

Notes

A Home of One's Own: The Fight Against Illegal Housing Discrimination Based on Criminal Convictions, and Those Who Are Still Left Behind*

“The ache for home lives in all of us, the safe place where we can go as we are and not be questioned.”

—*Maya Angelou*

Introduction

Housing discrimination against men and women with criminal records is ubiquitous in American society. Considering America imprisons more of its population than any country in the world,¹ the effects of this discrimination are enormous. More than 29% of the adult population—roughly 70 million people—have state convictions on their records,² and one estimate calculates that around 3.5 million people have been convicted of a crime that would lead to automatic exclusion from public housing within the past five years.³ Until recently, housing discrimination, in spite of the ramifying hardships it imposed on such a large percentage of the population, was considered entirely legal and went virtually unchallenged.

But things have begun to change. The U.S. Department of Housing and Urban Development (HUD) recently clarified that these bans likely constitute illegal discrimination under the Fair Housing Act,⁴ and an ongoing lawsuit

* To Marlon, Carlos, Divine, Eddie, Ronald, Andre, El-Sun, Robert, and the millions of other men and women who fight daily for their dignity and rights as currently or formerly incarcerated people. Your work is oxygen.

1. *Criminal Justice Facts*, SENT’G PROJECT, <http://www.sentencingproject.org/criminal-justice-facts> [https://perma.cc/6GYG-VCXC].

2. NAT’L EMP’T LAW PROJECT, RESEARCH FACT SHEET: RESEARCH SUPPORTS FAIR-CHANCE POLICIES 7 n.1 (2016), <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf> [https://perma.cc/SX3G-RRZU].

3. CORINNE CAREY, HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 33 & n.107 (2004), <https://www.hrw.org/reports/2004/usa1104/usa1104.pdf> [https://perma.cc/3PZW-JNGH].

4. HELEN R. KANOVSKY, 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 10 (Apr. 4,

against a New York City housing provider, squarely addressing the illegality of these policies, promises to create precedent for future litigation around the country.⁵ Other reforms, through litigation and legislation, are also on the rise. For example, lawsuits have begun to challenge the length of time that housing providers are able to look back into an individual's criminal record (known as a "lookback period") in order to deny housing, and they have reduced lifelong lookback periods to five or ten years depending on the offense.⁶ Additionally, advocates challenging "blanket bans"—bans that exclude anyone who has ever been convicted of a misdemeanor or felony—have been pushing instead for housing providers to weigh factors such as length of time since conviction and evidence of rehabilitation in order to determine housing eligibility.⁷

Yet the changes that these reforms promise may not ultimately affect the individuals most in need of stable housing—men and women who have just been released from jail or prison and who have nowhere to go. Studies have consistently shown that individuals released into stable homes have a significantly greater chance of successfully reintegrating into society, while those released into unstable and short-term housing are at risk of spiraling into a cycle of instability and recidivism that "threatens to transform spells of incarceration or homelessness into more long-term patterns of social exclusion."⁸ Therefore the current reforms may benefit individuals who have already succeeded in reintegrating into society, but they fail to address the immediate need for stability of the men and women who have just been released.

This Note attempts to identify the problems created by housing bars based on criminal convictions, the various reform efforts currently at work, and the potential inadequacies of the reforms based on the needs of those most at risk for recidivism. To that end, Part I discusses the prevalence of housing discrimination in both the private and public housing sectors. Part II pulls from social science to demonstrate the effects of unstable housing or

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https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASStandCR.pdf [<http://perma.cc/89SR-TZNX>] [hereinafter, HUD Guidance] (suggesting that "arbitrary and overbroad criminal history-related bans" that result in unjustified discrimination likely violate the Fair Housing Act).

5. First Amended Complaint at 2, *Fortune Soc'y, Inc. v. Sandcastle Towers Hous. Dev. Fund Corp.*, No. 1:14-cv-06410 (E.D.N.Y. May 1, 2015).

6. *See, e.g., Cardenas v. Apartment Inv. & Mgmt. Co.*, Cause No. 380,393 (Co. Ct. at Law No. 2, Bexar Cty. Jan. 7, 2015) (unpublished order) (on file with author).

7. *See* HUD Guidance, *supra* note 4, at 6 (stressing that blanket bans are likely to violate Title VII); Rebecca Oyama, *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, 212–15 (2009) (arguing that blanket bans violate Title VIII).

8. Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUB. POL'Y 139, 141–42 (2004).

homelessness on individuals just released from jail or prison. Part III outlines the various reform strategies that advocates are using to challenge these bars, and Part IV discusses both the positive effects of these reforms and their failure to assist those most in need of relief. Finally, Part V attempts to identify potential solutions to bridge the gap between the limits of the ongoing reform efforts and the need to provide housing for individuals who have just been released back into society.

I. Housing Discrimination Against Individuals with Criminal Convictions

“We do not allow people convicted of felonies to live here.” This was the response of a Texas public housing provider to a questionnaire asking how long an applicant with a criminal record would have to wait before he could be considered for public housing.⁹ Similarly, a private landlord in Texas stated on a real-estate forum: “I do not rent to convicted felons or registered sex offenders. Period. No exceptions.”¹⁰ While the attitudes represented by these two statements are not representative of all housing providers, they are by no means uncommon. Discrimination against people with criminal records¹¹ has not only been considered constitutional, it has been thought necessary to ensure community safety. Enabled by easy and increasingly inexpensive access to criminal-record data, landlords now regularly screen potential tenants’ criminal records and can reject individuals with convictions based on almost any criteria they create.¹²

This discrimination has long been considered legal because it is not based on a protected status—race, sex, national origin, or religion. And

9. MARIE CLAIRE TRAN-LEUNG, SARGENT SHRIVER NAT’L CTR. ON POVERTY L., WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 1 (2015) <http://www.povertylaw.org/files/docs/WDMDFinal.pdf> [<https://perma.cc/3WWB-LN44>].

10. John T., Comment to *Renting to a Felon*, BIGGER POCKETS, <https://www.biggerpockets.com/forums/81/topics/106939-renting-to-a-felon> [<https://perma.cc/3MZE-WP6N>].

11. Throughout this paper, I will refer to formerly incarcerated people, or people with criminal convictions, in a way that emphasizes their humanity, as requested by Dr. Divine Pryor and Eddie Ellis of Center on NuLeadership for Urban Solutions. Open Letter from Eddie Ellis, Center on NuLeadership for Urban Solutions, http://centerformleadership.org/cnus/wp-content/uploads/2013/11/CNUS-lang-ltr_regular.pdf [<https://perma.cc/ZR4Y-X8AA>] (“The worst part of repeatedly hearing your negative definition of me, is that I begin to believe it myself ‘for as a man thinketh in his heart, so is he.’ It follows then, that calling me inmate, convict, prisoner, felon, or offender indicates a lack of understanding of who I am, but more importantly *what I can be*. I can be and am much more than an ‘ex-con,’ or an ‘ex-offender,’ or an ‘ex-felon.’”).

12. Marie Claire Tran-Leung, *Beyond Fear and Myth: Using the Disparate Impact Theory Under the Fair Housing Act to Challenge Housing Barriers Against People with Criminal Records*, 45 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 4, 5–6 (2011). One study conducted by the National Multi-Housing Council—an organization of large apartment companies—revealed that 80% of its members screen prospective tenants for criminal histories. Oyama, *supra* note 7, at 191–92.

because collateral consequences of a criminal conviction are classified as civil penalties, no mechanism exists to challenge them within the criminal justice system.¹³ Furthermore, defense attorneys, prosecutors, and judges have no obligation to inform a criminal defendant about the collateral consequences that may result from their guilty plea.¹⁴ As a result, collateral consequences, including housing discrimination, remain invisible to many individuals charged with crimes, and when visible, are elusive to legal challenge.

Housing discrimination occurs in both public and private housing, severely limiting the housing options for someone with a criminal record, regardless of whether that criminal record is evidence of a long-past life or a fresh reminder of the effects of drug addiction and poverty.

A. *Public Housing*

All public housing providers are required by federal mandates to impose permanent bans on applicants who have been convicted of manufacturing methamphetamine on federally assisted property and applicants who are required to register as sex offenders for life.¹⁵ Beyond those two mandatory permanent bans, public housing authorities have discretion to admit individuals with criminal records, but they also have discretion to develop more stringent screening policies.¹⁶ Federal guidelines instruct that public housing authorities may reject applicants who have engaged in any of the following activities *during a reasonable time* before submitting their application:

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

13. The controlling test for determining whether a penalty is civil or criminal is a two-pronged inquiry set forth in *United States v. Ward*, 448 U.S. 242, 248–49 (1980), which instructs courts to first determine legislative intent as to whether a sanction is to be classified as civil or criminal; and second, if civil, to employ a seven-factor analysis articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167–68 (1963), to determine whether the purpose or effect of the sanction is so punitive as to be considered criminal.

14. *See, e.g.*, *United States v. Yearwood*, 863 F.2d 6, 8 (4th Cir. 1988) (deciding that requiring defense counsel to advise defendants on collateral consequences would be unreasonably burdensome); *Fruchtman v. Kenton*, 531 F.2d 946, 949 (9th Cir. 1976) (holding that “collateral consequences flowing from a guilty plea are so manifold that any rule requiring a district judge to advise a defendant . . . would impose an unmanageable burden on the trial judge”).

15. TRAN-LEUNG, *supra* note 9, at 7.

16. *Id.* at 8.

17. 42 U.S.C. § 13661 (2012).

Although this last factor is not supposed to be enforced as a catch-all, it has been used by some housing authorities to create bans on applicants whose “arrest or conviction record . . . indicates that the applicant may be a . . . negative influence on other residents,” or applicants who have convictions for “immoral conduct of any type.”¹⁸ These vague and confusing categories may lead potential applicants to forego applying for housing altogether, even if they may in fact be eligible. Human Rights Watch spoke to a homeless woman in Birmingham who has seen this phenomenon firsthand: “A lot of people don’t apply because they know they got a felony and they’re not going to get [it].”¹⁹ Vague standards may also give housing authorities the discretion to deny applicants for illegal reasons—for example, a housing provider might find that a white applicant with an old marijuana charge will not be a “negative influence on other residents,” while a black applicant with a similarly old charge would be.²⁰

Furthermore, neither Congress nor HUD has given guidance on how long the “reasonable time” between a criminal conviction and submitting a housing application should be. Housing authorities vary widely in the time barriers placed on different categories of criminal conduct, and many contain no time limits on using a person’s criminal history to deny admission, sometimes excluding individuals for minor offenses from many years prior.²¹

While lifetime bans and other unreasonable lookback periods discriminate against individuals who have been out of prison for years or more, the “One Strike and You’re Out” Act creates a dilemma for those just released and their families. The “One Strike and You’re Out” Act requires housing authorities to include a clause in leases declaring that

any criminal 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.²²

This has been construed as a strict liability law allowing eviction if the housing authority discovers criminal activity.²³ The tenant need not be the

18. TRAN-LEUNG, *supra* note 9, at viii.

19. CAREY, *supra* note 3, at 71.

20. *See id.* at 4 (criticizing the language as overbroad and, therefore, subject to abusive application). Of course, this type of discrimination is illegal, as it is disparate treatment based on race. HUD Guidance, *supra* note 4, at 10. But it is difficult to document and may often be unconscious on the part of the housing provider. Vague criminal categories, however, give consciously or unconsciously racist housing providers a tool with which to discriminate.

21. CAREY, *supra* note 3, at 50–51.

22. 42 U.S.C. § 1437d(l)(6) (2012).

