

## RACISM KNOCKING AT THE DOOR: THE USE OF CRIMINAL BACKGROUND CHECKS IN RENTAL HOUSING

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### ABSTRACT

*One of the harshest collateral consequences of an arrest or conviction is the impact a criminal record can have on one's ability to secure housing. Because racial bias permeates every aspect of the criminal justice system as well as the housing market, this collateral consequence—the inability to find a place to live after an arrest or conviction—disproportionately affects minorities.*

*In 2016, after decades of appearing to encourage local public housing providers to adopt harsh policies barring applicants with criminal records, the Office of General Counsel for the United States Department of Housing and Urban Development (“HUD”) issued guidance instructing public and private housing providers to take in to account the potentially disparate effects of such policies on racial minorities (the “HUD Guidance”). Recognizing that African Americans and Latinos are “arrested, convicted and incarcerated at rates disproportionate to their share of the general population,” HUD advised that any policy that “restricts access to housing on the basis of criminal history” may have an unlawful disparate impact based on race.*

*The HUD Guidance on the potentially disparate impact of the use of criminal background checks has remained in place, though it is expected to be rolled back like many other Obama-era policies;*

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## INTRODUCTION

Cell phone videos and news reports of unlawful arrests of African American citizens,<sup>1</sup> racially tainted evidence tampering,<sup>2</sup> and biased sentencing practices have become ubiquitous, and study after study has shown that racial bias permeates every aspect of the criminal justice system.<sup>3</sup> What happens when the victims of racially biased policing try to go on with their lives—when they try to find a place to live?

One of the harshest collateral consequences of an arrest or conviction is the impact a criminal record can have on one's ability to secure housing. During the "tough on crime" period in the 1980s and 1990s, many housing providers, and especially public housing providers, adopted broad policies that barred applicants with criminal records, making it nearly impossible for those released from prison (or even just from police custody after an arrest) to find suitable housing.<sup>4</sup> Individuals who are pulled over or arrested by a racially motivated police officer may eventually be released, but they will often struggle to retain or find housing, even if never convicted of any crime.

In 2016, after decades of appearing to encourage local public housing providers to adopt harsh policies barring applicants with criminal records, the Office of General Counsel for the United States Department of Housing and Urban Development ("HUD") issued guidance instructing public and private housing providers

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1. See *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html> [<https://perma.cc/K3W2-KUXF>].

2. See, e.g., Eric Levenson et al., *Public Defender: Baltimore Police Caught Planting Fake Evidence—Again*, CNN (Aug. 4, 2017, 2:17 AM ET), <https://www.cnn.com/2017/08/04/us/baltimore-police-body-camera-footage/index.html> [<https://perma.cc/H6MJ-X2Y6>].

3. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* 4 (2011); see also 24 C.F.R. § 100.500 (2018); Rebecca J. Walter et al., *One Strike to Second Chances: Using Criminal Backgrounds in Admission Decisions for Assisted Housing*, 27 HOUSING POL'Y DEBATE 1, 1–2 (2017).

4. Lahny R. Silva, *Collateral Damage: A Public Housing Consequence of the "War on Drugs,"* 5 U.C. IRVINE L. REV. 783, 784–85 (2015).

to take in to account the potentially disparate effects of such policies on racial minorities (the “HUD Guidance”).<sup>5</sup> Recognizing that African Americans and Latinos are “arrested, convicted and incarcerated at rates disproportionate to their share of the general population,” HUD advised that any policy that “restricts access to housing on the basis of criminal history” may have an unlawful disparate impact based on race.<sup>6</sup>

The HUD Guidance on the potentially disparate impact of the use of criminal background checks has remained in place, though it is expected to be rolled back like many other Obama-era policies; thus, the question has now become how municipalities and housing providers will interpret and give effect to the HUD Guidance. This article examines how one such municipality—the District of Columbia—has grappled with putting the HUD Guidance into effect via legislative changes.

This article proceeds in five parts. Part I describes the impact of racialized policing as it relates to housing. Part II examines the rise of the background check industry, exploring how the explosion of “big data” has impacted how housing providers make decisions. Part III presents an argument for interpreting the HUD Guidance as broadly as possible. Part IV explores how one municipality—the District of Columbia—is currently implementing the HUD Guidance and makes recommendations based on those experiences. Part V poses some unanswered questions about best practices and how housing providers should incorporate the dictates of the Fair Housing Act (“FHA”) and the HUD Guidance into their tenant selection processes.

## I. THE PROBLEM

### A. *Race Matters*

Starting with “stop and frisks,” and continuing through arrests, trials, sentencings, and post-sentencing relief, the criminal justice

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5. See 24 C.F.R. § 100.500.

6. 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 2 (2016) [hereinafter HUD GUIDANCE], [https://www.hud.gov/sites/documents/hud\\_ogcguidappfhastander.pdf](https://www.hud.gov/sites/documents/hud_ogcguidappfhastander.pdf) [<https://perma.cc/ZB8K-DMC4>].

system treats minorities differently than whites.<sup>7</sup> Black and Latino individuals are arrested and prosecuted at rates that are disproportionate both to the percentage of population and the likelihood that a crime has been committed.<sup>8</sup> A 2013 study showed, for example, that 9% of whites and 10.5% of blacks used illegal drugs over the course of a month, but drug-related arrest rates were 332 per 100,000 residents for whites and 879 per 100,000 residents for blacks.<sup>9</sup> Another study showed that arrest rates overall are 2.5 times higher for African Americans than for whites, and pretrial detention rates are 5.2 times higher for African Americans than for white defendants.<sup>10</sup>

The racial disparities in the criminal justice system continue after arrest. Conviction rates, for example, are much higher when the defendant is black than when the defendant is white.<sup>11</sup> Among those tried for felonies, 59% of those convicted were white, whereas 38% were black, an overrepresentation given that blacks make up only 13% of the total United States population.<sup>12</sup> Race also influences incarceration rates and length of sentences. Currently, 4347 per 100,000 black men are incarcerated, whereas only 678 per 100,000 white men are incarcerated.<sup>13</sup> Similarly, black women are disproportionately represented in prison with an incarceration

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7. Walter et al., *supra* note 3, at 1–2; see also Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race and Disparate Impact*, 93 IND. L.J. 421, 426 (2018).

8. Schneider, *supra* note 7, at 423; see also Jesse Kropf, *Keeping “Them” Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Caste*, 4 GEO. J.L. & MOD. CRITICAL RACE PERSP. 75, 83 (2012).

9. AFOMEIA TESFAI & KIM GILHULY, HUMAN IMPACT PARTNERS, THE LONG ROAD HOME: DECREASING BARRIERS TO PUBLIC HOUSING FOR PEOPLE WITH CRIMINAL RECORDS 3 (2016), [https://humanimpact.org/wp-content/uploads/2018/10Executive-Summary\\_HIA-Report.pdf](https://humanimpact.org/wp-content/uploads/2018/10Executive-Summary_HIA-Report.pdf) [<https://perma.cc/PVH9-VXWP>]; see also 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 GEO. J. POVERTY L. & POLY 435, 443–44 (2004) (“[W]hile whites and blacks used drugs at about the same rate, approximately 1.1% of the black population of the United States (including all age ranges) was arrested for this use, while only 0.33% of the white population was. That is, blacks were arrested at more than three times the rate of whites, for nearly the same level of drug use. Others have estimated that in the drug war, the government arrests and imprisons nonwhites at four to five times the rate of whites, even though whites commit most drug crimes.” (footnotes omitted)).

