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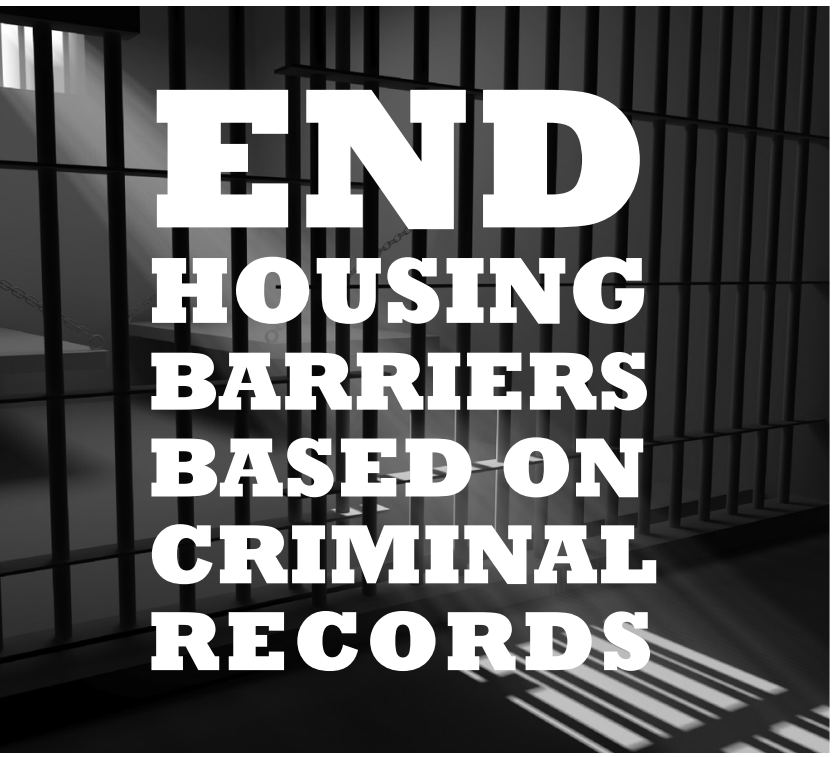

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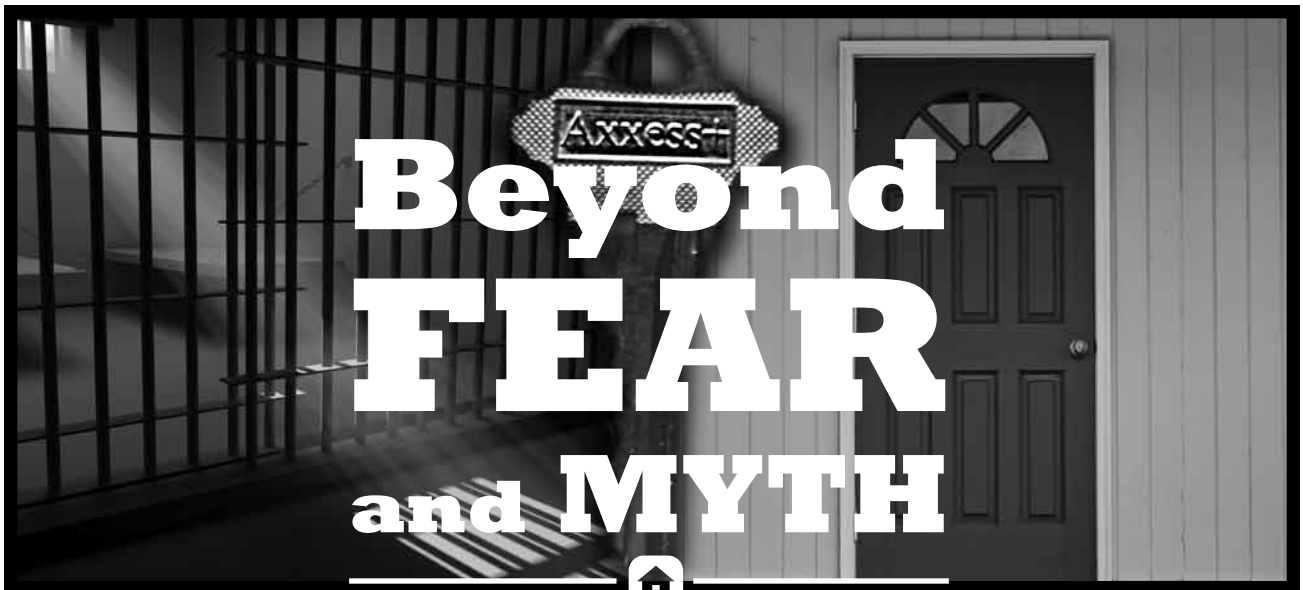