23. *See, e.g., Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 134 (2002).

one allegedly engaging in criminal conduct—it could be a tenant’s child, grandchild, or guest—and the criminal activity need not occur on the premises. Thus, a tenant could be evicted based on the criminal activity of a guest, miles away, that the tenant was unaware of.²⁴

But most individuals returning from prison have few resources and must live with family for some time postrelease. Indeed, a long-term study conducted by the Vera Institute of Justice of forty-nine individuals released from New York prisons found that 80% were living with a relative two days after release.²⁵ The “One Strike and You’re Out” Act serves to deter individuals from providing a home for family members returning from jail or prison. The tenant may be subject to eviction if the newly released friend or family member is perceived as a threat to the “health, welfare, or safety” of the housing project.²⁶ Additionally, the tenant bears the risk of a strict liability eviction if the friend or family member ever reoffends.²⁷ For these reasons, public housing, which is for most recently released people the only affordable option, is virtually unobtainable.

B. *Private Housing*

Because of the highly restrictive practices of public housing authorities, private housing may be the only option for stable housing for recently released individuals, assuming they can afford it.²⁸ Private housing accounts for 97% of the total U.S. housing stock.²⁹ Without family resources, buying property immediately upon release will be out of the question, so most individuals look to rent privately owned apartments.³⁰ Additionally, once an

24. Heidi Lee Cain, *Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 138–39 (2003). Indeed, this is exactly how the Act has been used. For example, in *Department of Housing and Urban Development v. Rucker*, the Supreme Court upheld the “One Strike and You’re Out” Act in a case in which the Oakland Housing Authority evicted individuals who had no knowledge of their guests’ criminal activity. 535 U.S. at 127–30. Similarly, one New Orleans grandmother was attempting to retrieve her grandchildren from her home when she was maced by a woman, who she then punched before being taken to the hospital. Though she was never arrested or charged, her public housing provider moved to evict her from her public housing. FORMERLY INCARCERATED & CONVICTED PEOPLE’S MOVEMENT, COMMUNITIES, EVICTIONS & CRIMINAL CONVICTIONS 10 (2013), https://www.prisonlegalnews.org/media/publications/convicted_ppl_mvmt_evictions_and_convictions_report_2013.pdf [<https://perma.cc/E6PM-XXRK>].

25. MARTA NELSON ET AL., VERA INST. OF JUSTICE, THE FIRST MONTH OUT: POST-INCARCERATION EXPERIENCES IN NEW YORK CITY 8 (1999), http://archive.vera.org/sites/default/files/resources/downloads/first_month_out.pdf [<https://perma.cc/83U8-26R4>].

26. Cain, *supra* note 24, at 162.

27. *Id.*

28. *See id.* (“Private housing leases are not subject to the ‘One Strike and You’re Out’ housing policy.”). However, a landlord may place a comparable clause in the terms of the lease. *Id.*

29. Oyama, *supra* note 7, at 183.

30. *See* Sarah Spangler Rhine, *Criminalization of Housing: A Revolving Door that Results in Boarded Up Doors in Low-Income Neighborhoods in Baltimore, Maryland*, 9 U. MD. L.J. RACE

individual has been out of prison for several years and has been able to gain education or employment, he or she may look to private apartments as a more affordable alternative to buying property. But several factors have made this option even less attainable for individuals with criminal records. First, stigma underlies any justification for discriminating against individuals with criminal convictions.³¹ In this context, stigma refers to a person's reluctance to interact, either socially or economically, with an individual with a criminal record.³² This stigma might manifest as a belief that the individual has bad moral character or is undeserving of help and support. Even if a potential landlord believes that individuals can change, a preoccupation with risk might lead to denial of housing.³³ While this stigma may fade with the passage of time and as individuals are able to demonstrate their rehabilitation, the prevalence of life-long bans in both public and private housing illustrates the persistent effects of this stigma.

Landlords may justify banning individuals with criminal convictions by citing concerns about the safety of their tenants and the perception of their apartments as safe and "crime-free." The notion that screening for criminal records leads to safer neighborhoods has taken such a firm hold that some police departments run training programs for landlords on how to screen tenants, and local groups may publish the names of landlords who do not participate in these programs.³⁴ However, the vast majority of landlords do not understand how to read the technical language and abbreviations used in criminal records, nor do they know how to analyze predictors of criminal behavior.³⁵ For example, many private apartments impose lifetime bans on individuals with felony convictions, even though studies show that seven

RELIGION GENDER & CLASS 333, 333–34 (2009) (noting the difficulties communities have maintaining housing for imprisoned individuals who, upon release, have limited incomes). Lack of resources means men and women returning from jail or prison are often only able to afford apartments in substandard conditions. *Id.*

31. TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* 125 (2007) ("It is clear that being convicted of a crime and sent to prison carries a stigma, and being a criminal can become a person's master status.").

32. Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 520 (1996).

33. Andrew Henley, *Abolishing the Stigma of Punishments Served*, CENTRE FOR CRIME & JUST. STUD. (Sept. 1, 2014), <http://www.crimeandjustice.org.uk/publications/cjm/article/abolishing-stigma-punishments-served> [<https://perma.cc/964D-JS4C>].

34. Oyama, *supra* note 7, at 192; Mark Walker, *Finding a Home After Prison Tough for Released Felons*, USA TODAY (Feb. 28, 2015), <http://www.usatoday.com/story/news/nation/2015/02/28/another-barrier-prison-finding-home/24197429/> [<https://perma.cc/CNY7-XTTZ>] ("Sioux Falls adopted the Crime-Free Multi-Housing Program in March 1997. The program is based on a national program that originated in Mesa, Ariz., in 1991. Since then, it's spread to about 2,000 cities in 48 states, five Canadian provinces, England, Nigeria, and Puerto Rico.").

35. Oyama, *supra* note 7, at 189.

years postrelease, individuals with felony convictions are no more likely to commit a crime than a person with no convictions.³⁶

Landlords also fear legal liability for crimes committed by tenants with criminal records known to the landlord. This type of liability first emerged in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,³⁷ in which a tenant prevailed against her landlord after being robbed and assaulted in the building's hallway.³⁸ Since that time, suits against landlords for criminal activities on premises have been increasingly common.³⁹ Generally, landlords have no duty to police the premises, and courts are reluctant to find landlords liable in these situations.⁴⁰ But it is possible that a court will determine that the criminal activity was foreseeable to the landlord based on the proximity of past criminal activities and other factors.⁴¹ This possibility alone has made landlords much more hesitant about leasing to someone with a criminal record. As one landlord bluntly stated: "Everyone deserves a second chance, but odds are that they are not getting it from me."⁴²

Landlords have also become increasingly able to access criminal records for potential tenants. Counties and states are centralizing and automating criminal-history records, and companies are capitalizing on this by offering their services, at low cost, to landlords.⁴³ All of these policies serve to keep individuals with criminal convictions, even decades-old convictions, out of private apartments.

C. *Compounding Racial Discrimination in Housing*

Housing discrimination against people with criminal convictions is more prevalent for people of color because people of color are disproportionately represented in the criminal justice system. African-Americans are incarcerated at almost six times the rate of whites,⁴⁴ and

36. Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQ. 64, 80 (2007).

37. 439 F.2d 477 (D.C. Cir. 1970).

38. *Id.* at 486–87.

39. Cain, *supra* note 24, at 160.

40. *Id.*

41. *Id.* at 161.

42. Pete T., Comment to *Renting to a Felon*, BIGGERPOCKETS, <https://www.biggerpockets.com/forums/81/topics/106939-renting-to-a-felon> [<https://perma.cc/3MZE-WP6N>].

43. See, e.g., TransUnion, *Criminal Report*, SMART MOVE, <https://www.mysmartmove.com/SmartMove/tenant-background-report.page> [<https://perma.cc/VVS8-AS66>] ("Making sure that you can trust your tenants is important. That's why we access millions of criminal records to provide tenant background checks that help property owners steer clear of problem renters.")

44. NAACP, *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> [<https://perma.cc/P844-CV37>].

Latinos are incarcerated at almost three times the rate of whites.⁴⁵ Additionally, nearly half of black males are arrested by the age of twenty-three.⁴⁶ So it is not surprising that discriminating against people with criminal records disproportionately affects people of color. What is less understood is the way that this discrimination overlaps with longstanding racial discrimination against people of color in housing.

Black Americans have fought, and continue to fight, a long and hard battle against racial discrimination in American neighborhoods. A 2012 report by HUD concluded, “[t]here can be no question that the housing circumstances of whites and minorities differ substantially. Whites are more likely to own their homes, to occupy better quality homes and apartments, and to live in safer, more opportunity-rich neighborhoods.”⁴⁷ In paired-testing studies of equally qualified white and minority home seekers, HUD found that “white homeseekers are more likely to be favored than minorities. Most important, minority homeseekers are told about and shown fewer homes and apartments than whites.”⁴⁸ This occurred for minority testers who presented themselves as “unambiguously well-qualified.”⁴⁹ But other research has shown that discrimination increases when minority testers present themselves as more marginally qualified home seekers.⁵⁰ Since people of color returning from jail or prison will likely not have the financial or social resources to be “unambiguously well-qualified” in their search for housing, they can expect to face increased racial discrimination in addition to the discrimination that stems from having a criminal record.

While the effects of race and criminal justice involvement have not been well studied in housing, studies have confirmed overlapping effects of race and criminal records in employment. In one study, black and white male testers applied to jobs using the same résumé.⁵¹ However, half of the men indicated on the résumé that they had been to prison.⁵² The results showed that within each race, a criminal conviction made an applicant less likely to

45. Jose Luis Morin, *Inequities for Latino in Criminal Justice*, YOUNG LATINO MALES, <http://cronkitezine.asu.edu/latinomales/criminal.html> [https://perma.cc/H88R-JFCJ].

46. Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), <https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas> [https://perma.cc/JY5T-KU9S].

47. MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, at xii (2013), https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf [https://perma.cc/5XS8-MVWZ].

48. *Id.* at 1.

49. *Id.* at xii.

50. *Id.* at xiii (citing William C. Hunter & Mary Beth Walker, *The Cultural Affinity Hypothesis and Mortgage Lending Decisions*, 13 J. REAL ESTATE FIN. & ECON. 57 (1996)).

51. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 947–48 (2003).

52. *Id.*

get a callback.⁵³ However, the most startling result comes from the interracial comparisons: white men *with* criminal convictions were more likely to get callbacks than black men *without* criminal convictions.⁵⁴ More pertinent for this Note, of the four categories, black men with criminal convictions were the least likely to get callbacks.⁵⁵

These results, while revealing, cannot necessarily be transferred to housing discrimination. First, lifelong blanket bans on criminal convictions are race neutral—they discriminate against everyone with a criminal record. Thus, while racial disparities in the criminal justice system are implicated here, additional racial discrimination likely is not. However, in more nuanced situations—when a landlord or public housing authority has discretion in whether to admit someone with a criminal record—it is highly likely that a white person with a criminal record will be favored over a person of color with a criminal record.

II. The Effects of Unstable or Substandard Housing

As the above Part describes, finding public or private housing for an individual with a criminal record presents enormous challenges at all stages of reentry—whether one day out or twenty years out. But while this discrimination may be discouraging for those who have been out for years, they have likely been able to amass evidence of their rehabilitation and cultivated relationships with individuals with financial or social capital who can help them find housing. Furthermore, a person who has been able to stay out of jail or prison for years is likely further removed from the influences—be they drugs, poverty, or unhealthy relationships—that would lead him or her back to crime and prison. But for individuals just released from prison, the ability or inability to find housing has crucial consequences. Stable housing has been referred to as the “lynchpin that holds the reintegration process together.”⁵⁶ As such, individuals who are unable to find stable housing are significantly more likely to recidivate than others. One study found that within a year of release those without stable housing were more than twice as likely to commit another crime as those with stable housing.⁵⁷

53. *Id.* at 955–59.