10. GREATER NEW ORLEANS FAIR HOUS. ACTION CTR., LOCKED OUT: CRIMINAL BACKGROUND CHECKS AS A TOOL FOR DISCRIMINATION 2 (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) [<https://perma.cc/2GVA-QXE7>].

11. Walter et al., *supra* note 3, at 1.

12. *Id.*

13. *Id.* at 1–2.

rate of 260 per 100,000 for black women compared to 91 per 100,000 for white women.<sup>14</sup> Many studies have shown that differences in the criminal justice system cannot be explained by differential involvement in criminal activities.<sup>15</sup> Regardless of rates of engagement in criminal behavior, minorities, especially black males, are arrested, detained, convicted, and imprisoned at rates much higher than similarly situated whites.<sup>16</sup>

The extent of racial disparities in the criminal justice system cannot be overstated.<sup>17</sup> One in three African American men will serve time in jail or prison at some point during his life.<sup>18</sup> Each of those individuals will leave jail or prison with a mark on his or her record that may push securing housing out of reach.

### B. *One Strike, and You're Homeless*

“Nowhere are the effects of barring those with criminal records from seeking housing starker than in our public housing system.”<sup>19</sup> The vast majority of individuals leaving prison (and particularly minority individuals leaving prison) cannot afford to secure housing in the private market. Instead, these individuals generally seek to enter public housing on their own or to rejoin their families in

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14. *Id.* at 2.

15. *Id.*; see also Stinson, *supra* note 9, at 443 (“The disproportionate impact of the drug laws upon minorities, and African Americans in particular, is well documented.”).

16. Walter et al., *supra* note 3, at 2; see also EQUAL RIGHTS CTR., UNLOCKING DISCRIMINATION: A DC AREA TESTING INVESTIGATION ABOUT RACIAL DISCRIMINATION AND CRIMINAL RECORDS SCREENING POLICIES IN HOUSING 6 (2016), <https://equalrightscnter.org/wp-content/uploads/unlocking-discrimination-web.pdf> [https://perma.cc/UD9F-FBPV] (“[T]he racially disproportionate impact of mass criminalization and collateral consequences often focus on men of color, but it is critical to include the experiences of women of color in any analysis as well . . . African American women are imprisoned at more than twice the rate of white women.”).

17. See GREATER NEW ORLEANS FAIR HOUS. ACTION CTR., *supra* note 10, at 3 (“[T]he inequities embedded in the American criminal justice system are systemic and ongoing.”).

18. Schneider, *supra* note 7, at 424; see also Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 81 (2016) (citing PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (2009), <http://www.victcriminology.org/pdf/pew/onein31.pdf> [https://perma.cc/X6VR-5Z63]). Some recent research suggests that because of recently declining incarceration rates, one in four, not one in three, African American men will spend time in prison during his lifetime. See Glenn Kessler, *The Stale Statistic That One in Three Black Males ‘Born Today’ Will End Up in Jail*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/06/16/the-stale-statistic-that-one-in-three-black-males-has-a-chance-of-ending-up-in-jail/> [https://perma.cc/XAT2-VTJT]. This statistic, while slightly less dire, is still deeply disturbing.

19. Schneider, *supra* note 7, at 434. This article provides a more detailed explanation of the disparities illustrated in abbreviated form here.

public or government-subsidized housing.<sup>20</sup> Unfortunately, however, individuals with criminal records, even those who have only been arrested for or convicted of misdemeanors, often face insurmountable obstacles when attempting to access public housing.<sup>21</sup>

In the “tough on crime” era of the 1980s, Congress kicked off the so-called “war on drugs” with a series of legislative efforts that both expanded the prison population and limited opportunities for those who would ultimately be released from prison. The Anti-Drug Abuse Act of 1988 and its implementing regulations, for example, required public housing authorities to issue leases with the condition that tenants who engage in any drug-related criminal activity may be subject to eviction (commonly known as the “one-strike policy”).<sup>22</sup> Citing a “reign of terror”<sup>23</sup> in public housing, the Anti-Drug Abuse Act was eventually amended to subject public housing tenants to possible eviction not only if the tenant does drugs, but also if any guest under the tenant’s control engages in illegal drug activity on or off the premises.<sup>24</sup>

The one-strike language required under the Anti-Drug Abuse Act is as follows:

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20. See Reed Karaim, *Housing First: Ex-Offenders*, NPR, <https://www.npr.org/news/specials/housingfirst/whoneeds/ex-offenders.html> [<https://perma.cc/Y5DS-AU3H>] (last visited Feb. 1, 2019); see also John Wildermuth, *Ex-Offenders Compete for Low-Income Housing*, SFGATE (Feb. 17, 2013, 9:01 PM PST), <https://www.sfgate.com/bayarea/article/Ex-offenders-compete-for-low-income-housing-4286606.php> [<https://perma.cc/4QTV-9CX8>]; Walter et al., *supra* note 3, at 3 (“Returning citizens often live with a family member or close friend after first being released because of limited housing stock and criminal history restrictions.”).

21. See SANETA DE VUONO-POWELL ET AL., ELLA BAKER CTR. FOR HUMAN RIGHTS ET AL., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 26–27 (2015), [https://ellabakercenter.org/sites/default/files/downloads/who\\_pays.pdf](https://ellabakercenter.org/sites/default/files/downloads/who_pays.pdf) [<https://perma.cc/6HFA-Y2Q9>] (“In this study, nearly eight in ten formerly incarcerated individuals (79%) reported either being ineligible for or denied housing because of their conviction history.”).

22. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300 (codified as amended at 42 U.S.C. § 1437d(l) (2012 & Supp. V 2018)); 24 C.F.R. § 966.4 (1992); see Jim Moye, *Can’t Stop the Hustle: The Department of Housing and Urban Development’s “One Strike” Eviction Policy Fails to Get Drugs Out of America’s Projects*, 23 B.C. THIRD WORLD L.J. 275, 280–82 (2003).

23. Anti-Drug Abuse Act § 5122 (codified as amended at 42 U.S.C. § 11901(3) (2012)); see also Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 560 (2005).

24. 42 U.S.C. § 1437d(l)(6) (2012 & Supp. V 2018) (“[C]riminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy . . . .”); see also 24 C.F.R. § 982.310(c)(1) (2018) (implementing 42 U.S.C. § 1437d(l)(6)); Moye, *supra* note 22, at 281–82.