Using the Disparate Impact Theory Under the Fair Housing Act to Challenge Housing Barriers Against People with Criminal Records

By Marie Claire Tran-Leung

Marie Claire Tran-Leung
Staff Attorney/Soros Justice Fellow

Sargent Shriver National Center
on Poverty Law
50 E. Washington St. Suite 500
Chicago, IL 60602
312.368.3308
marieclairetran@povertylaw.org

When the issue of housing people with criminal records comes up, reason can often give way to fear. And where fear dominates, myths abound.

One persistent myth is that housing discrimination against people with criminal records is legal. Because of this myth, housing providers adopt policies that explicitly deny applicants with a criminal record, no matter how minor, old, or irrelevant the underlying offense is. Even when the policies are not explicit, people with criminal records have learned to dread questions on housing applications about prior arrests and convictions. Housing providers often justify these policies with yet another myth—that screening tenants with criminal records improves residential safety.

In reality the Fair Housing Act does not permit housing bans against people with criminal records. Although they do not constitute a protected class under this federal civil rights statute, people with criminal records may still be entitled to this law's protections against discrimination under the disparate impact theory. Under this theory, facially neutral policies violate the Act if they have an unjustified adverse effect on racial minorities.[1] Because racial minorities have disproportionately more contact with the criminal justice system than the general population, housing policies that ban people with criminal records adversely affect racial minorities.[2] Because housing providers are hard-pressed to justify this disparate impact, their policies very likely rise to the level of a violation of the Act.

This is not the first area where lawyers have used the disparate impact theory to challenge barriers to people with criminal records. Advocates have long understood that, in the area of employment, a criminal record often operates as a proxy for race. In the United States 1 out of every 106 adult white men are incarcerated; for Latino and black

[1]See *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977).

[2]See generally Sentencing Project, Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers (2008), http://bit.ly/haeiXB.

men, those numbers jump to 1 in 36 and 1 in 15, respectively.[3] In Chicago alone, 55 percent of black men have a felony record.[4] Given such racial disparities, both courts and civil rights enforcement agencies have declared that hiring bans against people with criminal records are highly suspect under Title VII of the Civil Rights Act of 1964 (Title VII).[5] Like the Fair Housing Act, Title VII prohibits not only employment policies that on their face discriminate on the basis of race but also employment policies that have a disparate, adverse impact on racial minorities.[6] Title VII offers a useful model for challenging housing barriers for people with criminal records under the Fair Housing Act.

Here I outline the basic components of a Fair Housing Act claim challenging housing policies that ban people with criminal records. I consider how criminal records policies have increased in both subsidized housing and the private rental market. After examining the relationship between Title VII and Fair Housing Act jurisprudence, I discuss how to challenge criminal records policies by using the disparate impact theory under the Act. I also touch upon the implications of these policies under the duty of affirmatively furthering fair housing under the Act.

The Problem

At more than 47 million, the number of people with a criminal record in the United States exceeds the population of the entire state of California.[7] For those living in poverty, affordable housing can be very difficult to come by, whether they have recently completed their sentences or have long left the criminal justice system.