54. *Id.* at 958.

55. *Id.*

56. JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 219 (2005).

57. Julian M. Somers et al., *Housing First Reduces Re-Offending Among Formerly Homeless Adults with Mental Disorders: Results of a Randomized Controlled Trial*, PLOS ONE, Sept. 2013, at 6–7, <http://journals.plos.org/plosone/article/asset?id=10.1371%2Fjournal.pone.0072946.PDF> [<https://perma.cc/ZK4L-H2MA>].

Another study discovered that each move after release increased a person's likelihood of rearrest by 25%.⁵⁸

What has been less explored though is *why* stable housing is so key in the reentry process. What are the effects of an inability to find stable housing on an individual's day-to-day life? His job prospects, his parole supervision, his educational goals? Unsurprisingly, stable housing is integral to all of these, and a lack of stable housing can derail even the most determined individual.

A. *Homelessness and Unstable Housing Increase the Risk of Recidivism*

Each year, nearly 650,000 individuals are released from prisons in our country, and over seven million more are released from jails.⁵⁹ A substantial minority of these men and women will use a homeless shelter within two years of release.⁶⁰ While nationwide statistics are not available on how many individuals are released from jails and prison without housing, studies estimate the percentage to be at least 10%.⁶¹ In urban areas this percentage is even higher, reaching 30%–50% in San Francisco.⁶²

Furthermore, research has consistently shown that homelessness contributes to a higher risk for reincarceration. In one study, 11.4% of the 49,000 people in the study experienced homelessness in the two years following release,⁶³ and almost 33% returned to prison.⁶⁴ Unsurprisingly, considering the additional housing discrimination faced by African-Americans, this study also found that African-Americans were more likely than any other racial group to face homelessness and were subsequently more likely to recidivate.⁶⁵

58. RE-ENTRY POLICY COUNCIL, THE COUNCIL OF STATE GOV'TS, PUBLIC-HOUSING AUTHORITIES (PHAS) AND PRISONER RE-ENTRY 1 (2006), http://www.reentry.net/library/item.110320-Public_Housing_Authorities_and_Prisoner_Reentry [<https://perma.cc/YZ3Y-E5S4>].

59. RE-ENTRY POLICY COUNCIL, THE COUNCIL OF STATE GOV'TS, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY 3 (2009), <https://csgjusticecenter.org/wp-content/uploads/2013/03/Report-of-the-Reentry-Council.pdf> [<https://perma.cc/GDR7-VTQ2>].

60. *See, e.g.*, Metraux & Culhane, *supra* note 8, at 139–40, 144 (reporting that 11.4% of the nearly 50,000 people released from New York State prisons to New York City from 1995 to 1998 entered a homeless shelter within two years after release and that “9.3%, 10.5%, and 6.3% of all state prison releases in Massachusetts directly preceded a shelter stay in 1997, 1998, and 1999, respectively”).

61. Maria Foscarinis & Rebecca K. Troth, *Reentry and Homelessness: Alternatives to Recidivism*, 39 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 440, 443 (2005).

62. *Id.*

63. Metraux & Culhane, *supra* note 8, at 144.

64. *Id.*

65. *See id.* (“Blacks, who comprised a little more than half of the study group, were the only racial/ethnic subgroup to have proportions of persons with subsequent shelter stays (12.9%) and reincarcerations (34.6%) that were higher than the overall group proportions.”).

Furthermore, individuals who are unable to find stable housing are much more likely to abscond from parole. In the Vera Institute study, individuals without stable housing were seven times more likely to abscond from parole within the first month following release than individuals with stable housing.⁶⁶ The study quoted a participant who was unable to find housing, describing the difficulties he faced: “To get housing, I learned you gotta have a lot of money or be on public assistance, and the second way takes forever . . . I can go live places, but either there are alcohol and drugs there, or the rent is astronomical.”⁶⁷

Reincarceration subsequently increases the risk for homelessness. One study estimated that nearly a quarter of the homeless population had a felony conviction.⁶⁸ This pattern creates a cycle that “threatens to transform spells of incarceration or homelessness into more long-term patterns of social exclusion.”⁶⁹ Studies emphasize the first month postrelease as the most critical period for an individual to have stable housing to avoid reincarceration.⁷⁰ Unfortunately, it is also the period when an individual will be least likely to obtain it. A study that examined homelessness and recidivism for individuals released from jail and prison in New York City over a two-year period found that of the individuals who experienced homelessness, over half experienced it within the first month postrelease.⁷¹ Yet studies also demonstrate that individuals released into homeless shelters or unstable housing have a more difficult time reintegrating into the community than those with stable housing.⁷² Indeed, another study revealed that 21.5% of the sample of incarcerated people reported being homeless the night before their arrest.⁷³

Of course, just because an individual is able to stay with family or friends upon release does not necessarily mean that his situation is stable or desirable. These situations are often short lived, for a variety of reasons. Some families who live in public housing will not welcome a returning

66. NELSON ET AL., *supra* note 25, at 9.

67. *Id.*

68. Gelberg et al., *Mental Health, Alcohol and Drug Use, and Criminal History Among Homeless Adults*, 145 AM. J. PSYCHIATRY 191, 194 (1988).

69. Metraux & Culhane, *supra* note 8, at 142.

70. See RE-ENTRY POLICY COUNCIL, *supra* note 56, at 272 (“[T]he first month after release from prison is a vulnerable and critical period during which the risk of becoming homeless and/or returning to criminal justice involvement is high. Entering an unstable housing situation during this first month can destabilize an individual’s re-entry process and ability to remain crime-free altogether.”).

71. Metraux & Culhane, *supra* note 8, at 144.

72. See, e.g., NELSON ET AL., *supra* note 25, at 9 (“[P]eople who expected to go directly from jail or prison to a shelter . . . were more than seven times more likely to abscond from parole during the month.”).

73. David Michaels et al., *Homelessness and Indicators of Mental Illness Among Inmates in New York City’s Correctional System*, 43 HOSP. & COMMUNITY PSYCHIATRY 150, 152 (1992).

family member because it puts their eligibility status at risk.⁷⁴ Others simply do not trust or are deeply disappointed in the individual. One nineteen-year-old participant in the Vera Institute study, Reggie, described being released and finding his family's home locked and empty.⁷⁵ They had gone to Disneyland. When he went to see his grandmother, she refused to hug him, and when he started to cry, she said: "You did this to yourself."⁷⁶ When Reggie's family returned from Disneyland, they let Reggie stay with them, but by the end of the month still had not given him a key.⁷⁷

By contrast, individuals who receive stable and supportive housing upon release are much less likely to reoffend. One study showed that the rate of return to jail or prison dropped by 40% when homeless, mentally ill individuals received supportive housing.⁷⁸ In a more qualitative study, the Vera Institute found that "people with strong, supportive families are more likely to succeed than those with weak or no family support."⁷⁹

B. Specific Effects of Unstable Housing on Reentry

That homelessness and unstable housing lead to an increased risk of recidivism is clear. But what are the specific reasons for this increased risk? While the inability to find stable housing will affect individuals in different ways, depending on their own unique circumstances, what follows is an outline of the most common effects as experienced by a hypothetical man released from prison on parole. We'll call him Dave.

1. Parole.—Dave, like most individuals returning from prison, does not gain full status as a citizen, as he is on parole (similarly, individuals returning from jail may be serving a sentence of probation). This means that their behaviors are limited and monitored—behaviors that for individuals not on parole would be entirely legal become parole violations punishable by a return to prison.

For Dave, these requirements may pose an immediate barrier to obtaining housing if anyone in Dave's family, with whom he plans to live, has a criminal conviction. Most parole regulations state that parolees may

74. JEREMY TRAVIS ET AL., URBAN INST. JUSTICE POLICY CTR., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 35 (2001), http://research.urban.org/UploadedPDF/from_prison_to_home.pdf [<https://perma.cc/7S8S-V3EY>].

75. NELSON ET AL., *supra* note 25, at 11.

76. *Id.*

77. *Id.*

78. TED HOUGHTON, CORP. FOR SUPPORTIVE HOUS., THE NEW YORK/NEW YORK AGREEMENT COST STUDY: THE IMPACT OF SUPPORTIVE HOUSING ON SERVICES USE FOR HOMELESS MENTALLY ILL INDIVIDUALS 4 (2001), http://shnny.org/uploads/NY-NY_Agreement_Cost_Study_2001.pdf [<http://perma.cc/QTN6-PU8M>].

79. NELSON ET AL., *supra* note 25, at 10.

not associate with other people with criminal convictions.⁸⁰ If Dave is African-American or Latino, this problem may be more acute. Considering the heavy criminalization of black and brown communities, the chance that Dave's father, mother, or siblings have had some sort of involvement in the criminal justice system is considerable. Even in the absence of a criminal conviction, if a family member uses drugs or is involved in any kind of crime, Dave may not be able to live there, as most parole regulations allow parole officers to search Dave's home at any time.⁸¹ Furthermore, if Dave is in recovery for drug or alcohol abuse, he may not want to live with family members who are abusing drugs, regardless of this parole restraint.

If Dave's family lives in public housing, they will risk losing this housing by allowing Dave to stay with them. While they may allow Dave to stay there despite this risk, the potential for eviction might create stress in an already stressful transition, straining emotional ties instead of repairing them. Additionally, if the public housing contains a high level of criminal activity, a parole officer might deem it inappropriate for Dave and not allow him to live there.

For any of these reasons, then, Dave may find himself without a place to stay. And in a catch-22, a lack of housing alone may be a violation of parole.⁸² Dave can go to a city homeless shelter, where he might find a bed depending on their availability and the shelter's restrictions against people with criminal records.⁸³ Here, however, Dave may encounter the drug and alcohol use and other criminal activity that he must avoid.⁸⁴ If Dave can't distance himself from this criminal activity and is swept up by police, he will have to report this arrest (or even contact short of arrest) to his parole officer.

80. A typical regulation of this sort is found in the New York Parole Regulations: "A releasee will not be in the company of or fraternize with any person he knows to have a criminal record or whom he knows to have been adjudicated a youthful offender except for accidental encounters in public places, work, school or in any other instance with the permission of his parole officer." N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.2(g) (1985).

81. Also from the New York Parole Regulations: "A releasee will permit his parole officer to visit him at his residence and/or place of employment and will permit the search and inspection of his person, residence and property." *Id.* § 8003.2(d).

82. Rhine, *supra* note 30, at 345.

83. See Statement of Interest of the United States at 3 & n.8, *Bell v. City of Boise*, No. 1:09-cv-540-REB (D. Idaho Aug. 6, 2015) (outlining plaintiffs' argument that criminalizing public sleeping in a city with insufficient shelter space for its homeless population violates the Eighth Amendment).

84. See, for example, Emmett's story in *The First Month Out*: "Emmett said the shelter he lived in was 'disgusting. The bathrooms don't work. Half the people aren't registered there. They climb in through the window at night and deal and use drugs.'" NELSON ET AL., *supra* note 25, at 9.

