued guidance to certain state-funded housing providers on their use of criminal records.<sup>70</sup> Similar to HUD's fair housing guidance, the New York guidance prohibits the use of arrests that have not resulted in a conviction, as well as convictions that have been excused by pardon, overturned on appeal, or otherwise vacated. Housing providers may consider convictions or pending arrests only if the underlying offense either (i) "involved physical danger or violence to persons or property" or (ii) "adversely affected the health, safety, or welfare of other people." Even when considering such convictions, a housing provider must conduct an individualized assessment of the applicant, weighing all factors under the totality of the circumstances.<sup>71</sup> Finally, the applicant is entitled to certain procedural protections, such as notice and a pre-decision opportunity to review and explain information the criminal background check, written notice of the housing provider's denial of admission, and a post-denial opportunity to respond to the housing provider's decision.<sup>72</sup> Housing providers are even given a worksheet so that they can document the decision-making process.<sup>73</sup>

---

<sup>66</sup> OR. REV. STAT. § 90.303 (2016).

<sup>67</sup> TEX. PROP. CODE ANN. § 92.025 (2016).

<sup>68</sup> California Fair Employment & Housing Council, Proposed Text of Housing Regulations Regarding Discriminatory Effect, Discriminatory Land Use Practices, and Use of Criminal History Information 6-10 (2017) <https://www.dfeh.ca.gov/files/2017/02/Text-HouseRegDiscriminatoryEffectLandUsePracticesandCriminalHistory.pdf>; *see also* California Fair Employment & Housing Council, Initial Statement of Reasons 19-29 (2017), <https://www.dfeh.ca.gov/files/2017/02/InitStmtofReason-HouseRegDiscriminatoryEffectLandUsePracticesandCriminalHistory.pdf>.

<sup>69</sup> Memorandum from Paul Kimball, North Carolina Hous. Fin. Agency to All Owners and Managers of Affordable Rental Housing with an NCFHA Regulatory Agreement (Feb. 8, 2016) (see attachment entitled "Model Policy on Screening Applicants with Criminal Records"), <http://www.fairhousingnc.org/wp-content/uploads/2016/05/NCHFA-Memo2.8.16.pdf>.

<sup>70</sup> The covered subsidy programs include New York state-funded public housing, Section 8 vouchers administered by New York State Homes and Community Renewal, and housing funded by the New York State Housing Finance Agency. NEW YORK STATE HOMES & COMMUNITY RENEWAL, GUIDE FOR APPLYING NEW YORK STATE'S ANTI-DISCRIMINATION POLICIES WHEN ASSESSING APPLICANTS FOR STATE-FUNDED HOUSING WHO HAVE CRIMINAL CONVICTIONS 1 (2016), [http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC\\_Guidance\\_Document.pdf](http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC_Guidance_Document.pdf). [hereinafter NEW YORK STATE GUIDE].

<sup>71</sup> *Id.* at 1-2.

<sup>72</sup> *Id.* at 2.

<sup>73</sup> Worksheet for Applying New York State's Anti-Discrimination Policies When Assessing Applicants for State-Funded Housing Who Have Criminal Convictions (2016), [http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC\\_Worksheet.pdf](http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC_Worksheet.pdf); *see also* NEW YORK STATE GUIDE, *supra* note 70, at 2-5 (explaining the reasoning behind the worksheet).

At the local level, a handful of municipalities have enacted legislation in recent years to increase access to housing for people with criminal records: Newark, New Jersey (2012);<sup>74</sup> San Francisco, California (2014);<sup>75</sup> Richmond, California (2016);<sup>76</sup> and Washington, D.C (2016).<sup>77</sup> The common elements of these ordinances include provisions that:

1. Prohibit certain housing providers from considering certain types of criminal activity, such as arrests that have not lead to convictions, expunged and sealed records, and juvenile records;<sup>78</sup>
2. Set limits on how far back housing providers can inquire about a person’s criminal history;<sup>79</sup>
3. Require housing providers to conduct individualized assessments of applicants using multiple factors, such as the nature, severity, and recency of the criminal activity;<sup>80</sup>
4. Install procedural safeguards to add transparency to the decision-making process, such as delaying consideration of criminal history information until after the housing makes a conditional offer to the applicant.<sup>81</sup>