For example, since the 1980s, concerns about drugs in public housing have led the U.S. Department of Housing and Urban Development (HUD) and public housing authorities to ratchet up their policies against applicants and tenants who engage in criminal activity.[8] Some public housing authorities have even rejected applicants whose criminal record consists of mere arrests, even though those arrests offer no proof of any past criminal activity.[9]

To make matters worse, the rental housing market is amidst an increase in municipal ordinances requiring landlords to ensure that their properties are free of crime. Under these "crime-free" ordinances, leases must give landlords the authority to evict tenants for any criminal activity, even if it is nonviolent, unrelated to drugs, and outside the tenant's control. In conjunction with these ordinances, some municipalities have mandated criminal background checks, sending the message to landlords that all tenants with criminal histories are more likely to bring criminal activity into their buildings.[10]

Even without these mandates, the shrinking costs of obtaining a criminal background check, combined with the growing pressure from municipalities to keep properties crime-free, make it

[3]Pew Center on the States, One in 100: Behind Bars in America 2008, at 6 (n.d.), http://bit.ly/hBPy5I.

[4]Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 184 (2010).

[5]See, e.g., *Green v. Missouri Pacific Railroad Company*, 523 F.2d 1290, 1298–99 (8th Cir. 1975) (hiring ban on people with past conviction records had unjustified disparate impact on African Americans in violation of Title VII); Equal Employment Opportunity Commission, EEOC Policy Statement on the Issue of Conviction Records [U]nder Title VII of the Civil Rights Act of 1964, as [A]mended, 42 U.S.C. [§§] 2000e *et seq.* (1982) (Feb. 4, 1987), http://1.usa.gov/gmmGu4.

[6]See *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

[7]Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion* 15, 18, in Invisible Punishment: The Collateral Consequences of Mass Imprisonment (Marc Mauer & Meda Chesney-Lind eds., 2002), http://bit.ly/hXsaeY.

[8]Paul Stinson, *Restoring Justice: How Congress Can Amend the One-Strike Laws in Federally Subsidized Public Housing to Ensure Due Process, Avoid Inequity, and Combat Crime*, 11 Georgetown Journal on Poverty Law and Policy 435, 436–40 (2004).

[9]See, e.g., *Landers v. Chicago Housing Authority*, 936 N.E.2d 735 (Ill. App. Ct. 2010).

[10]See, e.g., Aurora, Ill., Code Ordinances § 12-402(c) (2010) (requiring landlords to "conduct, or have conducted by a reputable agency, a criminal history/background investigation on prospective tenants of rental property"); see also David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 Law and Social Inquiry 5, 17–18 (2008) (describing "Crime-Free Multi-Housing" initiative and how it incentivizes tenant screening for criminal records).

easier for landlords to keep out people with criminal records rather than risk violating these ordinances and losing their rental licenses.[11] In 2005 four out of five members of the National Multi-Housing Council engaged in criminal records screening.[12] In a recent study of private landlords with properties in Akron, Ohio, nearly two-thirds of those surveyed indicated that they were not accepting applicants with criminal records.[13]

The paradox of these housing barriers is that housing can often make or break a person's attempts to stay out of the criminal justice system. One study found, for example, that parolees were much more likely to reintegrate successfully after leaving prison if they have stable housing. Otherwise the more often a parolee changes residence, the greater the chances that the parolee will reoffend.[14] Thus dismantling housing barriers against people with criminal records will likely increase rather than decrease public safety.