Even if Dave is never ultimately charged, or the charges are dismissed, the arrest alone can be a violation of parole.⁸⁵

2. *Emotional Drain.*—Assuming Dave is able to stay with his family in a less-than-satisfactory situation or the homeless shelter without relapsing or having contact with the police, he is still at a disadvantage, as the stress of trying to avoid living on the streets “becomes a primary preoccupation for many individuals.”⁸⁶ This focus diverts attention from the other aspects of Dave’s reentry, such as finding employment, getting back into school, and reestablishing connections with family and friends.⁸⁷ For example, one of the participants in the Vera Institute study, Tonya, said she “could not think about getting a job” because she was living in a shelter and had recently been diagnosed HIV positive.⁸⁸ The longer that Tonya (and Dave) wait to find employment and otherwise stabilize their lives, the more likely it is that they will violate their parole, succumb to the conditions around them, or otherwise recidivate. Dave’s struggle to find stable housing will almost certainly deplete his sense of responsibility and control over his reentry.⁸⁹ This is consistent with the Vera Institute study, which found that the participants who felt like rearrest was most likely “need to develop a greater sense of control over their own actions—coming, perhaps, from successes that they can attribute to themselves—before they will feel that the decision to avoid prison is in their hands.”⁹⁰

3. *Employment.*—Once Dave sets his mind to finding employment, though, he will be presented with new challenges. If he is in a shelter, he may not have any way for potential employers to contact him without revealing where he stays.⁹¹ Dave might have a friend whose number he can give out and who will take messages for him, but he might not. If Dave is living on the streets, the challenges mount, as it will be difficult for Dave to maintain his hygiene and look presentable when applying for jobs;⁹² and he

85. “A releasee will notify his parole officer immediately any time he is in contact with or arrested by any law enforcement agency. A releasee shall have a continuing duty to notify his parole officer of such contact or arrest.” N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.2(f).

86. Oyama, *supra* note 7, at 184.

87. *Id.*

88. NELSON ET AL., *supra* note 25, at 17.

89. See Oyama, *supra* note 7, at 196 (explaining how a recently released prisoner’s inability to find housing can lead to recidivism).

90. NELSON ET AL., *supra* note 25, at 28.

91. This is similar to Emmett’s situation in the Vera Institute study: “Since Emmett lived in a shelter, it was difficult for prospective employers to reach him—and he might not have wanted them to know where he lived.” *Id.* at 12.

92. Christine Schanes, *Homelessness Myth #1: Get a Job!*, HUFFINGTON POST (Nov. 17, 2011), http://www.huffingtonpost.com/christine-schanes/homelessness-myth-1-get-a_b_339500.html [<https://perma.cc/F8LZ-Z8RZ>].

will have no address, as well as no callback number, to put on an application.⁹³ A prospective employer might also want to see some sort of official identification for Dave, but if he does not already have an I.D., it will be difficult for him to obtain one.

4. *Identification.*—Dave will need identification for many purposes: landlords may request it when he applies for apartments, employers may require it when he applies for jobs, and he'll need it when applying for social security and other public assistance.⁹⁴ But if Dave doesn't have stable housing, he'll have a difficult time getting an I.D. To obtain a state I.D., Dave will need to show proof of his residency in the state. He'll have to furnish documentation that he likely does not have, precisely because he does not have a stable residence. For example, Texas requires *two* of the following items,⁹⁵ which have been categorized by the reason for their inaccessibility:

Requires a stable address

Current deed, mortgage, monthly mortgage statement, mortgage payment booklet, or a residential rental/lease agreement

An electric, water, natural gas, satellite television, cable television, or non-cellular phone bill dated within (90) days of the date of application

Current homeowners or renters insurance policy or homeowners or renters insurance statement

Mail from financial institutions; including checking, savings, investment account, and credit card statements dated within (90) days of the date of application

Mail from a federal, state, county, or city government agency dated within (90) days of the date of application

Current documents issued by the U.S. military indicating residence address

Requires some level of income

Texas motor vehicle registration or title

93. A homeless advice blog recommends getting a pager and a UPS mailbox for these purposes, but both of these things cost money, and without a job or other resources, they are unobtainable. *Employment, SURVIVAL GUIDE TO HOMELESSNESS* (Oct. 28, 2004), <http://guide2homelessness.blogspot.com/2004/10/employment.html> [https://perma.cc/JA84-7Q64].

94. As the Vera Institute noted, many recently released participants “were stymied in their attempts to work or apply for public assistance because they lacked basic identification.” NELSON ET AL., *supra* note 25, Executive Summary.

95. 37 TEX. ADMIN. CODE § 15.49 (2015).

2017]

A Home of One's Own

1119

Texas boat registration or title

Current automobile insurance policy or an automobile insurance statement

W-2 or 1099 tax form from the current tax year

Current automobile payment booklet

Pre-printed paycheck or payment stub dated within (90) days of the date of application

Prohibited by status as convicted felon

Valid, unexpired Texas voter registration card

Texas concealed handgun license

Other

Document from the Texas Department of Criminal Justice indicating the applicant's recent release or parole

Selective Service card

Medical or health card

Texas high school, college, or university report card or transcript for the current school year

Current Form DS2019, I-20 or a document issued by the U.S. Citizenship and Immigration Services

Texas does make an effort to acknowledge the difficulty that Dave might have obtaining a state I.D. by allowing him to use his release papers from the Texas Department of Criminal Justice, but the state still requires Dave to have an additional document in order to prove his residency. If Dave is in the military he will be able to meet this requirement, as he will if he is eligible for and has an SSI or Medicaid card. However, note that the Social Security Administration can take three to five months to process an application,⁹⁶ thereby increasing the time that Dave will have to live without proper identification. Furthermore, Texas requires that these documents contain Dave's name and *residential* address, meaning that if Dave is homeless and uses a P.O. box to receive mail, he is no closer to obtaining his I.D.⁹⁷

96. Foscarinis & Troth, *supra* note 61, at 444.

97. "Both documents must contain the individual's name and residential address." *Texas Residency Requirements for Driver Licenses and ID Cards*, TEX. DEP'T PUB. SAFETY, <https://www.dps.texas.gov/DriverLicense/residencyReqNonCDL.htm> [https://perma.cc/32ZE-KMXH].

If Dave is simply unable to provide two of the listed documents, he can sign an affidavit swearing his residency within the state, but he must be accompanied by an individual with proper identification who can attest to Dave's residency, and he must have a notarized letter from a not-for-profit, transitional house, or homeless shelter certifying that Dave receives services and mail there.⁹⁸ Thus, while it is not impossible for Dave to obtain proper identification, the process is daunting in its complexity. If Dave is anything less than determined, he will likely be stymied during his initial attempts to get an I.D.

5. *Education.*—Similarly, if Dave wants to go back to school, he will be frustrated by the residency requirements at community colleges to get in-state tuition. Many of the documents required to establish local residency present recently released people with problems similar to those discussed above.⁹⁹ Thus, even if Dave is released from prison and determined to get his education, he may be forced to pay significantly higher tuition—unable

98. *Texas Residency Affidavit*, TEX. DEP'T PUB. SAFETY, <http://www.txdps.state.tx.us/internetforms/Forms/DL-5.pdf> [<https://perma.cc/7TMG-F2HC>].

99. At Austin Community College, for example, Dave would have to present one item from "List A" and one item from "List B." Both present obvious barriers to individuals just released from prison.

List A

Employer-provided employment verification, proof of self-employment or living off earnings statement.

Ownership in real property sole or joint.

Marriage to a person who has established and maintained domicile in Texas.

Ownership in a Business in part or whole in Texas.

List B

Utility bills in name of the person.

Texas high school transcript.

Transcript from a Texas institution.

Texas driver's license or Texas I.D. card showing origination date.

Texas voter registration card showing origination date.

Pay stubs.

Bank statements.

Written statements from one or more social service agencies.

Lease or rental of residential real property in the name of the person.

Texas Residency Documentation, AUSTIN COMMUNITY C., <http://www.austincc.edu/apply-and-register/admission-steps/residency-information/texas-residency-documentation> [<https://perma.cc/6AWS-64XM>].

The problems that Dave will have providing a document from "List A" are easy to see—he must either be married, own a business, own property, or have proof of income. And the difficulties with "List B" are similar to those discussed with state I.D.s.

to register as a resident of the state in which he lives—simply because of his status as a recently released person.

6. *Criminalization.*—If Dave can't find housing with friends or family, and has no access to a homeless shelter, he will live on the streets, leaving him vulnerable to another set of restrictive and exclusionary laws and practices.¹⁰⁰ In response to increasing levels of homelessness, cities around the country have enacted laws “essentially making homelessness illegal.”¹⁰¹ Dave could be fined or jailed for sitting, sleeping, or lying down in public spaces—acts “which most homeless people have no choice but to do in public,” especially since most cities do not have adequate shelter space.¹⁰² The constitutionality of these laws is currently being litigated, since they arguably criminalize a status, in contravention of *Robinson v. California*.¹⁰³ In fact, the United States Department of Justice (DOJ) has recently issued a “Statement of Interest” in a case brought by homeless people against the City of Boise, Idaho, for ordinances criminalizing homelessness. The DOJ stated that these ordinances are unconstitutional if there is inadequate shelter space because there are not enough beds for the entire homeless population or if there are restrictions at the shelters disqualifying certain groups of homeless people.¹⁰⁴ However, most of these city ordinances are still in full effect. If Dave finds himself living on the streets, his ability (and incentive) to meet all of his parole requirements will likely plummet, and his chances of rearrest will skyrocket.

C. *Effects on the Community*

Unsurprisingly, the pervasive formal and informal punishments for individuals released from prison have repercussions beyond the targeted individual. As one advocate has noted, the effects on local housing markets start with arrest: because of targeted policing and criminalization of poor

100. While this Note does not focus on the effects of specific categories of criminal convictions, it is worth noting that all of the issues described above are exacerbated for people convicted of sex offenses. With regard to homelessness, if someone convicted of a sex offense is living on the streets, they will be in immediate violation of their requirement to register, likely sending them back to prison. Rhine, *supra* note 30, at 350.

101. Foscarinis & Troth, *supra* note 61, at 441–42.

102. *Id.*; Statement of Interest of the United States, *supra* note 83, at 2–3.

103. 370 U.S. 660 (1962). *Robinson* held that laws criminalizing addiction violated the Eighth Amendment in part because an addict would be “continuously guilty of this offense” and also because addiction “may be contracted innocently or involuntarily,” given that “a person may even be a narcotics addict from the moment of his birth.” *Id.* at 666–67, 667 n.9.

104. Statement of Interest of the United States, *supra* note 83, at 4. Although not stated explicitly in the statement, this language could easily be interpreted to include groups of homeless individuals excluded because of their criminal record.

communities of color, “entire neighborhoods” are imprisoned.¹⁰⁵ This destabilizes the housing market in those neighborhoods, for “the larger community may have trouble maintaining housing for the incarcerated individuals.”¹⁰⁶ In addition, when those who were imprisoned return to their communities, they have “limited income and [are] desperate for a place to live,” leading to a market for substandard housing.¹⁰⁷ Individuals who do not have criminal convictions also suffer from this effect, as they must live in substandard housing that might otherwise be better maintained.

Similarly, stigma attaches to entire neighborhoods that send a large number of residents to prison and then receive them back. Businesses and residents flee, which lowers property prices, resulting in a local economy reflective of the suffering of its residents.¹⁰⁸ These communities lose the “grounding social forces that typically bond communities together.”¹⁰⁹

In communities already suffering from myriad social problems, such as unemployment, disadvantaged schools, and homelessness, an influx of formerly incarcerated individuals and the problems they face may lead to a breakdown in community structure, support, and organization. The “coercive mobility hypothesis” states that high rates of incarceration, concentrated in poor communities, “will destabilize social networks in those communities, thereby undermining informal social control and leading to more crime.”¹¹⁰ A lack of affordable and supportive housing for individuals returning from incarceration is a key piece of this cycle of violence, crime, and community destabilization.

III. Current Pushback Against Housing Discrimination

Although housing discrimination against individuals with criminal convictions has been practiced openly and, most thought, legally, the practice has come under increasing fire and scrutiny in the last few years. This Part describes the various methods that advocates are using to attack the status quo. First, the Part describes current litigation strategies—disparate impact litigation through the Fair Housing Act and suits against public housing providers who have unreasonable lookback periods. Next, the Part summarizes some (though not all) recent legislation from around the country, from a Texas law that reduces potential liability for housing providers who rent to people with convictions to laws that allow people with convictions to apply for “certificates of recovery.”