[A] public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.<sup>25</sup>

Under the required lease language, neither a tenant's lack of knowledge of a guest's criminal activity nor the tenant's lack of ability to prevent a guest from engaging in criminal activity is a defense to an eviction.<sup>26</sup> Further, under HUD's implementing regulations, neither the filing of criminal charges nor a resulting conviction are required prior to an eviction—a mere accusation of criminal activity or drug-related activity can trigger an eviction.<sup>27</sup> Accordingly, it is entirely possible, for example, for a local public housing authority to evict an entire family because a tenant's guest was suspected (but never convicted) of selling drugs at a nearby location. Congress further strengthened the one-strike legislation with the Housing Opportunity Extension Act of 1996, which called on local police departments to provide criminal conviction records to local public housing authorities for “purposes of applicant screening, lease enforcement and eviction.”<sup>28</sup>

Though Congress required that public housing authorities include the so-called one-strike provision in all leases, no statute or regulation mandated that housing authorities exercise their right to evict in all cases. Instead, local housing authorities retain broad discretion when deciding whether to evict individual tenants.<sup>29</sup> Nevertheless, most local housing authorities either seem to think

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25. 42 U.S.C. § 1437d(l)(6); Robert Hornstein, *Litigating Around the Long Shadow of Department of Housing and Urban Development v. Rucker: The Availability of Abuse of Discretion and Implied Duty of Good Faith Affirmative Defenses in Public Housing Criminal Activity Evictions*, 43 U. TOL. L. REV. 1, 5 (2011) (alteration in original).

26. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002).

27. 24 C.F.R. § 966.4(l)(5)(iii)(A); see also *Rucker*, 535 U.S. at 130, 134–36 (holding that the housing authority may evict a tenant for drug-related activity that took place off the premises); Hornstein, *supra* note 25, at 4.

28. Pub. L. No. 104-120, § 9(b), 110 Stat. 834, 836-37 (codified as amended at 42 U.S.C. § 1437d(q)(1)(A) (2012)).

29. OFFICE OF PUB. & INDIAN HOUS., U.S. DEPT OF HOUS. & URBAN DEV., PIH 96-16 (HA), “ONE STRIKE AND YOU'RE OUT” SCREENING AND EVICTION GUIDELINES FOR PUBLIC HOUSING AUTHORITIES (HAS) 5, 7–8 (1996) [hereinafter PIH 96-16], <https://www.hud.gov/sites/documents/96-16pihn.doc> (encouraging local public housing authorities to “consider applications for residence by persons with such criminal histories on a case-by-case basis, focusing on the concrete evidence of the seriousness and recentness of criminal activity as the best predictors of tenant suitability”).

that eviction is mandatory, or they exercise their discretion quite aggressively.<sup>30</sup>

In addition to having the authority to evict entire families for one household member or guest's criminal (or suspected criminal) activity and to bar existing tenants who are arrested, convicted, or suspected of criminal activity, public housing authorities also have the discretion to bar any *applicant* who has a criminal record.<sup>31</sup> Generally, federal law permits local housing authorities to develop admissions policies regarding three types of criminal activity: (1) drug-related criminal activity; (2) violent criminal activity; and (3) criminal activity that poses a threat to the health, safety, and welfare of other residents.<sup>32</sup> Many local public housing authorities interpret the third category extremely broadly or go beyond these categories to deny admission to applicants with other types of criminal records as well.<sup>33</sup>

Historically, HUD encouraged this broad interpretation. In 1996 HUD issued a series of official notices to local housing authorities which provided a framework for evaluating local public housing authorities based, in part, on the strictness of their admission and eviction policies.<sup>34</sup> Housing authorities were encouraged to conduct extensive criminal background checks and to adopt “zero-tolerance” policies for criminal behavior among both tenants and applicants.<sup>35</sup>

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30. MARIE CLAIRE TRAN-LEUNG, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 9 (2015), <http://povertylaw.org/files/docs/WDMD-final.pdf> [<https://perma.cc/SU6B-58V5>].

31. *Id.* While local public housing authorities generally have the discretion to determine whether to accept an applicant with a criminal record, there are a few circumstances under which they are required by federal law to reject applicants. For example, federal law requires local housing authorities to impose permanent bans on: (1) applicants who have been convicted of manufacturing methamphetamine on public housing property, and (2) applicants who have been required to register as sex offenders for life. 42 U.S.C. §§ 1437n(f)(1), 13663(a)–(b) (2012).

32. 34 U.S.C. § 12491 (2012); TRAN-LEUNG, *supra* note 30, at 9. There are some categories of criminals that public housing authorities are required to exclude, including sex offenders and methamphetamine manufactures; *see also* Carey, *supra* note 23, at 583.

33. TRAN-LEUNG, *supra* note 30, at 9.

34. *See, e.g.*, PIH 96-16, *supra* note 29; OFFICE OF PUB. & INDIAN HOUS., U.S. DEP'T OF HOUS. & URBAN DEV., PIH 96-27 (HA), OCCUPANCY PROVISIONS OF THE HOUSING OPPORTUNITY PROGRAM EXTENSION ACT OF 1996 (1996) [hereinafter PIH 96-27], [https://www.hud.gov/sites/documents/DOC\\_10992.PDF](https://www.hud.gov/sites/documents/DOC_10992.PDF); *see also* Walter et al., *supra* note 3, at 4.

35. *See, e.g.*, PIH 96-16, *supra* note 29; PIH 96-27, *supra* note 34; OFFICE OF PUB. & INDIAN HOUS., U.S. DEP'T OF HOUS. & URBAN DEV., PIH 96-52 (HA), PUBLIC HOUSING MANAGEMENT ASSESSMENT PROGRAM (PHMAP)—INDICATOR #8, SECURITY: “ONE STRIKE AND

Many housing authorities interpreted the various one-strike rules to indicate HUD's support for broad bans on applicants with any type of criminal history, regardless of whether the conviction was recent or whether the crime alleged is predictive of a potential lease violation or of behavior that would endanger other tenants. One local housing authority, for example, has a policy requiring it to deny applicants if their criminal record includes "civil disobedience" within the past ten years, meaning that a ten-year-old arrest record related to a political protest could result in a denial of housing.<sup>36</sup> Another official in public housing authority in South Carolina reported that many denials of applications related to minor crimes such as shoplifting charges or not paying for video rentals.<sup>37</sup> A social worker in Pittsburgh described one twenty-nine-year-old African American mother who was rejected from the Allegheny County Housing Authority because of a retail theft charge related to shoplifting Chapstick from a drug store three or four years prior to her application for housing.<sup>38</sup> Clearly none of these crimes would be predictive of behavior that would endanger other tenants.

While housing providers have the ability to exercise discretion and while HUD has recently admonished local housing authorities to implement an individualized approach to reviewing applications as opposed to using bright line rules, in practice, "individualized review [has often been] the exception rather than the rule."<sup>39</sup> Many local housing authorities have "zero tolerance" policies when it comes to certain types of crime, particularly drug crimes (even low-level ones). One leader of a housing authority in New Hampshire said that "[a]nyone who has a criminal record with any sort of violence or drug-related crime[] is pretty much excluded from getting housing,"<sup>40</sup> suggesting that a person who, for example, pled guilty to a simple possession of marijuana charge at age twenty would be

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YOU'RE OUT" (1996) [hereinafter PIH 96-52], [https://www.hud.gov/sites/documents/DOC\\_111016.PDF](https://www.hud.gov/sites/documents/DOC_111016.PDF); see also Walter et al., *supra* note 3, at 4.

