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The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact

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The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact

VALERIE SCHNEIDER*

Study after study has shown that securing housing upon release from prison is critical to reducing the likelihood of recidivism,¹ yet those with criminal records—a population that disproportionately consists of racial minorities—are routinely denied access to housing, even if their offense was minor and was shown to have no bearing on whether the applicant would be likely to be a successful renter. In April of 2016, the Office of General Counsel for the United States Department of Housing and Urban Development (HUD) issued much anticipated guidance dealing directly with the racially disparate impact of barring those with criminal records from public and private housing.

After decades of seeming to encourage local public housing providers to adopt harsh policies barring applicants with criminal records regardless of the nature or recency of the crime, the Obama-era guidance from HUD represents a sea change in federal policy and will force local housing authorities to grapple with the potentially disparate impacts of harsh criminal record policies. The guidance is particularly timely, given that HUD issued a rule clarifying the burden of proof in disparate impact cases in 2013² and the Supreme Court affirmed that disparate impact claims are cognizable under the Fair Housing Act in its 2015 decision in Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.³ Additionally, while the Trump administration seems focused on rolling back Obama-era protections in some arenas, this guidance has remained in place. Even if withdrawn by HUD, the guidance has already inspired local policies

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1. See, e.g., CTR. FOR HEALTH & JUSTICE AT TASC, POST-PRISON HOUSING AND WRAPAROUND SERVICES LINKED TO REDUCED RECIDIVISM (2014), http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/FIJ%2006-14_Issue2.pdf [<https://perma.cc/LUL8-S886>]; Christopher Moraff, “Housing First” Helps Keep Ex-Inmates off the Streets (and out of Prison), NEXT CITY (July 23, 2014), <https://nextcity.org/daily/entry/housing-first-former-prisoners-homelessness> [<https://perma.cc/7K7N-623G>]; Doug Ryan, To Reduce Recidivism Rates, Turn to Housing Policy, SHELTERFORCE (June 15, 2016), <https://shelterforce.org/2016/06/15/to-reduce-recidivism-rates-turn-to-housing-policy> [<https://perma.cc/S7BB-LG35>].

2. See 24 C.F.R. § 100.500 (2017).

3. 135 S. Ct. 2507, 2525 (2015).

restricting the use of criminal background checks in housing decisions potentially giving rise to a new era for those seeking housing after being released from prison.⁴

This Article first puts the problem of using criminal records to evaluate potential tenants into historical context, discussing the particular impact of the rising rates of incarceration on minority communities. Next, the Article delves into the guidance itself, examining what it does and does not require of housing providers, with a focus on public housing. Finally, the Article provides insight into what is missing from the guidance, what might be done to strengthen it, how advocates might use it, and how housing providers might work to limit both their legal exposure and moral culpability related to the disparate impact the use of criminal records in housing decisions has on minorities.

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4. See D.C., LAW 21-259 (2016) (Fair Criminal Record Screening for Housing Act of 2016); SEATTLE, WASH., HUMAN RIGHTS ch. 14.09 (2017) (Fair Chance Housing Ordinance).

INTRODUCTION

The United States has the highest rate of incarceration in the world, with over 2.2 million men, women, and children incarcerated in federal and state prisons and local jails on any given day—an increase of 500% over the past forty years.⁵ Each year, more than 600,000 individuals are released from prison, joining the over 4.7 million Americans who are supervised through probation or parole services.⁶ These staggering numbers mean that over 100 million adults—or nearly one-third of the population of the United States—have a criminal record.⁷

As has been reported in numerous scholarly and news articles, African Americans and Latinos are “arrested, convicted and incarcerated at rates [that are] disproportionate to their share of the general population,”⁸ with Black men experiencing the

5. Nicole D. Porter, *Unfinished Project of Civil Rights in the Era of Mass Incarceration and the Movement for Black Lives*, 6 WAKE FOREST J.L. & POL’Y 1, 3 (2016) (citing SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 2 (2017), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/385B-BAM7>]); see also Reuben Jonathan Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 MICH. J. RACE & L. 291, 291 (2016) (citing DANIELLE KAEBLE, LAUREN GLAZE, ANASTASIOS TSOUTIS & TODD MINTON, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, at 2, tbl.1 (rev. ed. 2016), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf> [<https://perma.cc/LJ8T-5CB7>] (“On any given day in 2014, just over 2.3 million people were held in U.S. jails and prisons.”)).