105. Rhine, *supra* note 30, at 334–35.

106. *Id.*

107. *Id.*

108. CLEAR, *supra* note 31, at 126, 135.

109. Oyama, *supra* note 7, at 197.

110. CLEAR, *supra* note 31, at 149.

A. *Fair Housing Act*

The Fair Housing Act prohibits discrimination in the sale or rental of homes or apartments on the basis of race, color, religion, sex, disability, familial status, or national origin.¹¹¹ A policy can violate the Fair Housing Act if it has a disparate impact on any of these protected classes, even if the landlord had no intention to discriminate against that class.¹¹² While some real estate investors and landlords have been aware of potential disparate impact claims based on criminal records, most have thought they would be unsuccessful.¹¹³ Advocates, however, have thought otherwise and published several guides within the last decade encouraging lawyers to file disparate impact suits against landlords employing these practices.¹¹⁴

In 2014, the Fortune Society (Fortune), a New York-based reentry organization, took up the cause and filed a suit directly attacking these practices.¹¹⁵ In *Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp.*,¹¹⁶ Fortune sued a large private rental company under the Fair Housing Act for its blanket ban against individuals with criminal convictions. Fortune argues that this ban has a disparate impact on black and Latino men and women, who make up 95% of those served by Fortune.¹¹⁷ While litigation is ongoing, the plaintiffs (and others contemplating suit) received two boons in the last two years: a Supreme Court decision confirming that the Fair Housing Act supports disparate

111. 42 U.S.C. § 3604 (2012); HUD Guidance, *supra* note 4, at 1.

112. HUD Guidance, *supra* note 4, at 2.

113. *See, e.g.*, Robert J. Wise, *Felons & Fair Housing – How Discrimination Can Include the “Disparate Impact” Rule*, EZLANDLORDFORMS (Jan. 27, 2017), <https://www.ezlandlordforms.com/articles/educational/1/135/felons-and-fair-housing-how-discrimination-can-include-the-disparate-impact-rule/> [<https://perma.cc/V3SV-JKMU>] (arguing that “it is apparent that felons are not similar to [classes that] are presently protected,” and that plaintiffs “would not be able to offer ‘a viable alternative that satisfies the defendant’s policy objectives while reducing the discriminatory impact’”); Dulcey S., *Would You Rent to a Felon?*, RENTEC DIRECT (July 12, 2013), <https://www.rentecdirect.com/blog/would-you-rent-to-a-felon/> [<https://perma.cc/L77T-C6WS>] (“Is a landlord being totally unreasonable to think that a felony conviction says something relevant about what kind of tenant that person might be?”).

114. *See, e.g.*, MERF EHMEN, INSTS. PROJECT OF COLUMBIA LEGAL SERVS., FAIR HOUSING DISPARATE IMPACT CLAIMS BASED ON THE USE OF CRIMINAL AND EVICTION RECORDS IN TENANT SCREENING POLICIES (2015), <http://www.columbialegal.org/DisparateImpactManual2015.pdf> [<https://perma.cc/JW2V-8EZ3>]; FORMERLY INCARCERATED & CONVICTED PEOPLE’S MOVEMENT, *supra* note 24; TRAN-LEUNG, *supra* note 9.

115. Mireya Navarro, *Lawsuit Says Rental Complex in Queens Excludes Ex-Offenders*, N.Y. TIMES (Oct. 30, 2014), http://www.nytimes.com/2014/10/31/nyregion/lawsuit-says-rental-complex-in-queens-excludes-ex-offenders.html?_r=0 [<https://perma.cc/B568-QKGF>].

116. No. 1:14-cv-6410 (E.D.N.Y. Oct. 30, 2014).

117. First Amended Complaint, *supra* note 5, at 2, 6.

impact suits and guidance from HUD stating that blanket bans likely violate the Fair Housing Act.¹¹⁸

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,¹¹⁹ the Supreme Court upheld the practice of using disparate impact theory under the Fair Housing Act.¹²⁰ Even though every federal court of appeals had interpreted the Fair Housing Act as permitting disparate impact suits, the Court's decision was still surprising, as the Roberts Court has "rolled back many protections of the civil rights era," and housing advocates worried the Court would do the same here.¹²¹ But happily, the Court did not, and its decision removes any question about the validity of disparate impact suits, taking with it any potential defense on these grounds. Additionally, the recognized validity of disparate impact suits under the Fair Housing Act will help create uniformity in "an increasingly incoherent body of case law."¹²²

HUD's guidance will likely impact ongoing and future litigation. While not binding on courts, the opinions of HUD are certainly influential. The guidance addresses the potential illegality of housing discrimination against people with criminal convictions by analyzing each step in a disparate impact claim. These types of claims will now use a three-step burden-shifting framework. First, a plaintiff must show that a policy has a disparate impact on people of color.¹²³ To do this, Helen Kanovsky, then general counsel for HUD and author of the statement, cites national statistics showing the disproportionate conviction rates among black and Latino men and women.¹²⁴ Having established a discriminatory effect, the burden then shifts to the defendant to show that the practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.¹²⁵ The statement emphasizes that the challenged policy must actually address the asserted interest—in other words, defendants cannot simply state that discrimination is necessary for the safety of their tenants without showing that the bans put in place actually create a safer environment: "Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk

118. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2516, 2526 (2015); HUD Guidance, *supra* note 4, at 6.

119. 135 S. Ct. 2507 (2015).

120. *Id.* at 2518–22, 2526.

121. Alana Semuels, *Supreme Court vs. Neighborhood Segregation*, ATLANTIC (June 25, 2015), <http://www.theatlantic.com/business/archive/2015/06/supreme-court-inclusive-communities/396401/> [https://perma.cc/L28K-BS7V].

122. Villas W. II of Willowridge v. McGlothlin, 841 N.E.2d 584, 599 (Ind. Ct. App. 2006) (quoting Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 439 (1998)).

123. HUD Guidance, *supra* note 4, at 3.

124. *Id.* at 3–4.

125. *Id.* at 4.

than any individual without such a record are not sufficient to satisfy this burden.”¹²⁶

Applying this test, HUD made several findings. First, a housing provider that excludes people on the basis of arrests that did not result in conviction “cannot satisfy its burden.”¹²⁷ As support, HUD quotes the Supreme Court’s assertion that “[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.”¹²⁸

Second, HUD found unequivocally that “[a] housing provider that imposes a blanket prohibition on any person with any conviction record—no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then—will be unable to meet this burden.”¹²⁹ While acknowledging that a more tailored approach could meet the burden, HUD emphasized that a housing provider must still show that its policy “accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.”¹³⁰ As guidance, HUD states that policies that do not take into consideration the nature of the criminal conduct or the time since the criminal conduct occurred will be unlikely to satisfy this standard.¹³¹ However, this means that a tailored approach that considers the type of criminal convictions and the time elapsed since the convictions might be able to meet the burden of having a legitimate, nondiscriminatory purpose.

In the third step of this burden-shifting framework, the plaintiffs can show that even if the housing providers’ policies are legitimate, less discriminatory alternatives to achieving the same purposes exist.¹³² HUD suggests that one less discriminatory alternative would be individualized assessment of mitigating information relating to an individual’s criminal record.¹³³ According to HUD, this assessment should include (1) the facts or circumstances of the crime(s), (2) the age of the individual at the time of the crime(s), (3) evidence that the applicant has a good tenant history, and (4) rehabilitation efforts.¹³⁴

126. *Id.* at 5.

127. *Id.*

128. *Id.* (quoting *Schwabe v. Bd. of Bar Examiners*, 353 U.S. 232, 241 (1957)).

129. *Id.* at 6.

130. *Id.*

131. *Id.* at 7.

132. *Id.*

133. *Id.*

134. *Id.*

Much is still left to be resolved regarding HUD's recommendations for public and private housing owners. But there is no doubt that the pronouncement's impact on current and future litigation will be great.¹³⁵

B. Other Litigation Strategies for Public Housing

While disparate impact suits will apply equally against public and private housing providers, public housing providers accept certain obligations when they take federal funds that may also provide some relief from housing discrimination.

1. Unreasonable Lookback Periods.—When housing providers accept federal funds to provide subsidized housing, they become subject to federal law regulating public housing.¹³⁶ This federal law requires that public housing providers create “reasonable” lookback periods for criminal convictions when assessing applicants.¹³⁷ Frustratingly for advocates, the law does not define what constitutes a “reasonable” period.¹³⁸ But the fact that federal law imposes indefinite bars against only two narrow categories of criminal conduct (sex offenses and methamphetamine production) “strongly suggests a preference for reasonable time limits over limitless review.”¹³⁹ Yet many public housing providers have enacted limitless lookback periods or have neglected to include any lookback periods in their written criteria.¹⁴⁰ These policies discourage individuals with criminal records from applying at all, and when individuals do apply, “the policy

135. While HUD's pronouncement might have taken some housing providers off guard, there was precedent for their determination. Over twenty years ago, the U.S. Equal Employment Opportunity Commission (EEOC) released guidelines regarding the use of criminal records in employment decisions. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, No. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012). The Commission found, similar to HUD, that blanket bans had a discriminatory effect and, under Title VII of the Civil Rights Act, could not be justified by employers' hiring concerns. Oyama, *supra* note 7, at 200–02. Thus, the EEOC stated that employers should not base hiring decisions on criminal records absent a relation between the job and the conviction. *Id.* at 200–01. After the EEOC's decision, scholars immediately recognized the similarities between Title VII and Title VIII (which includes the Fair Housing Act) of the Civil Rights Act, and the potential impact of the EEOC's decision on housing policies. See, e.g., Tran-Leung, *supra* note 12, at 7 (contending that “housing providers' screening of applicants on the basis of past criminal arrests and convictions has similar deficiencies” to, and advocates should emulate challenges to, employers' screening).

136. 29 U.S.C. § 794(b) (2012).

137. TRAN-LEUNG, *supra* note 9, at v.

138. Rebecca Burns, *No Second Chances When It Comes to Housing*, TRUTHOUT (Mar. 15, 2015), <http://www.truth-out.org/news/item/29584-no-second-chances-when-it-comes-to-housing> [<https://perma.cc/TQL3-SPYE>].

139. TRAN-LEUNG, *supra* note 9, at 11.

140. *Id.*

provides little to hold . . . project owners accountable when they rely on criminal records rendered irrelevant by age.”¹⁴¹

Although federal law is also unclear about whether applicants have a right to challenge what they view as unreasonable lookback periods, a Texas lawsuit against the Apartment Investment and Management Company (AIMCO), one of the nation's largest providers of subsidized housing, took on the issue.¹⁴² Several years ago, Maria Cardenas was charged with failure to identify to law enforcement—a misdemeanor.¹⁴³ She accepted a plea of no contest, completed the requirements mandated by the court, and moved on with her life.¹⁴⁴ But three years later, Ms. Cardenas, who is disabled, attempted to rent a federally subsidized apartment and was denied by two of AIMCO's properties.¹⁴⁵ AIMCO's policy barred Cardenas for life because of her three-year old misdemeanor conviction.¹⁴⁶

Last year, however, a Bexar County Court held that this policy violated federal law because it did “not provide for denial to federally assisted housing on the basis of criminal activity engaged in by the applicant during a *reasonable time* preceding the date the applicant would otherwise be selected for admission.”¹⁴⁷ The court ordered AIMCO to “immediately revise their rental selection guidelines” for tenants applying with criminal convictions.¹⁴⁸ Although the court did not give guidance regarding what would be a more reasonable lookback period, the court further ordered AIMCO to reconsider Ms. Cardenas's application after revising their policies, implying that the court thought Ms. Cardenas might be eligible for housing.¹⁴⁹

Similar success was had in a lawsuit in Travis County (Austin) when a public housing provider was held to have violated the reasonable lookback period provision: the provider had lifetime bans for all misdemeanor assaults.¹⁵⁰ They were also ordered to revise their policies to make them “reasonable,” and the lookback period was reduced to ten years.¹⁵¹

141. *Id.* at 12.