36. GALVESTON HOUS. AUTH., GHA ADMISSIONS AND CONTINUED OCCUPANCY PLAN 54–55 (2013), <http://www.ghatx.org/documents/ACOP%202012%20r2.pdf> [<https://perma.cc/2B76-6YZA>].

37. Carey, *supra* note 23, at 567.

38. *Id.* at 567–68. While some may feel uncomfortable living next door to a person who has a record of theft, accusations of such minor crimes are not predictive of a propensity for more dangerous crimes that would affect the safety of neighbors.

39. TRAN-LEUNG, *supra* note 30, at 9–10.

40. *Id.* at 10 (citing Charles McMahon, *Authorities Grapple with Crime, Drugs in Public Housing*, SEACOAST ONLINE (Mar. 24, 2013, 2:00 AM), <http://www.seacoastonline.com/articles/20130324/NEWS/303240340> [<https://perma.cc/8NQS-5NCG>]).

denied housing at age sixty, even if that person had no further interactions with the criminal justice system.

Even if local housing authorities do exercise discretion and provide individualized reviews of applications, written policies like the ones mentioned above dissuade many would-be applicants with criminal records from applying, even when their criminal records relate to minor crimes that occurred years ago.<sup>41</sup>

The impact of local housing authorities' often blanket denials based on criminal records cannot be overstated.<sup>42</sup> In a study of over 300 local housing authorities, the Sargent Shriver National Center on Poverty Law found that the majority of the study's housing authorities had policies on criminal records that were overly broad, that relied on arrest records in addition to records of convictions, or that barred applicants whose crimes were committed a long time ago.<sup>43</sup> President Clinton summed up the one-strike policy this way: "If you break the law, you no longer have a home in public housing, 'one strike and you're out.' That should be the law everywhere in America."<sup>44</sup>

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41. *Id.* at 23–24 (noting that the vagueness of various admission criteria leads would-be applicants to forego applying for housing).

42. *See* Stinson, *supra* note 9, at 436 ("[T]he federal government's drug policy with respect to federally subsidized public housing, though well-intentioned, has morphed from a means of ensuring resident safety into a disturbingly effective revolving door in which the poor and underrepresented are fast-tracked into homelessness.").

43. TRAN-LEUNG, *supra* note 30, at 4. After examining over 300 local housing authorities' policies, the report identified four areas where policies regarding the admission of applicants with criminal records are overly restrictive:

1. The use of long lookback periods for determining whether past criminal activity is relevant to the admissions decision;
2. The use of arrests without subsequent convictions as proof of past criminal activity;
3. The use of overbroad categories of criminal activity that sweep in activity tenuously related to the housing provider's public safety interest; and
4. The underuse of mitigating evidence as a means for overcoming criminal records-based denials.

*Id.*

44. President William J. Clinton, Remarks Announcing the "One Strike and You're Out" Initiative in Public Housing (Mar. 28, 1996) (transcript available at <https://www.presidency.ucsb.edu/documents/remarks-announcing-the-one-strike-and-youre-out-initiative-public-housing> [<https://perma.cc/4E5C-3ZWE>]); *see also* Carey, *supra* note 23, at 571 (noting that, even "[a] woman who won a high-profile grant of executive clemency from President Clinton in 2000 was . . . turned away from public housing" upon her release. Dorothy Gaines is a forty-five-year-old black woman who was convicted of a drug offense. Gaines' "only alleged link to drug activity was a one-time delivery of three small bags of crack cocaine to a corner dealer," and she was sentenced to twenty years to life. Upon release after her pardon, "she turned to public housing for assistance" and "was denied based on her prior record.").

C. *Do You Want a Person with a Criminal Record as a Neighbor?*

The architects of the one-strike policy asserted that it was aimed at making public housing complexes safer by reducing drug-related criminal activity and “eliminating second chances” for repeat offenders.<sup>45</sup> There is little empirical evidence that excluding individuals from housing opportunities solely because of a criminal record increases public safety.<sup>46</sup> One study, for example, found that individuals with extensive criminal histories, including those who committed more serious crimes and those who committed a crime recently, were able to retain housing for at least two years at rates equivalent to those without criminal histories.<sup>47</sup> That study revealed that the inability to retain stable housing was more correlated with age and substance abuse than with criminal record.<sup>48</sup> Other, more recent research confirms that a criminal record alone is not predictive of an individual’s ability to retain housing or abide by a lease. A 2012 study evaluated previously homeless individuals who were placed in supportive housing and found no difference in outcomes between participants who had been incarcerated and those with no criminal record.<sup>49</sup> The only significant difference identified in that study was “increased drug use amongst those incarcerated for more than 10 years compared with those with no incarceration history.”<sup>50</sup>

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45. Walter et al., *supra* note 3, at 4.

46. *Id.* at 6; *see also* Carey, *supra* note 23, at 546 (“The tenuous relationship between public housing restrictions and legitimate safety goals is exemplified by policies that, for example, automatically deny housing to a person convicted of a single shoplifting offense four years earlier, or to someone convicted of simple possession of marijuana ten years earlier. Denying these people a home does little to promote the welfare of existing tenants, but it can cause homelessness or transient living for those excluded. It can also be counterproductive for community safety, because it is difficult to be law-abiding while living on the streets.”).

47. Walter et al., *supra* note 3, at 6 (citing Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, 60 PSYCHIATRIC SERVS. 224, 225, 227–28 (2009)). In the Walter article, the authors discuss the study generally. For an in-depth review of the study’s finding and methodology, *see* MARTHA R. BURT & JACQUELYN ANDERSON, CORP. FOR SUPPORTIVE HOUS., AB2034 PROGRAM EXPERIENCES IN HOUSING HOMELESS PEOPLE WITH SERIOUS MENTAL ILLNESS 1–3 (2005), [https://d155kunxf1aozz.cloudfront.net/wp-content/uploads/2011/12/Report\\_AB20341.pdf](https://d155kunxf1aozz.cloudfront.net/wp-content/uploads/2011/12/Report_AB20341.pdf) [<https://perma.cc/28NL-NTSJ>].

48. Walter et al., *supra* note 3, at 6 (citing Malone, *supra* note 47, at 227).

49. *Id.* (citing Jack Tsai & Robert A. Rosenheck, *Incarceration Among Chronically Homeless Adults: Clinical Correlates and Outcome*, 12 J. FORENSIC PSYCHOL. PRAC. 307, 309–10, 319 (2012)).

50. *Id.* at 6–7 (citing Tsai & Rosenheck, *supra* note 49, at 307).