Fair Housing Act

The Fair Housing Act prohibits housing discrimination on the basis of race.[15] Besides instances of intentional racial discrimination, Fair Housing Act claims apply to facially neutral policies that have an unjustified adverse impact on racial minorities. Although the U.S. Supreme Court has not expressly endorsed the disparate impact theory in Fair Housing Act jurisprudence, eleven of the twelve federal circuits have.[16] The only circuit that has not expressly ruled on this issue is the D.C. Circuit, which, in recognition of the consensus of its sister circuits, has "assume[d] without deciding that [plaintiffs] may bring a disparate impact claim under the [Fair Housing Act]."[17] Furthermore, HUD—the agency charged with enforcing the Act—has also long incorporated disparate impact as a means of proving discrimination under the statute.[18]

Fair Housing Act and Title VII. To determine how to use the disparate impact theory to challenge criminal records barriers under the Fair Housing Act, we examine how similar challenges fare under Title VII. The Act and Title VII are "part of a coordinated scheme of federal civil rights laws enacted to end discrimination."[19] Both statutes contain identical language prohibiting actions taken "because of race."[20] The jurisprudence of one has long influenced the other, especially where disparate impact claims are concerned. The seminal case using

[11]See, e.g., Lynn M. Clark, *Landlord Attitudes Toward Renting to Released Offenders*, 71 Federal Probation 20, 24 (June 2007); cf. Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 Crime and Delinquency 64, 65 (2007) (describing how increased ease of obtaining criminal background check and lack of standards make employment discrimination more likely).

[12]Thacher, *supra* note 10, at 12.

[13]Clark, *supra* note 11, at 23.

[14]Matthew Markarios et al., *Examining the Predictors of Recidivism Among Men and Women Released from Prison in Ohio*, 37 Criminal Justice and Behavior, 1377, 1387–88 (2010).

[15]42 U.S.C. § 3604(a) (2006) (barring housing providers from "refus[ing] to sell or rent … or otherwise make unavailable or deny, a dwelling because of race"); 42 U.S.C. § 3604(b) (2006) (barring housing providers from "discriminat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling … because of race").

[16]*Langlois v. Abington Housing Authority*, 207 F.3d 43, 49 (1st Cir. 2000); *Pfaff v. HUD*, 88 F.3d 739, 745–46 (9th Cir. 1996); *Mountain Side Mobile Estates Partnership v. HUD*, 56 F.3d 1243, 1250–51 (10th Cir. 1995); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934–35 (2d Cir. 1988); *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574–75 (6th Cir. 1986); *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 986 (4th Cir. 1984); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146–48 (3d Cir. 1977); *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184–85 (8th Cir. 1974).

[17]*2922 Sherman Avenue Tenants' Association v. District of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006).

[18]Robert G. Schwemm & Sara K. Pratt, Disparate Impact Under the Fair Housing Act: A Proposed Approach 4–5 (Dec. 1, 2009), http://bit.ly/f44bEw.

[19]*Huntington Branch, NAACP*, 844 F.2d at 935.

[20]See 42 U.S.C. § 2000e-2(a) (2006); *id.* § 3604(a).

the disparate impact theory arose from a Title VII claim alleging employment discrimination.[21] Since then, courts adjudicating Fair Housing Act claims have consistently looked to Title VII case law for guidance.[22]

Under Title VII, employment discrimination on the basis of a person's criminal record is highly suspect. The Equal Employment Opportunity Commission (EEOC) (the federal agency charged with enforcing Title VII) has been delivering this message to employers for decades.[23] In fact, if a job applicant files a charge, EEOC presumes that these criminal records policies have a disparate impact because racial minorities, such as African Americans and Latinos, are disproportionately represented in the criminal justice system.[24]

The employer may rebut this presumption, but only by demonstrating that its policy is "job related and consistent with business necessity."[25] In the most recent case to address an employer's use of past criminal convictions, the Third Circuit noted that a successful rebuttal required the employer to show that its discriminatory hiring policies "accurately distinguish between applicants that pose an unacceptable level of risk and those that do not."[26] If the employer's rebuttal fails, its criminal records policy is then stricken as unlawful employment discrimination under Title VII.