142. *Cardenas v. Apartment Inv. & Mgmt. Co.*, No. SA-12-CV-962-XR, 2012 WL 6004212 (W.D. Tex. Nov. 29, 2012).

143. *Id.* at *1.

144. *Id.*

145. *Id.* at *2.

146. *Id.*

147. *Cardenas v. Apartment Inv. & Mgmt. Co.*, Cause No. 380,393, at 2 (Co. Ct. at Law No. 2, Bexar Cty. Jan. 7, 2015) (emphasis added) (unpublished order) (on file with author).

148. *Id.* at 3.

149. *Id.*

150. *James v. Park Place at Loyola Apartments*, Cause No. C-1-CV-10-012572, at 1–2 (Co. Ct. at Law No. 2, Travis Cty. July 31, 2013) (unpublished final judgment) (on file with author).

151. E-mail from Fred Fuchs, Hous. Attorney, Tex. Rio Grande Legal Aid, to author (May 2, 2016) (on file with author).

While the orders in these cases still allow for an uncomfortable amount of discretion when housing providers revise their lookback periods, as demonstrated by a ten-year ban for a misdemeanor, these suits show that lifetime bans in public housing are vulnerable to attack. And once lifetime bans are off the table, advocates can begin fighting for lookback periods that really do allow individuals with criminal records to overcome their past.

2. *Requirement to Affirmatively Further Fair Housing.*—Another somewhat amorphous, but potentially litigable, requirement imposed on public housing providers is the duty to administer housing programs in a manner that “affirmatively further[s] fair housing.”¹⁵² HUD describes this duty as

taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns¹⁵³

The rule does include language seeming to limit its application to protected classes, stating that housing providers must “foster inclusive communities free from barriers . . . that restrict access to opportunity *based on protected characteristics*.”¹⁵⁴ This limitation might explain why the rule has not been invoked in litigation challenging discrimination against those with criminal records. However, with the increasing awareness of the racial dynamics involved in criminal-conviction discrimination, making the connection between protected classes and those being refused housing because of criminal convictions will become easier.

Furthermore, the rule mandates that public housing providers conduct an “Assessment of Fair Housing” that identifies barriers to fair housing “pertaining to patterns of integration and segregation; racially and ethnically concentrated areas of poverty; disparities in access to opportunity; and disproportionate housing needs, as well as the contributing factors to those issues.”¹⁵⁵ HUD then reviews the assessment and deems it acceptable or unacceptable.¹⁵⁶ Because of the administrative mechanism for enforcing the rule, it is unclear whether an individual cause of action based solely on the

152. U.S. DEP’T OF HOUS. & URBAN DEV., AFFH FACT SHEET: THE DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING (2015).

153. *Id.*

154. *Id.* (emphasis added).

155. *Id.*

156. *Id.*

rule would be allowed.¹⁵⁷ Regardless, the language of the rule can certainly be used to bolster legal arguments against discriminatory policies.¹⁵⁸ Additionally, advocates can put pressure on HUD to use its enforcement power as a way to force housing providers to change their policies.

C. *Non-Judicial Reforms*

Litigation is not the only area in which changes are taking place regarding criminal records and housing determinations. Increasing public awareness about the racial motivations behind, and the utter failure of, the war on drugs, as well as awareness of the many challenges facing formerly incarcerated individuals, has led to a wide variety of reforms in state legislatures, city councils, and administrative agencies.¹⁵⁹

In Texas, for example, H.B. 1510 passed in 2015, which limits the liability landlords face for potential crimes committed by renters with nonviolent felony convictions.¹⁶⁰ Since landlords often use this fear of liability as a reason to not take risks on individuals returning from prison, H.B. 1510 and similar laws might alleviate that concern. However, the law does not guarantee that housing providers will loosen their policies, so the law's impact is uncertain.¹⁶¹

In New Orleans, the Housing Authority of New Orleans (HANO) recently approved a sweeping new policy related to criminal background

157. NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 61 (2008), http://www.civilrights.org/publications/reports/fairhousing/future_of_fair_housing_report.pdf [<https://perma.cc/LJQ9-NJ66>] ("Although plaintiffs have successfully brought numerous Section 3608 claims in federal court against HUD (using the Administrative Procedure Act) and against state and local housing agencies pursuant to the general civil rights statute, 42 U.S.C. § 1983, most courts have found no 'direct' cause of action against HUD or HUD grantees under this provision, and based on recent decisions on the use of § 1983 to enforce federal statutes, some courts are becoming reluctant to entertain a claim based on § 3608 against state or local government entities.").

158. Tran-Leung, *supra* note 12, at 10.

159. RAM SUBRAMANIAN ET AL., CTR. ON SENTENCING & CORR., RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION 2009–2019, at 5, 19 (2014), <http://www.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v3.pdf> [<https://perma.cc/FZF9-9DS3>] ("In recent years, however, the veil of invisibility has slowly lifted. With rising awareness of the increasing number of people under correctional supervision and, therefore, an ever-increasing number reentering society, state policymakers, legal practitioners, advocates and the American public have become more concerned about the issue of offender reentry and more supportive of rehabilitative and reentry services, particularly those which prevent recidivism." (citations omitted)).

160. 2015 Tex. Sess. Law Serv. 2092 (West) (codified at TEX. PROP. CODE ANN. § 92.025 (West 2016)); Erik Barajas, *New Law Could Change to Allow Felons to Rent Apartments*, ABC13 EYEWITNESS NEWS (Aug. 6, 2015), <http://abc13.com/news/law-could-change-to-allow-felons-to-rent-apartments/907237/> [<https://perma.cc/L2EF-ZZF4>].

161. Barajas, *supra* note 160.

checks.¹⁶² While this policy has been three years in the making, it closely tracks the recommendations set forth by the HUD statement. The policy eliminates an outright ban on individuals with criminal convictions, instead establishing an individualized review process.¹⁶³ Initially, HANO housing providers will consider the severity of the crime and the time since conviction in order to determine whether to admit or further evaluate the applicant.¹⁶⁴ For recent or serious crimes, a panel will consider several factors, including rehabilitation efforts, ties to the community, and current employment status.¹⁶⁵

In a different context, a bill passed in Arizona would have allowed homeowners to rent their homes to individuals without conducting criminal background checks, regardless of the rules put in place by the homeowner's associations to which they belong.¹⁶⁶ Since many homeowner's associations belong to "crime-free programs, which partner with local law enforcement to ban convicted felons, sex offenders and drug dealers," this law would have allowed homeowners to skirt those restrictions.¹⁶⁷ The bill sparked controversy, pitting the rights of homeowners against those of their neighbors and their homeowner's association, but it was struck down in state court as an unconstitutional amendment to a campaign finance bill.¹⁶⁸

Other states have started allowing people with criminal convictions to apply for "certificates of recovery," which can be given to third parties as evidence of rehabilitation.¹⁶⁹ Some states require that an individual wait twelve months after release before applying, while others allow applications while the individual is still incarcerated.¹⁷⁰ Decisions would be made based on a showing of programs completed and behavior in prison.¹⁷¹

162. Richard A. Webster, *HANO Approves New Criminal Background Check Policy*, NOLA.COM (Mar. 29, 2016), http://www.nola.com/politics/index.ssf/2016/03/hano_approves_new_criminal_bac.html#incart_m-rpt-2 [https://perma.cc/BUC4-MYEU].

163. *Id.*

164. Mathilde Laisne, *In New Orleans, the Housing Authority Is Helping People with Criminal Convictions Rejoin Families*, VERA (Mar. 30, 2016), <https://www.vera.org/blog/in-new-orleans-the-housing-authority-is-helping-people-with-criminal-convictions-rejoin-families> [https://perma.cc/4CR6-EL92].

165. *Id.*

166. *New Law Opens Rental Market for Convicted Felons*, CBS5 (July 15, 2014), <http://www.cbs5az.com/story/22848798/new-law-opens-rental-markets-for-convicted-felons> [https://perma.cc/Y4SV-EZPS].

167. *Id.*

168. *Id.*

169. SUBRAMANIAN ET AL., *supra* note 159, at 11.

170. *Id.* at 18–19 (noting that North Carolina requires applicants to wait twelve months after release, while Ohio allows individuals to apply up to one year prior to release).

171. *Id.*

Since 2009, at least seventeen states have passed laws expanding “access to information” for incarcerated or formerly incarcerated people.¹⁷² These include laws requiring that people leaving prison receive information on how their convictions might impact their civil rights, what reentry resources are available to them, and whether expungement or sealing remedies might be available to them.¹⁷³ In Indiana, a law specifies that a third-party criminal-background provider can only provide information relating to a conviction; they cannot disclose arrests, charges that did not lead to a conviction, or outdated or inaccurate information.¹⁷⁴

These reforms show an increasing willingness to view those labeled as “criminals” or “felons” as individuals with strengths and goals. However, these reforms are slight compared to the problem, and in no way do they ease all, or even many, of the barriers faced by individuals coming home from prison. There is much more to be done.

IV. The Good, the Bad, and the Nonexistent

Housing discrimination against individuals with criminal convictions has been so rampant, so widely accepted, and so misinformed that at this point any reform of the practice is progress. However, much can be learned from social scientists who have studied reentry and, more importantly, from the individuals who have transitioned out of prison—whether successfully or not. Advocates need to consciously work to bridge the gap between the reforms that seem most accessible under current law and the needs of those most affected by housing discrimination. This Part attempts to identify this gap, while acknowledging the good that will come from current reforms.

A. *The Good*

The current reforms have the potential to positively influence two groups of people: those who have successfully reentered society and have gone years without reoffending, and those who have committed relatively minor offenses or have substantial mitigating factors.

Litigation around reasonable lookback periods in public housing and reforms mandated by Fair Housing Act litigation will ensure that people's criminal records do not stymie their housing applications for the rest of their lives. It is unclear what lookback periods will be deemed reasonable, or to what degree a “less discriminatory alternative” will limit housing providers' ability to consider past criminal activity. What is clear is that the first to go will be lifetime bans for most categories of offenses.

172. *Id.* at 27.

173. *Id.*

174. *Id.* at 28.

When housing providers are forced to rewrite their lookback period policies, advocates should not be satisfied with a twenty-year lookback period just because it is not a lifetime ban. Instead, advocates should aggressively fight against any policy that looks back more than seven years,¹⁷⁵ at most, for violent felony convictions. Advocates can cite widely accepted studies showing that individuals who have been out for seven years are no more likely to commit a crime than a person who has never been to prison.¹⁷⁶ For nonviolent felonies and misdemeanors, the lookback period should be significantly shorter than seven years. This will ensure that those who have proved that they are rehabilitated and are productive members of society will not be hobbled by their past.

The second category of individuals who will certainly benefit from current reforms are those whose offenses are minor or who have mitigating factors weighing in favor of admission to housing. This stems from the final part of the disparate impact burden-shifting framework, which requires plaintiffs to provide less discriminatory alternatives in order to succeed. The recommendations made by HUD and the relief requested by the *Fortune Society* lawsuit suggest that a less discriminatory alternative will be an individualized evaluation of each applicant with a criminal history, considering factors like “the facts or 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.”¹⁷⁷

These factors presume, to a certain degree, that the conviction is older (considering length of time since it occurred, postrelease conduct, and evidence of rehabilitation), that the individual was young when the crime occurred (considering the age of the person at the time of the offense), that the conviction was not violent or aggravated (considering the nature of the conviction), and that the individual was able to afford or maintain stable housing in the past (considering a good tenant history).