With the exception of the studies mentioned above and a few others, there is little research examining factors that are predictive of a successful tenancy.<sup>51</sup> That said, there has been much research on recidivism generally, which suggests that recidivism rates differ by type of crime, age of the individual convicted, the strength of the individual's family ties, and the neighborhood to which the individual returns.<sup>52</sup> A study by the National Institute for Justice showed that most recidivism occurs within three years of an arrest and almost certainly within five years.<sup>53</sup> The risk of rearrest for a person convicted of robbery at age eighteen "dropped below the general population for persons of the same age after 7.7 years."<sup>54</sup> For those arrested for aggravated assault, the risk of rearrest is 4.3 years; for burglary, it is 3.8 years.<sup>55</sup> The same study showed that the rearrest rate for older arrestees dropped even more.<sup>56</sup>

While the one-strike rule was aimed at reducing drug-related criminal activity in public housing complexes, studies have shown that recidivism rates for property crimes are actually higher than recidivism rates for drug crimes.<sup>57</sup> That said, the recidivism rate drops off more steeply over time for property crimes than it does for drug crimes.<sup>58</sup> For all types of crimes, if a person is not re-arrested in the first year after release, the recidivism rate drops dramatically and after about seven years, an individual with a criminal record's risk of a new offense is similar to that of a person without any criminal record.<sup>59</sup>

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51. *Id.* at 7; *see also* Carey, *supra* note 23, at 563 ("Curiously, there has been relatively little discussion among federal or local housing officials as to what, in fact, predicts a good tenant, much less the predictive value of a criminal record.")

52. Walter et al., *supra* note 3, at 7–8.

53. Alfred Blumstein & Kiminori Nakamura, "Redemption" in an Era of Widespread Criminal Background Checks, NAT'L INST. JUST. J., no. 263, June 2009, at 11, <https://www.ncjrs.gov/pdffiles1/nij/226872.pdf> [<https://perma.cc/3M66-MHJJ>].

54. Ian B. Petersen, *Towards True Fair-Chance Hiring: Balancing Stakeholder Interests and Reality in Regulating Criminal Background Checks*, 94 TEX. L. REV. 175, 182 (2015) (citing Blumstein & Nakamura, *supra* note 53, at 12).

55. *Id.* (citing Blumstein & Nakamura, *supra* note 53, at 12).

56. *Id.* (citing Blumstein & Nakamura, *supra* note 53, at 12–14).

57. Walter et al., *supra* note 3, at 4, 8 (citing Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 301, 311 (2003)).

58. *Id.* at 10 (citing Sampson & Laub, *supra* note 57, at 311–13).

59. *Id.* at 8 (citing Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64, 80 (2007)); MATTHEW R. DUROSE ET AL., *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010*, at 7 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> [<https://perma.cc/QLT3-U88K>].

While there is some empirical research regarding recidivism rates, there is little research about the intersection between recidivism and safety in a public housing complex. While it may feel intuitive that public housing complexes would be safer if those with criminal records were barred, this intuition certainly does not hold true for all types of convictions. For example, those convicted of crimes such as shoplifting or even drug use are not necessarily more likely to pose a threat to public safety than those with no criminal record. Further, we do know that almost all convicted persons are eventually released, with approximately 650,000 individuals leaving prison each year, and that if former prisoners cannot find housing, they are much more likely to commit crimes which may indeed affect the safety of neighborhoods.<sup>60</sup>

We do know, however, what happens when we do not allow those with criminal histories to rejoin neighborhoods. Housing instability is often a direct path to recidivism.<sup>61</sup> A study in New York revealed that “a person without stable housing [is] seven times more likely to re-offend after returning from prison” than a person who has stable housing.<sup>62</sup> Another study found that incarcerated individuals who moved in with family members postrelease were less likely to recidivate than those who were homeless or moved frequently.<sup>63</sup>

To answer the question posed in the header for this part—do you want a person with a criminal record as a neighbor—the answer is “it’s unclear.”<sup>64</sup> What is clear is that many types of convictions do

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60. U.S. DEPT OF JUSTICE, ACCESS TO JUST. INITIATIVE, CIVIL LEGAL AID SUPPORTS FEDERAL EFFORTS TO HELP PEOPLE WITH CRIMINAL RECORDS MAKE A SUCCESSFUL REENTRY 1 (2014), <https://www.justice.gov/sites/default/files/atj/pages/attachments/2015/03/13/reentry.pdf> [<https://perma.cc/2JFL-44FM>]; see also Steven D. Bell, Comment, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. L. REV. 1, 3, 11 (2014).

61. Schneider, *supra* note 7, at 432; see also Walter et al., *supra* note 3, at 2 (“Obtaining stable housing in particular is a critical need for individuals returning from incarceration to the community.”).

62. Bell, *supra* note 60, at 11 (quoting S.F., CAL., POLICE CODE art. 49, § 4902 (2018)).

63. Walter et al., *supra* note 3, at 2 (citing Benjamin Steiner et al., *Examining the Effects of Residential Situations and Residential Mobility on Offender Recidivism*, 61 CRIME & DELINQ. 375, 391 (2015)).

64. See Carey, *supra* note 23, at 545 (“Strict admissions policies in public housing ostensibly protect existing tenants. There is no doubt that some prior offenders pose a risk and may be unsuitable neighbors in many of the presently-available public housing facilities. But U.S. policies are so arbitrary, overbroad, and unnecessarily harsh that they exclude even people who have turned their lives around and remain law-abiding, as well as others who may never have presented any risk in the first place.”).

not provide insight into whether a person will be a good tenant and separating people who are released from prison from their families has a destabilizing effect on communities and increases rates of recidivism.

D. *The Double Whammy—African Americans Are More Likely to Have a Criminal Record and Are More Likely to Face Discrimination Because of It*

As described in detail above, because of the racialization of our criminal justice system and the mass incarceration of African Americans, a disproportionate number of African Americans have criminal records. On top of that, a number of studies show that black applicants with criminal records are not only treated worse than individuals without criminal records, they are also treated worse than white applicants with similar criminal records.<sup>65</sup> A 2015 study in New Orleans, for example, showed that African American testers with criminal backgrounds experienced negative differential treatment 50% of the time compared to white testers with similar criminal backgrounds.<sup>66</sup> The differential treatment came in many forms ranging from outright denial of housing to differing ways of explaining criminal background screening policies. For example, over 70% of the instances in which criminal background policies were discussed, housing providers quoted more lenient policies to white potential renters than to black potential renters with similar criminal backgrounds.<sup>67</sup> One white tester with a misdemeanor was told that the criminal background policy only excluded felonies and was encouraged to apply despite her misdemeanor conviction. The same leasing agent told a black tester with a similar misdemeanor conviction that the misdemeanor would result in a denial.<sup>68</sup>

In addition to providing different information about their criminal records policies to black and white applicants, housing providers were much more likely to “go the extra mile” or make exception to the policies for white applicants. For example, one leasing agent

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65. Making this a “triple whammy,” blacks and Latinos live below the poverty line at disproportionate rates, meaning that they are more likely to apply for public housing, and then be denied because of a criminal record. Carey, *supra* note 23, at 587; see also GREATER NEW ORLEANS FAIR HOUS. ACTION CTR., *supra* note 10, at 3–4; Stinson, *supra* note 9, at 441.