In recent years, EEOC has renewed its enforcement efforts against overbroad criminal records policies through its Eradicating Racism and Colorism from Employment (E-RACE) initiative. As part of this initiative, EEOC has been updating its earlier policy guidance on the use of arrest and conviction records; the guidance was last updated in the 1980s.[27] Advocates have complemented EEOC's efforts by helping people with criminal records file EEOC charges and bring federal litigation challenging these polices under Title VII. As a result, employers and their counsel have become far more cognizant of the risks of excluding people from criminal records in all aspects of employment. As one trade publication recognized, EEOC's renewed enforcement efforts "will kick up questions about the role of criminal screening in hiring and the extent to which employers find false comfort in a relatively cheap and easy—but unproven—risk management tool while neglecting more effective measures to reduce workplace violence, theft, fraud and employment-related lawsuits."[28] Because housing providers' screening of applicants on the basis of past criminal arrests and convictions has similar deficiencies, the time has come for advocates to step up their efforts to lodge Fair Housing Act challenges to criminal records screening.

Disparate Impact: Plaintiff's Prima Facie Case. Because the exact formulation of the disparate impact test differs

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[21]*Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

[22]Christopher P. McCormack, Note, *Business Necessity in Title VII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 Fordham Law Review 563, 580 (1986).

[23]Equal Employment Opportunity Commission (EEOC), Compliance Manual § 15-VI.B.2 (2006), http://1.usa.gov/glAQIL.

[24]Equal Employment Opportunity Commission, *supra* note 5; see also Janet Ginzburg, Senior Staff Attorney, Community Legal Services, Statement at Equal Employment Opportunity Commission Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (Nov. 20, 2008), http://1.usa.gov/fW1ufQ.

[25]If a policy screens for convictions records, the employer must show that the employer considered three factors: (1) the nature and gravity of the offense, (2) the time elapsed since the applicant was convicted or completed the applicant's sentence, and (3) the relationship between the offense and the job sought. If a policy screens for arrest records, the employer must show that the underlying offense is related to the job sought. The employer must evaluate whether the applicant actually engaged in the activity for which the applicant was arrested (see EEOC Compliance Manual, *supra* note 23).

[26]*El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232, 245 (3d Cir. 2007). The court also noted that eliminating all risk in hiring decisions was nearly impossible (*id.* at 245 n.13).

[27]At writing, the EEOC had not released its updated policy guidance.

[28]Fay Hansen, *Special Report on Background Checking—Burden of Proof,* Workforce Management, Feb. 2010, at 27.

among the circuits, advocates should familiarize themselves with the tests adopted by their circuits.[29] The primary difference lies in whether the circuit shifts the burden of proving different elements of the test onto the plaintiff and the defendant. Whereas some circuits engage in burden-shifting, other circuits maintain the burden on the plaintiff to prove each element.[30] Regardless of into which camp a particular circuit falls, however, the basic elements are essentially the same. In this section I examine each of the elements under the most commonly adopted model, the burden-shifting analysis.

Initially the burden of proving that the challenged policy has a disparate racial impact falls on the plaintiff. The challenged screening policy will have a disparate racial impact if it has "a greater adverse impact on one racial group than another."[31] For this task, statistical evidence is often in order, as is an expert to decipher the statistics. In the context of criminal records screening policies, the plaintiff must show that racial minorities have disproportionately more contact with the criminal justice system than the general population. Whether rates of arrest, conviction, or incarceration are necessary depends on the specific screening policy being challenged.[32] Plaintiffs can also bolster their arguments of disparate impact by showing that the need for specific types of housing (e.g., subsidized housing, rental housing) is also disproportionately greater for a particular racial minority group.[33]

The plaintiff may create a stronger case if the plaintiff produces local statistics. For example, in arguing that a housing authority's arrest records screening policy had a disparate impact on African Americans, *amici* in *Landers v. Chicago Housing Authority* relied on city-level statistics.[34] At the time African Americans represented the overwhelming majority of the city's public housing applicants (60 percent), Housing Choice Voucher applicants (80 percent), and persons arrested by the Chicago Police Department (75 percent).[35] Because only one-third of Chicagoans are African American, *amici* argued, a policy that screened applicants based on their arrest records would have had a disparate and adverse impact on this racial population.