In addition, the adjacent Illinois cities of Urbana and Champaign have longstanding ordinances outlawing housing discrimination on the basis of prior arrests and convictions.<sup>82</sup> The Urbana ordinance has no limit on its anti-discrimination provision, but under an exception in Champaign, housing providers may deny housing to individuals who have been convicted of (i) a forcible felony, (ii) a felony drug offense, or (iii) the sale, manufacture, or distribution of illegal drugs. This exception

---

<sup>74</sup> NEWARK, N.J. MUNI. CODE, tit. 2, §§ 31-1 to 31-9 (2016).

<sup>75</sup> S.F., CAL., POLICE CODE, art. 49, § 4906 (2016) (“Procedures for Considering Arrests and Convictions and Related Information in Employment and Housing Decisions”).

<sup>76</sup> Richmond, Cal., Ordinance 20-16 N.S. (Dec. 20, 2016), <http://www.ci.richmond.ca.us/ArchiveCenter/ViewFile/Item/7690>.

<sup>77</sup> Washington, D.C., Bill 21-706 (Dec. 21, 2016), <http://lims.dccouncil.us/Download/35646/B21-0706-Engrossment.pdf>.

<sup>78</sup> The San Francisco ordinance applies to city-funding housing providers. S.F., CAL., POLICE CODE, art. 49, § 4903 (definition of “affordable housing”). The Richmond ordinance applies to affordable housing providers. Richmond, Cal., Ordinance 20-16 N.S., § 7.110.040(b). The ordinances in Washington, D.C., and Newark apply to all housing providers.

<sup>79</sup> Richmond bars the use of convictions that are older than two years. Richmond, Cal., Ordinance 20-16 N.S., § 7.110.050(a)(5). San Francisco and Washington, D.C. bar the use of convictions older than seven years. S.F., CAL., POLICE CODE, art. 49, § 4906(a)(5); Washington, D.C., Bill 21-706 § 3(d). Washington, D.C. also places limits on the universe of convictions and pending arrests that a landlord can consider. Washington, D.C., Bill 21-706 § 3(d). Newark limits the use of convictions for indictable offenses to eight years; it also limits the use of convictions for disorderly persons offenses and municipal ordinances violations for five years. NEWARK, N.J. MUNI. CODE, tit. 2, § 31-3.

<sup>80</sup> NEWARK, N.J. MUNI. CODE, tit. 2, § 31-4 (required considerations); S.F., CAL., POLICE CODE, art. 49, § 4906(f) (individualized assessment required); Richmond, Cal., Ordinance 20-16 N.S., § 7.110.050(e) (individualized assessment required); Washington, D.C., Bill 21-706 § (3)(e) (required considerations).

<sup>81</sup> NEWARK, N.J. MUNI. CODE, tit. 2, § 31-2 (“ban-the-box” & notice requirements), § 31-5 (notice requirements); S.F., CAL., POLICE CODE, art. 49, § 4906(b)-(c) (“ban-the-box”), § 4906(d)-(e) & (g)-(i) (notice and hearing requirements); Richmond, Cal., Ordinance 20-16 N.S., § 7.110.050(c) (“ban-the-box”), § 7.110.050(d) (opportunity to provide evidence of rehabilitation or other mitigating evidence), § 7.110.050(f) (additional procedures), § 7.110.080 (recordkeeping requirements).

<sup>82</sup> CHAMPAIGN, ILL. CODE §§ 17-2, 17-3 (2016); URBANA, ILL. CODE §§ 12-39, 12-64 (2016).

does not apply to anyone who has lived outside of prison for five years without being subsequently convicted for a similar offense.<sup>83</sup>

In Wisconsin, similar housing protections once existed in the cities of Madison and Appleton as well as Dane County.<sup>84</sup> In 2013, however, the Wisconsin legislature passed a law that stripped these and other localities from offering such ordinances that offered more tenant protections than the minimum provided by the state.<sup>85</sup> Municipalities considering these ordinances, therefore, must be mindful of such possible setbacks.