66. GREATER NEW ORLEANS FAIR HOUS. ACTION CTR., *supra* note 10, at 3–4.

67. *Id.* at 11, 19.

68. *Id.* at 19.

offered the white tester, but not the black tester, guidance on appealing a rejection because of a criminal record.<sup>69</sup> Some agents offered to call upper management to advocate for white applicants with criminal records, but made no such offer to black applicants with similar criminal records.<sup>70</sup> Other agents “coached white testers about how to obtain definitive answers regarding their eligibility” before paying application fees.<sup>71</sup> Leasing agents tended to make encouraging remarks to white applicants with criminal records, while making discouraging remarks to black applicants in a similar situation. For example, African Americans were more likely to be told that their applications were likely to be denied.<sup>72</sup> Further, discretionary policies that allowed property managers to evaluate prospective tenants’ criminal backgrounds on a case-by-case basis consistently favored white applicants.<sup>73</sup>

In the same year as the New Orleans study mentioned above, the Equal Rights Center investigated whether black women with criminal records in the District of Columbia were treated less favorably than white women with similar criminal records.<sup>74</sup> In that study, black and white female testers posed as rental applicants with criminal records. In total, 47% of the tests revealed differential treatment in which a housing provider favored the white female tester over the black female tester.<sup>75</sup> Black women were given less information regarding availability of apartments, were treated differently when they disclosed their criminal background, and were more often told that it was unlikely that their applications for housing would be successful.<sup>76</sup>

In addition to showing that black women with criminal records are treated worse than white women with criminal records, the Equal Rights Center investigation found that, for almost 30% of the tests conducted, the housing provider utilized a policy that the HUD Guidance now suggests would be likely to have a disparate

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69. *Id.* at 20.

70. *Id.*

71. *Id.*

72. *Id.* at 21.

73. *Id.* at 18.

74. EQUAL RIGHTS CTR., *supra* note 16, at 6.

75. *Id.* at 20.

76. *Id.* at 23–26.

impact based on race—e.g., blanket bans on any applicant with a felony conviction, no matter the nature or date of the conviction.<sup>77</sup>

## II. THE RISE OF THE BACKGROUND CHECK INDUSTRY

With technological advances in recent years, criminal records have become more widely available and, as a result, are being used for nonlaw enforcement purposes with increased frequency.<sup>78</sup> One author noted that criminal records are “rapidly becoming a negative curriculum vitae . . . used to determine eligibility for occupational licenses, social welfare benefits, employment, and housing.”<sup>79</sup> A web of federal and local laws have increased the accessibility of criminal records to the public and to companies that amass data on behalf of housing providers. The 1993 Brady Handgun Violence Prevention Act (the “Brady Act”), for example, required the development of a National Instant Criminal Background Check System that could be used by retail firearms dealers.<sup>80</sup> The Bureau of Justice Statistics and the FBI encourage states to maintain complete criminal records by offering grants and monitoring compliance.<sup>81</sup> Additionally, all fifty states have adopted Megan’s Laws, which impose registration requirements on sex offenders, creating large masses of searchable data about criminal backgrounds.<sup>82</sup> As laws requiring the tracking of criminal record data vastly increased in number and force, court systems and administrative offices also began to put information related to arrests, cases and convictions online, making the data easily accessible to the public and to entrepreneurs.<sup>83</sup> As a result of these

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77. *Id.* at 27.

78. See SHARON DIETRICH, EXPANDED USE OF CRIMINAL RECORDS AND ITS IMPACT ON RE-ENTRY 1–3 (2006), [https://www.reentry.net/library/item.98152-Expanded\\_Use\\_of\\_Criminal\\_Records\\_and\\_Its\\_Impact\\_on\\_Reentry\\_Sharon\\_M\\_Dietric](https://www.reentry.net/library/item.98152-Expanded_Use_of_Criminal_Records_and_Its_Impact_on_Reentry_Sharon_M_Dietric) [<https://perma.cc/3ZWK-C7GA>]; see also MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1 (2011), [https://www.nelp.org/wp-content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf) [<https://perma.cc/PGH2-NQUW>] (“In recent years, the criminal background check industry has grown exponentially.”).

79. James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 177 (2008).

80. *Id.* at 180 (citing Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. § 921)).

81. *Id.* at 181.

82. Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 363 (2008).

83. Jacobs & Crepet, *supra* note 79, at 183–84.

developments and a host of other factors, an entire industry has arisen to cull criminal records, particularly on behalf of rental housing providers.<sup>84</sup>

In addition to obtaining rental histories and credit histories, housing providers can now cheaply and quickly find out whether applicants have been arrested, charged, convicted, or sentenced. One company used frequently by housing providers—Core Logic—boasts on its webpage that it: “collects criminal background data from multiple sources, including the Department of Corrections, which includes records from state prisons and incarcerations. In addition, we access the Administrative Office of the Courts (AOC), which provides background records for criminal events that resulted in a court case being filed.”<sup>85</sup>

The same website warns that: “Every resident affects the quality and safety of your community. Criminals can disrupt—and even endanger—the entire neighborhood. Our resident background search accesses criminal records across the country to help you determine if a potential resident has a background containing violence, property destruction, sex offense or financial crime.”<sup>86</sup>

Unfortunately, even as housing providers have relied more heavily on criminal background checks, the data provided in such checks is sometimes inaccurate and often misunderstood by housing providers.<sup>87</sup> “Poor data integrity may result in the attribution

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84. See Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. SOC. JUST. 319, 325 (2010) (“[S]ome tenant screeners—particularly those that market nationwide criminal-history reports—purchase private criminal background reports for resale as part of the tenant-screening package.”).

85. *Rental Property Solutions: Criminal Screening*, CORELOGIC, <https://www.corelogic.com/products/criminal-screening.aspx> [<https://perma.cc/E937-DYYP>] (last visited Feb. 1, 2018).

86. *Id.*

87. One attorney in the District of Columbia reported, while testifying before the District of Columbia Council Committee of the Judiciary, that one of her clients was denied housing because he had the same first initial and last name as someone with a criminal record. By the time the attorney provided proof that her client did not have a criminal record, the unit had been promised to someone else and her client had no legal recourse to challenge the denial. *Fair Criminal Record Screening for Housing Act of 2016: Hearing on Bill 21-0706 Before the D.C. Council Comm. of the Judiciary*, 114th Cong. 2 (2016) (statement of Amber W. Harding, Att’y, Wash. Legal Clinic for the Homeless).

of an offense to the wrong individual . . . a listing of the wrong offense . . . and reports in which the disposition of arrests has not been entered long after charges were dropped.”<sup>88</sup>

### III. THE GUIDANCE

In April of 2016, the Office of General Counsel for HUD issued the HUD Guidance addressing the racially disparate impact of the use of criminal records in evaluating applicants for rental housing. The HUD Guidance recognizes that “[a]cross the United States, African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population” and that, as a result, “criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers.”<sup>89</sup>

While it is abundantly clear that criminal records policies that intentionally treat minority home seekers differently from white home seekers violates the FHA, the HUD Guidance also recognized that that “a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification.”<sup>90</sup> Thus, if a housing provider uses criminal background checks to screen tenants, and if those criminal background checks tend to disadvantage members of a protected class,<sup>91</sup> the housing provider must be able to show that the policy is necessary to serve a “substantial, legitimate, nondiscriminatory interest” and that such interest could not “be served by another practice that has a less discriminatory effect.”<sup>92</sup>

The HUD Guidance reiterates the three-step burden-shifting framework that developed in FHA jurisprudence and that was restated in HUD’s 2013 disparate impact rule and echoed in the recent *Inclusive Communities* case.<sup>93</sup> Under this framework, the plaintiff bears the initial burden of demonstrating that a particular criminal history policy results in a disparate impact on a protected

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88. Rebecca Oyama, Note, *Do Not (Re)enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 188 (2009).