This means that individuals who were convicted of minor offenses, perhaps in their youth, but who have since demonstrated their rehabilitation, should be granted housing. The multiple factors also mean that someone convicted of a violent felony, but who has, either in prison or since release, clearly demonstrated his transformation, could be granted housing. In other words, it requires housing providers to consider people with criminal convictions as individuals who have their own stories and the potential for transformation. But the factors also indicate that individuals with convictions

175. Even this is long—HUD has recommended a five-year lookback period for serious crimes. TRAN-LEUNG, *supra* note 9, at v.

176. Kurlychek et al., *supra* note 36, at 80.

177. HUD Guidance, *supra* note 4, at 7.

should be able to explain their conviction or stand out in some other way. The average person returning from prison, who left an impoverished community and returns to one, and who was incarcerated in a prison with little or no programming or educational opportunities, will have a hard time making these factors work for him, regardless of his desire to successfully reintegrate into society.

But a more radical alternative to the individualized assessment proposed by HUD exists and should not be overlooked by advocates. As discussed above, disparate impact litigation requires housing providers to prove that their policies *work*—something they have never had to do before. Advocates should take full advantage of this requirement. The HUD statement emphasized this requirement, pointedly stating that “[b]ald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual *without such a record* are not sufficient to satisfy this burden.”¹⁷⁸ Because housing providers have never had to provide such evidence, few studies have been conducted on the subject. But there is some indication that current bars do not, in fact, produce safer communities.

A study from Knoxville, Tennessee, found that a new screening policy implemented by the public housing authority had very little effect on crime.¹⁷⁹ The housing authority barred anyone with a conviction for murder, attempted murder, or sex offenses, and screened on a case-by-case basis anyone with other felonies or public-order crimes within the previous three years.¹⁸⁰ Researchers found that this policy had little impact on crime: while property crimes decreased, aggravated assaults went up, and murder and rape rates remained consistent.¹⁸¹ Another study, conducted in Seattle with homeless people who were given access to supportive housing, found that criminal records had no predictive value in determining housing success.¹⁸²

Advocates can also argue that because of the strong association between stable housing and success in reintegration, “dismantling housing barriers against people with criminal records will likely increase rather than decrease public safety.”¹⁸³ While housing providers may argue that this is an overly broad assertion and is not representative of crime within housing complexes,

178. *Id.* at 5 (emphasis added).

179. 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 J. CONTEMP. CRIM. JUST. 6, 25 (2004).

180. *Id.* at 15.

181. *Id.* at 19–23.

182. Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, 60 PSYCHIATRIC SERVS. 224, 229 (2009).

183. Tran-Leung, *supra* note 12, at 6.

they will have the burden of proving—in a more specific manner—that their policies do decrease criminal activity.

B. The Bad and the Nonexistent

Although many individuals will certainly benefit from the current and future reforms taking place, many of those who need stable housing the most will still find themselves barred, for several reasons.

First, a more theoretical issue. Advocates fighting these policies are starting in a bad place. As it currently stands, the vast majority of private and public housing providers bar individuals with criminal convictions.¹⁸⁴ Many have blanket bans, and others have policies that effectively serve as blanket bans. Thus, the prospect of reducing a blanket ban to a ten-year ban, or to a consideration of several factors, is a vast improvement. But if, in practice, the ten-year ban still excludes most people searching for housing, or the weighing of several factors still leads to the denial of housing for the majority of people with criminal convictions, not much has changed. Instead, advocates should recalibrate their base line: not from what currently exists, but from what will give relief to as many individuals as possible. From that base line, they should yield only to those policies that housing providers are able to prove really serve public safety.

This theoretical point leads to the practical concerns with the current reforms. One major problem is that the reforms will mostly benefit individuals who have already succeeded in reintegrating into society. For example, if someone has stayed out of jail or prison long enough to get outside of a three-year lookback period, he is also outside of the highest risk period for homelessness and recidivism. Or, if an individual is able to convince a housing provider that he is rehabilitated because he has steady employment and a positive tenant history, he will likely also have more resources—whether monetary or social—to pull from in order to find housing.

But the reforms largely ignore the population that needs stable housing the most and is at the highest risk of recidivating: those who have just been released. As discussed above, studies have repeatedly found that the most crucial period for men and women upon release is the period immediately following release.¹⁸⁵ If a person is unable to find stable housing at that time, his chances of spiraling into a cycle of homelessness and recidivism increase dramatically. Yet the current and proposed reforms do little to alleviate this burden. A person just released will inevitably fall into any lookback period that is in place, and he may not have had the time or resources to demonstrate

184. See *supra* notes 13–17, 28–33 and accompanying text.

185. See *supra* notes 60–77 and accompanying text.

his rehabilitation. Advocates need to be responsive to the needs of this population and must demand reforms that will allow successful reintegration for all—not just those who have enough resources or who are lucky enough to make it through the most difficult period of transition.

Another potentially problematic element of the reforms is the continuing reliance on tenant history—both before and after incarceration—as a factor in determining eligibility for housing.¹⁸⁶ While a landlord certainly has a right to investigate whether their prospective tenant will pay the rent and not engage in behavior detrimental to the community, the use of eviction history may itself be subject to disparate impact litigation.¹⁸⁷ Women and people of color are disproportionately impacted by eviction, and having an eviction or housing dispute on one's record serves to place individuals on a "blacklist" for future housing applications.¹⁸⁸ While the disparate impact of eviction records and the solution to this problem are beyond the scope of this Note, this is just one example of how the proposed solutions to criminal-conviction discrimination may in fact entrench other discriminatory practices.

In order to ensure that legal solutions to this problem really do provide relief, advocates need to work with social scientists who can measure the results of policy changes—both in terms of who is able to get housing and whether crime rates change as a result. Additionally, advocates need to ensure that they are not accepting solutions simply because they are slightly better than the system we now have. Questioning the very premise that discrimination against individuals with criminal records increases public safety is a good start.

V. Bridging the Gap

Regardless of how diligent lawyers are in responding to the needs of those most affected by housing bars, litigation cannot be expected to completely eradicate barriers to housing for people with convictions. For one, studies may find that barring some individuals with criminal convictions, after an individualized consideration, does actually serve public safety in a particular housing community, effectively rebutting a disparate impact challenge on those grounds. For another, courts may be reluctant to remove all discretion from housing providers' consideration of criminal convictions, even if studies don't support the providers' contentions.

186. Both the HUD Statement and the *Fortune Society* lawsuit suggest using tenant history as one factor in determining housing eligibility for individuals with criminal convictions. HUD Guidance, *supra* note 4, at 7; First Amended Complaint, *supra* note 5, at 6.

187. In fact, one of the disparate impact guides for criminal histories also includes a guide to challenging the use of eviction records. EHMAN, *supra* note 114, at 1, 20.

188. *Id.* at 4–5.

Thus, advocates, legislators, and concerned citizens—prioritizing the voices of those who have experienced reentry—must work together to create solutions that will meet housing providers in the middle. In other words, if housing providers will remove blanket bans and unreasonable lookback periods and start honestly considering applicants with criminal records, the government should work to develop systems that give applicants an opportunity to demonstrate their rehabilitation and desire for reintegration. What follows are some suggestions, supported by social science and reentry advocates, on how to do this.

A. *Expansion of Reentry Services*

Instead of releasing men and women who have received little information or assistance while incarcerated into communities that have few to no resources to assist in reintegration, services should be built up both before and after release to help people make this transition.

1. *Prerelease Services.*—One oft-cited recommendation to help people as they reenter is to develop or expand existing prerelease services in jails and prisons. One of the most consistent findings in the Vera Institute study was that while individuals just released from prison had strong motivation to turn their lives around, they needed to be better prepared before release.¹⁸⁹ This preparation involves “start[ing] the process of connecting with employers who will hire ex-offenders; get[ting] the identification they will need to find a job or cash a check; sign[ing] up for Medicaid coverage so they can enroll in drug treatment; and [getting] assessed and referred for mental health services.”¹⁹⁰

Some jails and prisons have prerelease agreements with the Social Security Administration, which allows the application process for SSI—Supplemental Security Income—and food stamps to begin prior to release.¹⁹¹ If an incarcerated person is eligible, she will begin receiving her benefits immediately upon release instead of waiting three to five months for the Social Security Administration to process her application.¹⁹² This creates some cash flow that can generate stability immediately upon release. These resources should be available to all people in jail or prison so that when they are released they have the capability of immediately finding a home, getting a job, and entering drug or mental health treatment.

189. NELSON ET AL., *supra* note 25, Executive Summary.

190. *Id.*

191. Foscarinis & Troth, *supra* note 61, at 445.

192. *Id.* at 444–45.

2. *Expanded Resources and Culture Shift for Parole Officers.*—Once individuals are released, they are usually placed under the supervision of a parole officer.¹⁹³ Parole officers often deal with heavy caseloads, and the high turnover rate in the profession indicates rapid burnout.¹⁹⁴ As a result, many parole officers are unable or unwilling to provide anything more than perfunctory monitoring when the critical need is for substantive assistance and information about available resources.¹⁹⁵ Lowering caseloads and increasing the resources available to parole officers could make parole supervision a tool for success instead of a threat of punishment. Additionally, parole officers could be a resource to recently released individuals in need of housing: as more housing options become available, parole officers could serve as reentry counselors with centralized knowledge about available housing placements.

Parole officers also need to understand the particular challenges facing individuals as they reenter, especially the challenges of those with unstable housing. For example, an inability to find stable housing should never, in and of itself, be a parole violation; parole officers should be aware of the risks that instability gives rise to, such as the increased risk of police involvement if someone is forced to stay at a homeless shelter. Additionally, since imprisonment for a parole violation leads to increased risk for homelessness and subsequent reincarceration upon release, parole officers should rarely use incarceration as a punishment for parole violations.¹⁹⁶

3. *Private Reentry Services.*—Reentry service providers—especially those who are able to provide emergency and transitional housing for those most in need—are incredibly helpful resources for individuals returning from prison. The Fortune Society in New York City serves as a model agency, with a “holistic, one-stop model of service provision.”¹⁹⁷ In addition to providing emergency, transitional, and permanent housing for select categories of formerly incarcerated people, Fortune provides career counseling, job training and placement, educational classes, drug treatment, assistance with family reunification, and mental health treatment, among other services.¹⁹⁸ In 2015, Fortune served almost 6,000 people returning to

193. Of the forty-nine participants in the Vera Institute study, forty-six were on parole. NELSON ET AL., *supra* note 25, at 25.

194. OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, STRESS AMONG PROBATION AND PAROLE OFFICERS AND WHAT CAN BE DONE ABOUT IT 2, 4 (2005).

195. NELSON ET AL., *supra* note 25, at 25.

196. Metraux & Culhane, *supra* note 8, at 150 (“[B]eing imprisoned on a parole violation increased the hazards for both a shelter stay and a reincarceration.”).

197. *Programs*, FORTUNE SOC'Y, <https://fortunesociety.org/#programs> [<https://perma.cc/MF33-BNGX>].

198. *Id.*

New York City from jail or prison, and housed over 400 people.¹⁹⁹ While these numbers are impressive, they are only a fraction of the estimated 125,000 people released from jail and prison into New York City every year.²⁰⁰ Furthermore, most communities around the country do not have large-scale, one-stop reentry programs like Fortune and struggle to meet the increased demands for reentry services for the large number of people released each year.²⁰¹

Organizations like Fortune should be replicated around the country to ease the burdens faced by people coming out of jail or prison, and to give those who are ready to transform their lives the tools with which to do so. However, regardless of the amount of prerelease and postrelease services and programs made available to incarcerated people, the fact remains that individuals need stable and safe housing as soon as they walk out of jail or prison. The services offered to motivated men and women during the day will mean little if they have to face a park bench or a cot in a homeless shelter at night. Cities and states have a responsibility to their citizens to ensure that every individual who leaves jail or prison has access to a safe and stable home.