Finally, similar to state administrative efforts, there have been local efforts to protect the fair housing rights of people with criminal records administratively. The Boston Department of Neighborhood Development, for instance, recently developed a fair chance tenant selection policy that housing providers must adopt as a condition of receiving funds or land from the department.<sup>86</sup>

In summary, there have been a growing number of efforts, especially by states and municipalities, to take affirmative steps to increase housing opportunities for people with criminal records. Even more jurisdictions are at various stages of considering the types of legislation discussed above. As encouraging as these developments are, however, state and local protections are few. Where local protections do not exist, people with criminal records will have to rely on enforcement of the federal Fair Housing Act to protect their housing rights, and it is unclear at this time whether HUD affirmatively acts in this realm. Many more state and local legislatures and administrative bodies will need to step up, therefore, if we want to help protect the housing rights of the more than 70 million people in the United States living with a criminal record.

### *C. Policy Responses from Public Housing Authorities*

Like states and municipalities, public housing authorities can be important partners in helping ensure that people with criminal records get a fair chance at housing. Heeding the call from HUD to give people this fair chance, a number of PHAs have taken steps to make their housing programs more accessible, offering important models for their peers in both subsidized and private housing. In November 2013, for example, the New York City Housing Authority (NYCHA) started its Family Reentry Pilot Program, whose purpose was to reunite people leaving the criminal justice system with family members living in NYCHA housing. In implementing this program, NYCHA sought to address a problem common in countless PHAs across the country: justice-involved individuals with little to no housing options living in the shadows with family members in federally subsidized housing, thus jeopardizing that housing for the whole family. Through the Family Reentry Pilot Program, the formerly incarcerated individual had access to an array of support

---

<sup>83</sup> CHAMPAIGN, ILL. CODE § 17-4.5 (2016).

<sup>84</sup> FAIR HOUSING COACH, THE DOS & DON'TS OF CONDUCTING CRIMINAL BACKGROUND CHECKS 6 (2012), <http://www.sentencingproject.org/wp-content/uploads/2016/04/Fair-Housing-Coach-Ex-Offender-Issue.pdf>.

<sup>85</sup> WIS. STAT. § 66.104(2)(a) (2016); *see also* Doug Erickson & Dean Mosiman, *In Raft of State Law Changes, Tenants Lost Ground to Landlords*, WIS. STATE J. (June 8, 2016), [http://host.madison.com/wsj/news/special/homeless/in-raft-of-state-law-changes-tenants-lost-ground-to/article\\_f021f5c3-f081-58e9-909e-6ac7b91f280c.html](http://host.madison.com/wsj/news/special/homeless/in-raft-of-state-law-changes-tenants-lost-ground-to/article_f021f5c3-f081-58e9-909e-6ac7b91f280c.html) (discussing past legislative changes that have curtailed housing protections for people with criminal records).

<sup>86</sup> BOSTON DEP'T OF NEIGHBORHOOD DEV'T, BOSTON FAIR CHANCE TENANT SELECTION POLICY (2017) (on file with author).

services and, upon successful completion of the program, the option of being permanently added to the family member's lease or, alternatively, seeking his or her own NYCHA unit.<sup>87</sup>

The Family Reentry Pilot Program has proven to be so successful that NYCHA is now working on expanding the pilot and making the program permanent.<sup>88</sup> Moreover, the success of the NYCHA program has spurred three other housing authorities in New York (Schenectady Public Housing Authority, Syracuse Housing Authority, and White Plains Housing Authority) to implement their own pilot programs to help justice-involved individuals to reunite with their families in subsidized housing.<sup>89</sup> Pilot programs with a similar goal of family reunification exist at the Chicago Housing Authority and the Housing Authority of the City of Los Angeles.<sup>90</sup>