If local statistics are not available, a plaintiff may rely on state-level or national data to illuminate the adverse impact that criminal records screening has on racial minorities. The use of these broader statistics has precedent. In the employment context, for instance, EEOC's policy guidance on the use of criminal records is premised on racial minorities nationally being disproportionately represented in the criminal justice system as opposed to the general population. The U.S. Department of Justice's Bureau of Justice Statistics is a good source of statistics about the criminal justice system, as are comparable state agencies. Another rich source of statistics is a Pew Center on the States' 2009 study, according to which African American adults are four times as likely as whites to be under correctional supervision, a category that includes prison, jail, parole, and probation.[36] Whereas the national cor-

[29]For the principal circuit court decisions endorsing the disparate impact theory in Fair Housing Act claims, see Schwemm & Pratt, *supra* note 18, at 6–7.

[30]For a breakdown of circuits that do and do not adopt a burden-shifting analysis, see Columbia Legal Services, Fair Housing Disparate Impact Claims Based on the Use of Criminal and Eviction Records in Tenant Screening Policies 20 n.29 (Jan. 2011), http://bit.ly/f6zqOE.

[31]*Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); see also *Wallace v. Chicago Housing Authority*, 321 F. Supp. 2d 968, 973 (N.D. Ill. 2004) (Clearinghouse No. 55,072) ("Plaintiffs can establish a prima facie disparate impact case under the [Fair Housing Act] simply by showing that Defendants' actions had discriminatory effects upon a protected class.").

[32]E.g., if a policy bans applicants with prior convictions, supplying the court with arrest statistics may not be necessary.

[33]See Columbia Legal Services, *supra* note 30, at 24.

[34]Brief of Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School et al. as Amici Curiae Supporting Plaintiff-Appellee, *Landers v. Chicago Housing Authority*, 936 N.E.2d 735 (Ill. App. Ct. 2010) (No. 09-1717).

[35]*Id.* at 7–8.

[36]Pew Center on the States, One in 31: The Long Reach of American Corrections 5 (March 2009), http://bit.ly/fGc2i5.

rectional population includes one out of every forty-five white adults, the statistic for African American adults surges to one in eleven.[37] The Pew study includes similar statistics for states.[38]

Disparate Impact: Defendant's Burden to Show that the Challenged Policy Is Justified by a Legitimate Interest. Once the plaintiff has established the plaintiff's prima facie case, the burden shifts from the plaintiff to the defendant to prove that the defendant has a legitimate interest and that this legitimate interest justifies the challenged policy's disparate racial impact.[39] At this stage, defendant-housing providers undoubtedly refer to public safety as the legitimate interest that justifies their criminal records screening policies. Public housing authorities, for example, may point to the U.S. Housing Act, which lists as one of its goals the promotion of safe, decent, and affordable housing.[40] Private landlords similarly tend to cite safety as their primary justification for screening people with criminal records.[41]

Whether criminal records screening actually serves the purpose of promoting resident safety is questionable, although few people dispute the need for a policy that promotes such a purpose. If the policy does not serve the purpose, the policy is deemed unjustifiable.[42] As the chief justice of West Virginia's highest court once noted, "[a]lthough excluding all persons with criminal records may indeed work toward accomplishing [these] stated ends, the blanket presumption that all persons with criminal records are a threat to people and property is difficult to sustain."[43] Ultimately, whether a criminal records policy is effective depends on whether it reduces crime, and whether it reduces crime depends, in part, on whether people with criminal records are more likely to engage in criminal activity in the future than are people in the general population. Recent studies have undermined both propositions.