6. Miller & Alexander, *supra* note 5, at 292 (citing DANIELLE KAEBLE, LAURA M. MARUSCHAK & THOMAS P. BONCZAR, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2014, at 1 (2015), <http://www.bjs.gov/content/pub/pdf/ppus14.pdf> [<https://perma.cc/DCN5-43SH>]); see also Nkechi Taifa, *Roadblocked Re-Entry: The Prison After Imprisonment*, NAT’L B. ASS’N MAG., May/June 2004, at 20, 20.

7. 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 1 (2016) (citing U.S. DEP’T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2012, at 3 (2014), <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf> [<https://perma.cc/3GZY-62GM>]), https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf [<https://perma.cc/6Y4P-5B46>]); see also Miller & Alexander, *supra* note 5, at 293. Some reports have estimated that over sixty-five million (not 100 million) adults have criminal records. See, e.g., Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. U. L. REV. 1, 2 (2014) (citing BAN THE BOX: RESOURCE GUIDE, NAT’L EMP’T LAW PROJECT 1 (2014), <http://www.nelp.org/content/uploads/2015/03/Bantheboxcurrent.pdf> [<https://perma.cc/STA2-KLST>]).

8. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 7, at 2; see also Brad Heath, *Racial Gap in U.S. Arrest Rates: ‘Staggering Disparity,’* USA TODAY (Nov. 18, 2014, 5:13 PM), <http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207> [<https://perma.cc/Z3VG-45EN>]; Tanasia Kenney, *Blacks in Colorado Arrested, Sentenced to Prison More than Any Other Racial Group, According to New Report*, ATLANTA BLACK STAR (Dec. 26, 2016), <http://atlantablackstar.com/2016/12/26/blacks-in-colorado-arrested-sentenced-to-prison-more-than-any-other-racial-group-according-to-new-report> [<https://perma.cc/G3U6-8F74>]; Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-*

highest rates of incarceration.⁹ In 2014, for example, African Americans comprised approximately twelve percent of the country's total population, but thirty-six percent of the total prison population, a rate that is nearly three times the proportion of the country's population.¹⁰ In contrast, non-Hispanic Whites comprised sixty-two percent of the country's population and only thirty-four percent of the prison population.¹¹ Currently, one in nine Black men age twenty to thirty-four is incarcerated, and one in three Black men will spend time in jail or prison over the course of his lifetime.¹²

Upon release, each of the millions of Americans with criminal records must find a place to live, and more often than not, regardless of the nature of the crime committed, the length of time served, the length of time that has elapsed since the criminal act, or the likelihood of recidivism, the mere existence of criminal record serves as a bar to obtaining suitable housing. With minorities disproportionately represented among the ranks of those with criminal records, not surprisingly, housing barriers related to criminal records have a vastly disparate impact on minorities.¹³

In April of 2016, the Office of General Counsel for the United States Department of Housing and Urban Development (HUD) addressed the racially disparate impact of criminal records on housing availability by issuing long-awaited guidance ("2016 Guidance") on the use of criminal records by housing providers.¹⁴ The 2016 Guidance makes it clear that housing providers must grapple with the racially disparate impact of policies that prevent those with criminal records from securing housing. Buoyed by the decision in *Texas Department of Housing & Community Affairs*

by-State Incarceration Rates by Race/Ethnicity, PRISON POL'Y INITIATIVE (May 28, 2014), <http://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/QW47-XGM8>].

9. Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 81 (2016).

10. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 7, at 3.

11. *Id.* at 4.

12. Eisenberg, *supra* note 9, at 81.

13. In testimony before the District of Columbia Council Committee of the Judiciary, one Fair Housing advocate stated, "We know from experience and data that the criminal justice system is neither blind nor just for many in our community and that using criminal history as a reason to deny housing compounds the discrimination that may have contributed to the [criminal] record in the first place." *Fair Criminal Record Screening for Housing Act of 2016: Hearing on Bill 21-0706 Before the D.C. Council Comm. Judiciary* (2016) (statement of Amber W. Harding, Attorney, Washington Legal Clinic for the Homeless).