Rather than start with a pilot program, some PHAs have instead opted to change their program policies outright, such as the Housing Authority of New Orleans. After a multi-year campaign by local advocates, HANO reversed its policy of automatically denying people with criminal records and instead adopted a plan that is more narrowly tailored, transparent, and practical.<sup>91</sup> For example, HANO has restricted its criminal records inquiry to an enumerated list of criminal activity, and if more than three years has passed since the conviction (or, alternatively, one year since release), criminal history will no longer factor into the admissions analysis.<sup>92</sup> Moreover, in adopting an "individualized assessment" approach with a three-person review panel, HANO has provided a list of relevant mitigating evidence as well as factors that it will consider, giving applicants a clear view of how the admissions process will proceed and thus making HANO more accountable to those applicants.<sup>93</sup> In addition to substantive and procedural changes, the HANO policy also led to an important shift in attitudes about people with criminal records: now, when applicants are subject to a criminal history review, they are placed on a track for "further review" rather than "denial," thereby affirming to both the applicant and housing authority staff that automatic denials should now be a thing of the past.<sup>94</sup> In operation for just over a year, HANO has reviewed

---

<sup>87</sup> For an in-depth look at NYCHA's pilot program, see JOHN BAE ET AL., VERA INST. OF JUSTICE, COMING HOME: AN EVALUATION OF THE NEW YORK CITY HOUSING AUTHORITY'S FAMILY REENTRY PILOT PROGRAM (2016), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/coming-home-nycha-family-reentry-pilot-program-evaluation/legacy\\_downloads/NYCHA\\_report-032917.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/coming-home-nycha-family-reentry-pilot-program-evaluation/legacy_downloads/NYCHA_report-032917.pdf).

<sup>88</sup> See Tolan, *supra* note 13.

<sup>89</sup> Corp. for Supportive Hous., Increasing Housing Opportunities for Formerly Incarcerated (March 6, 2017), <http://www.csh.org/2017/03/increasing-housing-opportunities-for-formerly-incarcerated>.

<sup>90</sup> See IT STARTS WITH HOUSING, *supra* note 45, at 10-11; CHICAGO HOUS. AUTH., CHICAGO HOUSING AUTHORITY DEMONSTRATION PROGRAM AND SPECIAL INITIATIVES OVERVIEW: REENTRY PILOT (2016), [http://www.thecha.org/assets/1/6/Reentry\\_Pilot\\_Program\\_rev\\_820161.pdf](http://www.thecha.org/assets/1/6/Reentry_Pilot_Program_rev_820161.pdf).

<sup>91</sup> Katy Reckdahl, *Housing Authority Eliminates Ban of Ex-Offenders*, SHELTERFORCE (July 5, 2016), <http://www.shelterforce.org/article/4535/housing-authority-eliminates-ban-of-ex-offenders/>

<sup>92</sup> HOUS. AUTH. OF NEW ORLEANS, CRIMINAL BACKGROUND SCREENING PROCEDURES 2-4 (2016), [https://www.hano.org/agency\\_plans/2016%20CRIMINAL%20BACKGROUND%20PROCEDURES%20-%20FINAL.pdf](https://www.hano.org/agency_plans/2016%20CRIMINAL%20BACKGROUND%20PROCEDURES%20-%20FINAL.pdf).

<sup>93</sup> *Id.* at 6-7.

<sup>94</sup> *Id.* at 5.

seventeen applicants and admitted fifteen, with the other two withdrawing their applications from consideration.<sup>95</sup>

PHAs officials who have adopted programs to help people with criminal records are often the first to tout their benefits. When individuals who have left the criminal justice system are able to reunite with their families openly, for example, PHAs do not have to deal with the unknown of a shadow population living off lease, which can ease their administrative duties. Conversations with PHA officials have also revealed that they incur far fewer administrative costs and spend less valuable staff time when they shift the focus of their admissions process to providing people with housing rather than keeping out individuals with criminal records. These administrative savings result from the decreased demand for informal hearings for applicants who have been denied housing and frees up the PHA's limited resources for more pressing problems. Furthermore, these policy changes have not negatively impacted the level of crime at their properties. Some PHAs have even found that these programs have actually helped to reduce recidivism in their communities. In Pennsylvania, the Union County Housing Authority provides housing vouchers and support services to individuals on parole or probation who have a substance abuse disorder and who exhibit a high risk of recidivism. Whereas the recidivism rate in Pennsylvania and Union County are 60% and 53% respectively, the rate of recidivism among the program participants over the last four years is 22% – a fraction of the state and county rates.<sup>96</sup> PHAs looking to reunite families, reduce administrative costs, and reduce recidivism should be considering adopting more reasonable criminal records policies.