89. HUD GUIDANCE, *supra* note 6, at 2.

90. *Id.*

91. The classes protected under the Fair Housing Act are race, color, religion, sex, disability, familial status, and national origin. 42 U.S.C. § 3604 (2012).

92. HUD GUIDANCE, *supra* note 6, at 7.

93. See 24 C.F.R. § 100.500 (2013); see also *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. \_\_\_, \_\_\_, 135 S. Ct. 2507, 2514–15 (2015).

class, that is, that the policy “actually or predictably results in a disparate impact.”<sup>94</sup> If the plaintiff establishes that a particular policy or practice has a disparate impact on a protected class, the burden shifts to the housing provider to prove that the challenged policy is “necessary to achieve a substantial, legitimate, nondiscriminatory interest.”<sup>95</sup> The interest proffered by the housing provider must “not be hypothetical or speculative, meaning [that] the housing provider must . . . provide evidence proving both that [it] has a substantial, legitimate and nondiscriminatory interest . . . and that the challenged policy actually achieves that interest.”<sup>96</sup> Protecting the safety of other residents or preventing damage to the property are, for example, substantial, legitimate and nondiscriminatory interests. Finally, if the housing provider proves that the challenged policy is necessary to achieving its nondiscriminatory goal, the burden shifts back to the plaintiff to show that such a goal could have been achieved by a practice that would have a “less discriminatory effect.”<sup>97</sup> If the plaintiff can prove that the housing provider could have accomplished its nondiscriminatory objective through a means that had a less disparate impact on a protected class, the plaintiff will prevail.

Helpfully, the HUD Guidance gives some suggestions regarding how housing providers can avoid disparate impact liability when developing a criminal records screening policy. For example, HUD recommends delaying the use of criminal background information until *after* the housing provider has evaluated all other qualifications that the tenant presented, such as his or her credit history, rental history and income.<sup>98</sup> Further, HUD encourages housing providers to individually assess each applicant, taking into account the “circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts.”<sup>99</sup> Finally, HUD acknowledges that if a housing provider uses a policy that excludes applicants because of arrests (as opposed to convictions) it will not be able to satisfy its burden of showing that such

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94. HUD GUIDANCE, *supra* note 6, at 3.

95. *Id.* at 4.

96. *Id.*

97. *Id.* at 7.

98. *Id.*

99. *Id.*

policy is “necessary to achieve a substantial, legitimate, nondiscriminatory interest.”<sup>100</sup> The use of arrest records are particularly problematic, per the HUD Guidance, because such records “do not constitute proof of past unlawful conduct and are often incomplete,” meaning that they fail to indicate whether a person was ultimately convicted of a crime.<sup>101</sup> Additionally, arrest records are particularly tainted by racial bias.<sup>102</sup>

Essentially, the HUD Guidance tries to strike a balance between a housing provider’s interest in developing screening practices that identify and avoid demonstrable risks with the FHA’s commitment to rooting out policies that have an unnecessary disparate impact based on race.<sup>103</sup>

#### IV. THE CURRENT LANDSCAPE—THE DISTRICT OF COLUMBIA, AS A MODEL

The HUD Guidance has served as a springboard for several jurisdictions to implement legislation limiting how and when landlords can use criminal background checks when evaluating rental applications. The District of Columbia, for example, has one of the most progressive laws.<sup>104</sup>

Beginning in October 2017, the Office of Human Rights in the District of Columbia was charged with enforcing the Fair Criminal Record Screening for Housing Act of 2016 (the “D.C. Fair Criminal Records Act”), which requires landlords to provide written notice to prospective tenants about the landlord’s eligibility requirements *before* a landlord can accept an application fee.<sup>105</sup> This forces the landlord to develop a policy regarding the use of criminal records that is tailored to legitimate goals (e.g., safety or compliance with

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100. *Id.* at 5.

101. *Id.*

102. *See id.* at 3.

103. Walter et al., *supra* note 3, at 3.

104. 64 D.C. Reg. 3980 (Apr. 7, 2017). Further, Seattle, Washington, passed an even more aggressive law, which prohibits housing providers from making rental decisions on the basis of an individual’s criminal history at all, except for sex offenses committed as an adult for which the individual is on a registry. *See* Seattle, Wash., Ordinance 125393 (Aug. 23, 2017), <http://seattle.legistar.com/View.ashx?M=F&ID=5387389&GUID=6AA5DDAE-8BAE-4444-8C17-62C2B3533CA3> [<https://perma.cc/Z5RV-R3PU>]; *Housing Law—Criminal Screening of Tenants—Seattle Bans the Use of Criminal History in Rental Decisions—Seattle, Wash., Ordinance 125393 (Aug. 23, 2017)*, 131 HARV. L. REV. 1844, 1844 (2018).

105. 64 D.C. Reg. 21-259 (Apr. 28, 2017).

a lease), as opposed to impermissible goals (e.g., banning all applicants with criminal records, or, worse, limiting the number of minorities at the property).<sup>106</sup> Second, the landlord is forbidden from making any inquiry into an applicant's criminal background until *after* evaluating the prospective tenant's other qualifications and issuing a conditional offer to the tenant, which can only be withdrawn for a substantial, legitimate, nondiscriminatory interest that is in accordance with the policy the landlord already provided to the tenant, and that is reasonable under six factors included in the Act:

- (A) The nature and severity of the criminal offense;
- (B) The age of the applicant at the time of the occurrence of the criminal offense;
- (C) The time which has elapsed since the occurrence of the criminal offense;
- (D) Any information produced by the applicant, or produced on the applicant's behalf, in regard to the applicant's rehabilitation and good conduct since the occurrence of the criminal offense;
- (E) The degree to which the criminal offense, if it reoccurred, would negatively impact the safety of the housing provider's other tenants or property; and
- (F) Whether the criminal offense occurred on or was connected to property that was rented or leased by the applicant.<sup>107</sup>

Finally, the landlord cannot consider convictions that are over seven years old, and, if the landlord rejects the applicant after a conditional offer is made, the landlord must provide written notification and a copy of all information used to make the determination.<sup>108</sup>