B. Prohibit Housing Discrimination Based on Criminal Records

The simplest way to ensure that individuals coming home from prison have access to housing is to prohibit housing providers from discriminating on the basis of criminal records. Cities and states are able to pass legislation prohibiting this type of discrimination, and, in fact, Madison, Wisconsin has passed legislation like this. The Madison ordinance generally prohibits private landlords from considering criminal convictions unless they bear a “substantial relationship to tenancy.”²⁰² A model law proposed by the Legal

199. THE FORTUNE SOCIETY, ANNUAL REPORT 2014–2015, at 2 (2016), <https://fortunesociety.org/2016/02/11/the-fortune-society-annual-report-2014-2015/> [<https://perma.cc/Q7LC-UFJS>].

200. NELSON ET AL., *supra* note 25, Executive Summary.

201. Richard Greenwald, *Making Prisoner Reentry Work*, CITY J. (July 20, 2009), <http://www.city-journal.org/html/making-prisoner-reentry-work-10593.html> [<https://perma.cc/B558-7YFB>] (“[C]ities often don’t have the infrastructure or capacity to offer the range of services that people need to stay out of prison. Communication about funding allocations and ex-offenders’ needs can be poor among state, county, and local authorities and service providers. Most communities struggle to establish a coherent central entity that can provide a comprehensive map of services and hold various agencies accountable for funding and performance.”); *see, e.g.*, Thomas Mentzer, *Former Prisoners Returning to Chicago Lack Services, Support*, URB. INST. (Sept. 14, 2005), <http://webarchive.urban.org/publications/900839.html> [<https://perma.cc/XHJ4-STTK>].

202. CITY OF MADISON DEP’T OF CIVIL RIGHTS, ARREST AND CONVICTION RECORD AND HOUSING DISCRIMINATION IN THE CITY OF MADISON (2011), <https://www.cityofmadison.com/dcr/documents/ConvRecHousingBro-Eng.pdf> [<https://perma.cc/HGB9-G6YZ>].

Action Center, based in part on the Madison ordinance, would prohibit the denial of housing based on any conviction—whether or not it has a substantial relationship to tenancy—if more than two years have passed since the applicant was released from jail or prison.²⁰³

Even if private housing were accessible to most, regardless of criminal convictions, it would not be financially obtainable for most people coming home from jail or prison. This is where supportive housing becomes important.

C. Supportive Housing

Supportive housing combines affordable housing with social services to help marginalized populations live with “stability, autonomy and dignity.”²⁰⁴ Studies have shown that not only is supportive housing successful in reducing recidivism, it is also significantly cheaper than the shelters, jails, and prisons used by those who cycle from homelessness to incarceration.²⁰⁵

Metraux and Culhane, in their large-scale study of 49,000 individuals released into New York City from jails and prisons, found that “the key intervention point appears to be at the time of release.”²⁰⁶ They suggest that “efforts to prevent homelessness among released prisoners should focus on the transitional period occurring right after prison and should focus on persons who demonstrate a history of unstable housing.”²⁰⁷ Furthermore, because of the costs associated with homelessness and reincarceration, “providing housing and support services lowers these costs considerably.”²⁰⁸ Many of the pre-existing supportive-housing initiatives focus on homelessness or mental illness and are not directly focused on individuals with criminal convictions. However, because of the large overlaps between these populations, it is possible to draw some conclusions about the effectiveness of supportive housing for those with criminal convictions.

203. JULIA SINGER BANSAL, CONN. OFFICE OF LEGISLATIVE RESEARCH, 2016-R-0023, UPDATED REPORT: HOUSING FOR ADULTS WITH CRIMINAL RECORDS 6 (2016), <https://www.cga.ct.gov/2016/rpt/pdf/2016-R-0023.pdf> [<https://perma.cc/LS69-VXBD>].

204. Ctr. for Supportive Hous., *What is Supportive Housing?*, <http://www.csh.org/supportive-housing-facts/introduction-to-supportive-housing/> [<https://perma.cc/4A3G-J9FC>].

205. John M. Glionna, *Utah Is Winning the War on Chronic Homelessness with ‘Housing First’ Program*, L.A. TIMES (May 24, 2015), <http://www.latimes.com/nation/la-na-utah-housing-first-20150524-story.html> [<https://perma.cc/98UV-EJ55>] (comparing the cost of housing and social services per year—\$11,000—to the cost of hospital and jail stays per year—\$17,000).

206. Metraux & Culhane, *supra* note 8, at 150, 154.

207. *Id.* at 153.

208. *Id.*

Housing First is a model designed to end homelessness by placing individuals in stable, long-term housing as quickly as possible.²⁰⁹ Once an individual is in a stable home, he or she is offered a variety of supportive services, depending on his need. “A central tenet of the Housing First approach is that social services to enhance individual and family well-being can be more effective when people are in their own home.”²¹⁰ Housing First models have cropped up in cities across the country and are viewed as effective tools to fight both temporary and chronic homelessness. For example, Utah has reduced the population of chronically homeless people by 91% through its Housing First program.²¹¹ However, some cities exclude individuals with criminal convictions from participating in Housing First.²¹² This means that those whose intersecting disadvantages—involvement with the criminal justice system, homelessness, and likely mental illness or drug addiction—make it incredibly difficult for them to find housing on their own will be left out of perhaps the most effective program for ending the cycle of homelessness and incarceration.

Yet the beneficial effects of Housing First for people with criminal convictions have been demonstrated in a study conducted in Vancouver. While the Housing First program being studied targeted homeless individuals with mental illness, 67% of the almost 300 participants also had involvement with the criminal justice system within the previous ten years.²¹³ The participants with criminal convictions had committed an average of more than eight offenses within the prior ten years and would thus be considered “habitual offenders.”²¹⁴ Following placement in stable housing, though, rates of reconviction dropped significantly, compared to a control group.²¹⁵ For those in “scattered site” housing (in which participants are dispersed in market accommodations), reconviction rates fell to less than one-third the rate of the control group, and for participants placed in “congregate” housing (in which participants are supported together in a single building), reconviction rates fell to almost half the rate of the control group.²¹⁶ A similar study conducted in New York City also showed a precipitous decline in

209. NAT’L ALL. TO END HOMELESSNESS, WHAT IS HOUSING FIRST? (2006), http://www.endhomelessness.org/page/-/files/1425_file_WhatIsHousingFirst_logo.pdf [<https://perma.cc/NM7F-DKY5>].

210. *Id.*

211. Glionna, *supra* note 205.

212. *See, e.g.*, Rhine, *supra* note 30, at 355 (explaining Baltimore’s Housing First program, which uses vouchers that can exclude homeless applicants based on criminal history).

213. Somers et al., *supra* note 57, at 1.

214. *Id.* at 4.

215. *See id.* at 8 (concluding that the study results showed that placement in a Housing First program significantly decreased recidivism rates as opposed to usual care).

216. *Id.* at 6.

incarceration for homeless and mentally ill individuals placed in supportive housing—a 74% decline in prison “use” and a 40% decline in jail “use.”²¹⁷

Although these studies focus on homeless individuals with mental illness, there is little reason to doubt that programs like Housing First would have similarly beneficial effects on populations with criminal convictions, regardless of mental health status. Housing First delivers stable, long-term housing and social services—two things that have been shown to be crucial for successful reintegration. Thus, cities and states should greatly expand the use of programs like Housing First and should remove all restrictions based on criminal convictions. Furthermore, these programs should be available to individuals immediately upon release from jail or prison, not after individuals become homeless.

D. Transitions

An important feature of Housing First is its long-term availability, granting permanent housing to homeless men and women who often have many intersecting disabilities or disadvantages that make them unemployable. However, supportive-housing programs designed for individuals with criminal convictions should recognize that this population likely has more potential to obtain gainful employment and otherwise move on with their lives, obviating the need for permanent supportive housing. One way to assist this transition is for social workers at supportive-housing programs to establish positive relationships with housing providers in the community who are willing to accept applications from individuals in supportive housing. This could create a pipeline for individuals that have been deemed ready to transition out of supportive housing, sending them to housing providers that understand their situation and have had positive experiences with this population in the past.

Cities, states, and the federal government can also help individuals transition from supportive housing to public or private housing in more structured ways. One relatively simple move is to issue certificates of recovery or rehabilitation to individuals who have successfully gained steady employment, completed certain programming, or otherwise demonstrated their rehabilitation, and to then require housing providers to consider those certificates when screening applicants. Many states already utilize certificates of this kind, including California, New York, New Jersey, Georgia, and Connecticut, and their use is growing.²¹⁸ Most of these states use the certificates to help individuals secure employment, but they could easily be used in the context of housing. For example, the Connecticut Office

217. HOUGHTON, *supra* note 78, at 4.

218. SUBRAMANIAN ET AL., *supra* note 159, at 12 (finding that nine states had enacted legislation regarding certificates of recovery from 2009 to 2014).

of Legislative Research recently recommended requiring public and private housing landlords to assume, “unless there is evidence to the contrary, that a person with a certificate of employability is not an unsuitable tenant because of his or her criminal record.”²¹⁹

Housing providers could also be incentivized to accept individuals who are transitioning from supportive housing by expanding programs like Connecticut’s Department of Housing’s Security Deposit Guarantee Program.²²⁰ This program, designed “for low-income individuals who do not have sufficient savings for a security deposit,” promises to pay the security deposit if the tenant leaves the apartment in a damaged condition or owing rent.²²¹ A similar program could be initiated for individuals transitioning from supportive housing, offsetting some of the risk that a landlord takes when giving a person a second chance. Similarly, state and federal governments could offer housing providers a tax break for accepting applicants with recent criminal convictions.

These are just a few of the many creative solutions that could be developed if legislators took seriously the project of providing housing for men and women coming home from prison. The combination of expanded reentry services, supportive housing, and incentives for housing providers could eradicate the current cycle of homelessness and incarceration, thereby fulfilling the promise that an individual who serves her time will be accepted back into society with respect and dignity.

Conclusion

The incarceration of over two million Americans, most of whom are released back into society, means that a staggering 700,000 people are released from prison each year.²²² Most return to poverty-ridden and unstable communities, where the problems that resulted in their incarceration are compounded by the label of “felon” or “ex-convict.” So it should come as little surprise that two-thirds of those released are rearrested within three years, and three-quarters are rearrested within five years.²²³

In recent years, growing awareness of the ineffectiveness of mass incarceration has led to reforms that promise to reduce our country’s reliance on prisons. But we cannot successfully reduce the number of incarcerated

219. BANSAL, *supra* note 203, at 7.

220. *Id.* at 5.

221. *Id.*

222. Editorial, *Mass Imprisonment and Public Health*, N.Y. TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/27/opinion/mass-imprisonment-and-public-health.html> [<https://perma.cc/2BNB-VPH4>].

223. MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUSTICE, NCJ 244205, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 1 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> [<https://perma.cc/RU9F-B789>].

2017]

A Home of One's Own

1143

people without adequately supporting those who are being released. For too long, reentry services have consisted of a bus ticket and the name of a parole officer to report to, with no guarantee of a place to sleep that night. And current litigation and reforms surrounding housing discrimination, while promising in many ways, likely will not address the need for housing immediately upon release. Local, state, and federal governments must step up and fill this gap so that the ache for home will live in fewer of us.

—*Hensleigh Crowell*