In a study of old criminal records and whether they can predict future criminal activity, for example, researchers panned the use of blanket bans against people with criminal records.[44] In the housing context, blanket bans usually consist of automatic denials against broad categories of applicants, such as applicants with a criminal record, applicants with a conviction, or applicants with a felony conviction. Housing policies that impose a decades-long waiting period also essentially function as a blanket ban. According to the study, blanket bans are problematic because they fail to account for the decreasing likelihood that a person will commit another crime years after leaving the criminal justice system. After about seven years, the likelihood of committing a crime for a person with a criminal record and a person without a criminal record reaches the same level.[45] In light of these declining recidivism rates, the researchers recommend that decision makers, such as housing providers, consider not only the existence of a criminal record but the time elapsed as well.[46]

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[37]*Id.* at 7.

[38]See *id.* at 45 tbl.A-6.

[39]See, e.g., *Langlois*, 207 F.3d at 51 ("[A] demonstrated disparate impact in housing [must] be justified by a legitimate and substantial goal of the measure in question.").

[40]See, e.g., 42 U.S.C. § 1437(a)(1)(A) (2006).

[41]See Clark, *supra* note 11, at 20.

[42]For a discussion of why arrest record screening specifically does not promote public safety, see Marie Claire Tran-Leung et al., *Past Arrests May Not Be Sole Basis for Rejecting Public Housing Applicants*, 44 Clearinghouse Review 492 (Jan.–Feb. 2011).

[43]*Collins v. AAA Homebuilders, Inc.*, 175 W. Va. 427, 431 (1985) (Miller, C.J., dissenting).

[44]See Kurlychek et al., *supra* note 11, at 80 ("[W]e are skeptical that blanket decision rules based exclusively on whether someone has a criminal record will provide useful information for behavioral predictions.").

[45]*Id.*; see also Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 Criminology 327 (2009).

[46]Kurlychek et al., *supra* note 11, at 80.

Blanket bans, however, are not the only criminal records policies vulnerable to attack under the Fair Housing Act. Even housing providers with policies that specify shorter time limits or differentiate among types of criminal offenses must show that their policies actually promote public safety.[47] As one study demonstrates, even if blanket bans give way to shorter look-back periods, housing does not necessarily become safer.

In the early 2000s researchers found that a new applicant screening policy had very little effect on crime reduction in public housing in Knoxville, Tennessee. Under this policy, the housing authority automatically denied admission to anyone whose criminal record included sex offenses, murder, and attempted homicide. The housing authority reviewed applicants on a case-by-case basis if their records contained the following activity within the past three years: violent felonies, drug possession, possession of drug paraphernalia, aggravated assault, multiple instances of simple assault, or multiple public-order crimes. A case-by-case review also applied to anyone involved in the manufacture, sale, or delivery of controlled substances within the past ten years. "Typically [choosing] to err on the side of caution," the housing authority screened applicants even if they had never been convicted of a crime.[48]

Contrary to the researchers' anticipated findings, this screening policy failed to reduce overall crime in Knoxville's public housing. Although the number of property crimes decreased, public housing saw an increase in cases involving aggravated assault, a category that covered "serious crimes against persons involving weapons."[49] Moreover, the screening policy had no effect on the crimes of rape and murder.[50] These findings comport with other studies showing that a person with a criminal record does not necessarily present an undue risk to housing safety.[51] In light of these minimal effects on crime and safety, a reconsideration of the benefits of criminal records screening policies is long overdue.[52]

By forcing housing providers to prove rather than simply assume that their criminal records policies advance public safety, advocates can ensure that future housing policies are the product of real evidence, not simply fear and assumptions.[53]

Affirmatively Furthering Fair Housing. In some cases advocates may be able to bolster their disparate impact claims by invoking the defendant's duty of affirmatively furthering fair housing under the Fair Housing Act.[54] This duty applies to HUD as well as agencies that receive federal housing and community develop-

[47]Cf. *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232, 245 (3d Cir. 2007) (requiring similar proof from an employer that used specific time limits for different types of criminal offenses).

[48]John W. Barbrey, *Measuring the Effectiveness of Crime Control Policies in Knoxville's Public Housing: Using Mapping Software to Filter Part I Crime Data*, 20 Journal of Contemporary Criminal Justice 6, 15 (2004).