We commend the leadership that these PHAs have shown in advancing the housing rights of people with criminal records. Given that they represent only a handful of the more than 3300 PHAs that operate across the country, however, more impactful change will require bold, clear-eyed leadership from HUD.

#### **IV. Recommendations for the U.S. Commission on Civil Rights**

We commend the U.S. Commission on Civil Rights for taking a close look at the issue of the collateral consequences of a criminal record, particularly in the housing arena. Although progress has been made on the federal, state, and local levels, more must be done to ensure that millions of people across the country are not unfairly shut out of the housing that they may need to leave the criminal justice system behind them. We urge the Commission to take the following further steps to address the collateral consequences of a criminal record.

First, we respectfully request that the Commission issue a report on this briefing that highlights the need for housing for people with criminal records as well as the barriers that people face upon returning to their communities in federally subsidized housing as well as on the private rental market. We also request that this report includes best practices based on examples from various jurisdictions that we have provided in this testimony.

Second, although our testimony is limited to housing, we ask the Commission to consider looking into the importance of access to health care, particularly behavioral health care, for justice-

---

<sup>95</sup> Jessica Williams, *A Year Later, HANO's Criminal Background Check Policy Still Not In Effect At Some Developments*, NEW ORLEANS ADVOCATE (Apr. 22, 2017), [http://www.theadvocate.com/new\\_orleans/news/politics/article\\_9d783f04-278c-11e7-9ee0-7fb36744c917.html](http://www.theadvocate.com/new_orleans/news/politics/article_9d783f04-278c-11e7-9ee0-7fb36744c917.html).

<sup>96</sup> DIANA T. MYERS & ASSOCS., INC., JUSTICE BRIDGE HOUSING PROGRAM: A SUCCESSFUL REENTRY PROGRAM OF THE HOUSING AUTHORITY OF UNION COUNTY, PENNSYLVANIA: REPLICATION TOOLKIT 9 (2016), <http://www.unioncountyhousingauthority.org/Documents/JBHP%20Toolkit%20FINAL-PRINT.pdf>.

involved individuals. For individuals leaving prison, Medicaid coverage can greatly improve their quality of life by giving them access to much needed health services and thus increasing the likelihood that they will successfully reintegrate into their communities. Technically, federal Medicaid law restricts coverage of individuals in prison while they are "inmates of public institutions." As a result, while people are in prison, the Medicaid program will pay only for services provided to them outside of the prison when they are hospitalized for more than 24 hours. Their coverage, however, becomes "unrestricted" upon their release from prison. Individuals should be leaving prison with a Medicaid card in their pocket and information on how to use it and how to keep their coverage intact. For this to happen, state departments of corrections and state Medicaid agencies must work together to enroll all Medicaid-eligible individuals in their state Medicaid programs while in prison and take whatever steps are necessary to switch their coverage from "restricted" to "unrestricted" before they leave the prison.<sup>97</sup> This enrollment must also occur in such a way as not to jeopardize any public benefits that the individual and the family he or she is rejoining upon release may receive, such as benefits under Temporary Assistance for Needy Families (TANF) or Supplemental Nutrition Assistance Program (SNAP). Given the number of people leaving the criminal justice system who would benefit from Medicaid coverage, we urge the Commission to look into this important topic as part of its review of the collateral consequences of a criminal record.

Finally, we thank the Commission for its time and attention to the various collateral consequences that hinder the reentry of justice-involved individuals and look forward to future discussions around these topics.

---

<sup>97</sup> In the thirty-two states (including the District of Columbia) that expanded Medicaid to low income adults under the Affordable Care Act (ACA), almost all prisoners are Medicaid eligible. In the states that did not expand Medicaid under the ACA, only prisoners who are 65 or over or totally and permanently disabled are Medicaid eligible. Because many people currently in prison did not meet the Medicaid coverage eligibility criteria before the Affordable Care Act's Medicaid expansion, many are unfamiliar with the Medicaid program. Instructions on how to use this program, therefore, are very important to their successful use of their coverage.