The goal of the D.C. Fair Criminal Records Act is to take an applicant's criminal record out of the equation until *after* the housing provider has evaluated whether the applicant is qualified to rent the unit. Only then, may the housing provider look at the applicant's criminal record. This accomplishes a variety of goals. First, it makes it expensive for the housing provider to reject those with criminal records without good reason. By the time a housing provider knows whether an applicant has a criminal record, the housing provider will have already invested time and money in evaluating whether the applicant is otherwise qualified. He or she may have done a credit check and examined the applicant's rental and

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106. *See id.*

107. D.C. CODE § 42-3541.02(e)(2) (2017).

108. *Id.* § 42-3541.02(d), (f)(1).

employment history. After spending the time and money doing that work, presumably, a housing provider would be less inclined to reject an applicant for a minor misdemeanor charge or a very old felony conviction without considering whether those convictions are truly predictive of future recidivism. Second, it forces the housing provider to conduct an individualized assessment (something encouraged by the HUD Guidance), asking whether the circumstances surrounding the applicant's criminal history warrant rejecting the applicant in light of the fact that, absent the criminal record, the housing provider had been prepared to rent to the applicant. Third, it makes rejecting an applicant because of a criminal record burdensome; if the housing provider rejects an applicant because of a criminal record, he or she must provide a written notification to the prospective tenant as well as furnish all information and records used to make the negative determination.

Though the D.C. Fair Criminal Records Act is one of the strongest in the nation in terms of protecting those with criminal records from being unnecessarily excluded from housing opportunities, it is far from perfect. The penalties for violations of the D.C. Fair Criminal Records Act are, unfortunately, not substantial (\$1000 to \$5000, depending on the number of units the housing provider rents), and only half of any penalty is given to the complainant.<sup>109</sup> For that reason as well as other reasons, the agency charged with enforcing the D.C. Fair Criminal Records Act reports that in the D.C. Fair Criminal Records Act's first year, only two complainants brought forth complaints against landlords under the D.C. Fair Criminal Records Act.<sup>110</sup>

Relying on individual plaintiffs to enforce the Act will likely continue to be challenging for a variety of reasons, in addition to the low cap on damages. First, citizens returning from periods of imprisonment are unlikely to be made aware of their rights under this new law. Second, returning citizens desperately need housing *quickly*; often securing housing is a condition of their parole. Thus, many do not have time to pursue their rights under the D.C. Fair Criminal Records Act (which gives applicants twenty days to request a copy of all records used in considering the application). Fi-

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109. *Id.* § 42-3541.05(a)(1)–(3).

110. D.C. Office of Human Rights, Training on the D.C. Fair Criminal Records Act at the District of Columbia Department of Consumer and Regulatory Affairs (Sept. 17, 2018) (unpublished meeting notes) (on file with author).

nally, it is challenging for potential plaintiffs to connect with attorneys. Potential plaintiffs have likely had experience with assigned attorneys in the context of their criminal case, and many are not eager to interact with the justice system again, even as a plaintiff. Further, most citizens returning from incarceration cannot afford private attorneys and free legal services organizations often do not make admissions cases a priority and instead focus on preventing evictions.<sup>111</sup>

One other quirk in the District of Columbia is that, just after the D.C. Fair Criminal Records Act went into effect, the D.C. Housing Authority seemed to move in the opposite direction by announcing its intention to implement rules that would require public housing tenants to undergo criminal background checks more frequently during re-certification processes over the course of their tenancies, even if the tenant in question is in complete compliance with his or her lease and there have been no reports of criminal activity.<sup>112</sup> Without citing any authority, representatives from the Housing Authority stated that more frequent background checks would “improve the quality of life” at public housing projects.<sup>113</sup>

Even if enforcement for violations of the D.C. Fair Criminal Records Act continues to be challenging and even if the D.C. Housing Authority seems somewhat out of step with the new law, the D.C. Fair Criminal Records Act serves as a useful model to other jurisdictions in large part because of its preventative effect. Many landlords currently do not have written policies regarding the use of criminal background checks, and instead blindly rely on recommendations from background check companies; legislation like the D.C. Fair Criminal Records Act will force housing providers to identify legitimate nondiscriminatory goals and then draft policies that are narrowly tailored to those goals. Additionally, legislation, like the D.C. Fair Criminal Records Act, may subtly shift the thinking of housing providers. If housing providers cannot institute broad bans on all people with criminal records, they may end up housing tenants with known criminal backgrounds. If those tenants turn out to be lease-abiding renters, landlords may feel more comfortable renting to those with criminal records in the future. Finally, legislation like the D.C. Fair Criminal Records Act that

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111. Carey, *supra* note 23, at 591.

112. D.C. Hous. Auth., Meeting with Local Housing Advocates at the District of Columbia Housing Authority (May 5, 2018) (unpublished meeting notes) (on file with author).

113. *Id.*

forces individuals to consider the potentially racially disparate impact of their actions, forces landlords to grapple with complicated issues regarding race, which will hopefully lead to more considered and fair policies.

## V. UNANSWERED QUESTIONS

While the D.C. Fair Criminal Records Act may serve as a useful model to other jurisdictions, it leaves several questions unanswered.

First, it is unclear how effective the D.C. Fair Criminal Records Act will be if housing providers continue to receive data that would be unlawful to use under the Act. For example, the D.C. Fair Criminal Records Act as well as the HUD Guidance makes reliance on arrest records alone an impermissible ground for denying housing.<sup>114</sup> Despite this, many tenant screening companies provide this data to landlords along with conviction records, credit reports and other information. If a landlord *sees* this data, is it possible that she or he will not rely on it, even subconsciously? Should the law require housing providers to demand that tenant screening companies narrow their searches only to data that may be lawfully relied upon in a given jurisdiction?

Second, will liability under the FHA reach not only housing providers, but also background check companies; these companies certainly do not provide “dwellings” under the FHA, but they are core to determining whether an individual will have access to housing.

Third, as easy and inexpensive access to data grows, would it be more effective to consider legislation that allows for broader rights to expungement of criminal records?

Fourth, while considering a housing provider’s potential disparate impact liability for using overly restrictive criminal background policies, must we also consider her potential third-party liability for acts a tenant with a criminal history may commit against another tenant?

Finally, how can we improve enforcement mechanisms under laws meant to prevent disparate impact? Relying on individual plaintiffs who are among the most disempowered in our society

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114. HUD GUIDANCE, *supra* note 6, at 5.

seems like an ineffective enforcement plan. Instead, municipalities should engage testers, compliance trainers, and use other means to ensure that housing providers are pushed to provide fair access to housing accommodations to individuals, even those with criminal records.

#### CONCLUSION

Release from prison should open the door to a fresh start for returning citizens, but that is impossible if doors to stable housing are closed—and, as discussed above, that door is most often closed to minorities both because of racial injustice in the criminal system and because housing providers' criminal background check policies often have disparate impacts on minorities. Although there is little empirical evidence to demonstrate that barring those with criminal records from housing increases public safety, there is no lack of evidence to support the idea that secure housing and employment reduces the risk of recidivism. HUD's Guidance pointed us in the right direction, and municipalities, such as the District of Columbia, have begun to take notice; there is much more work to be done.