[49]*Id.* at 24–25.

[50]*Id.* at 19–20.

[51]See, e.g., Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, 60 Psychiatric Services 224, 229 (2009).

[52]Strict criminal records policies for both admissions and evictions did not create a significant drop in major crimes in the public housing developments of Nashville, Tennessee, either (Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 New York University Review of Law and Social Change 527, 584 n.124 (2006)).

[53]In *Bannum Incorporated v. City of Louisville*, 958 F.2d 1354 (6th Cir. 1992), the Sixth Circuit held that the equal protection clause did not allow a municipality to require a special use permit for residential facilities that housed probationers and parolees and not for similar residential facilities. Notably the court remarked: "If the city's goal was to protect its residents from recidivists, then some data reflecting the extent of the danger must exist in order to render the different treatment of [these residential facilities] rationally related to that goal" (*id.* at 1360–61). Like the Fair Housing Act, the equal protection clause requires the defendant to demonstrate a rational relationship between the challenged policy and the defendant's legitimate interests. Because the *Bannum* court wanted some evidence showing a relationship between a person's conviction status and a city's public safety concerns, a court would require similar evidence to evaluate a Fair Housing Act claim.

[54]42 U.S.C. § 3608(e)(5) (2006); see also 24 C.F.R. § 570.601(a)(2) (2010).

ment funds and, as a condition of receiving those funds, certify to HUD that they will affirmatively further fair housing.[55] The concept of affirmatively furthering fair housing means more than simply refraining from discrimination. Rather, compliance compels agencies to take active steps toward dismantling discriminatory policies that are in their jurisdictions.[56] To this end, agencies must identify impediments to fair housing choice for protected classes (e.g., racial minorities), analyze those impediments, and specify actions that the agency will take to overcome those impediments. Collectively this analysis is known as the "analysis of impediments," which agencies submit to HUD as part of their funding obligations.

In accordance with these requirements, advocates should determine whether a given housing provider has the duty of affirmatively furthering fair housing under the Fair Housing Act, has properly analyzed the disparate impact of its criminal records policy, and has taken affirmative steps to eliminate its discriminatory effects. Without evidence of this analysis, the housing provider violates its duty—a violation that advocates may be able to leverage into a more sensible housing policy for people with criminal records.

■ ■ ■

Contrary to popular belief, housing discrimination against people with criminal records has serious civil rights implications under the Fair Housing Act. Such a violation occurs not only because the policy has a disparate impact on racial minorities but also because the policy has such an impact without furthering the goals of reducing crime and increasing public safety. Some housing providers are starting to realize the limited value of criminal records policies. The California Apartment Association, for example, advises its members to tailor their records screening policies narrowly to avoid a disparate impact claim. "Excluding every applicant with any criminal background," the association warns, "without regard to the offense's relationship to the applicant's ability to meet tenancy obligations is likely to run afoul of fair housing laws."[57] As more advocates advance Fair Housing Act arguments to challenge criminal records policies, more housing providers will pay attention and adopt policies like that of the California association. Only then will myth begin to give way to reason for people with criminal records.

[55]See 42 U.S.C. § 3608(e)(5) (U.S. Department of Housing and Urban Development); 42 U.S.C. § 5304(b)(2) (2006) (recipients of Community Development Block Grants).

[56]See *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33, 71–72 (noting a "substantial difference between a statute that merely exhorts officials not to discriminate in effect (a negative obligation) and one that exhorts them to take steps to promote fair housing (an affirmative obligation)").

[57]California Apartment Association, Question and Answer Sheet: Criminal Background Checks: Their Use and Application for the Rental Housing Industry (Jan. 2005), http://bit.ly/fotWiL.

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- ☐ 51–99 staff members
- ☐ 26–50 staff members
- ☐ 1–25 staff members
- ☐ Not applicable

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Sargent Shriver National Center on Poverty Law
50 E. Washington St. Suite 500
Chicago, IL 60602