14. *See generally* U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 7. Additionally, HUD's Office of Public and Indian Housing issued a notice to Public Housing Agencies (PHAs) five months earlier, on November 2, 2015, which directed PHAs to avoid using arrest records alone as evidence of criminal activity that could support an adverse action on a tenant application or in support of an eviction action. The November 2015 notice reiterates that HUD does not, and has never, required PHAs to adopt or enforce so-called "one-strike" rules that deny admission to anyone with a criminal record or require automatic eviction any time a household member engages in criminal activities. The November 2015 notice did not directly address the potential disparate impact of the use of criminal records. The 2016 Guidance addresses, in part, this omission.

v. Inclusive Communities Project, Inc.,¹⁵ which upheld over forty years of Fair Housing jurisprudence allowing for disparate impact claims under the Fair Housing Act, HUD's rule may signal a sea change in how housing providers—particularly public housing providers, which are most likely to house those with criminal records—evaluate criminal records when choosing tenants.

This Article proceeds in three Parts. Part I puts the problem of using criminal records to bar tenants from housing into historical context, discussing the particular impact of the rising rates of incarceration on minority communities. Part II delves into the 2016 Guidance itself, examining what it does and does not require of housing providers, with a focus on public housing. Part III provides insight into what is missing from the 2016 Guidance, what might be done to strengthen it, how advocates might use it, and how housing providers might work to limit both their legal exposure and moral culpability related to the disparate impact the use of criminal records in housing decisions has on minorities.

I. INCARCERATION AND DECARCERATION IN CONTEXT

A. Mass Incarceration's Disproportionate Effect

As has been well documented by scholars such as Michelle Alexander and others, beginning in the 1970s, the prison population in the United States surged, and “[t]he United States currently incarcerates a higher percentage of its population than any other country in the world.”¹⁶ The explosion of the prison population has affected minorities in particular. Approximately one in nine African American men between the ages of twenty and thirty-four is currently incarcerated, and one in three African American men will serve time in jail or prison at some point during his life.¹⁷ To make these facts all the more stark, consider this: African Americans are six times more likely to be imprisoned in the United States than a Black person who lived

15. 135 S. Ct. 2507 (2015).

16. JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, CTR. FOR ECON. & POLICY RESEARCH, *THE HIGH BUDGETARY COST OF INCARCERATION 2* (2010), <http://cepr.net/documents/publications/incarceration-2010-06.pdf> [<https://perma.cc/HY8U-9YLU>]; *see also* PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, at 5 (2008), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf.pdf [<https://perma.cc/53FZ-SR9U>]; Eisenberg, *supra* note 9 (“Rising crime explains only a small fraction of this exponential increase in incarceration levels. While levels of violent crime and property crime rose in the 1970s and 1980s, peaking in the early 1990s, both violent crime and property crime declined after 1992.”). By contrast, however, incarceration rates continued to explode throughout the 1990s and 2000s.). *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing mass incarceration of African American males in the United States).

17. Eisenberg, *supra* note 9 (citing PEW CTR. ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS* (2009), <http://www.convictcriminology.org/pdf/pew/onein31.pdf> [<https://perma.cc/X6VR-5Z63>]).

under South African apartheid,¹⁸ and “Blacks now make up a larger portion of the prison population than they did at the time of *Brown v. Board of Education*.”¹⁹

Numerous studies have shown that, at all levels of the criminal justice system, African Americans and other minorities are targeted for harsher treatment than white Americans.²⁰ Starting with arrests and “stop and frisks,” police officers interact with minorities in a manner that is disproportionate both to percentage of population and likelihood that a crime has been committed.²¹ One study of traffic stops on the New Jersey Turnpike, for example, found that although only fifteen percent of drivers were African American, African Americans represented forty-two percent of individuals stopped and seventy-three percent of individuals arrested.²² This was true despite that fact that African Americans and whites are equally likely to violate traffic laws, and, even more importantly, the study found that whites were twice as likely to be carrying illegal drugs or contraband when stopped.²³ Similarly, although whites

18. Jesse Kropf, *Keeping “Them” Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Caste*, 4 GEO. J.L. MOD. CRITICAL RACE PERP. 75, 81–82 (2012) (citing Marc Mauer, *The International Use of Incarceration*, 75 PRISON J. 113, 113 (1995)).

19. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22, 54–55 (2012) (noting that “a black man born in the 1960s is more likely to go to prison in his lifetime than was a black man born in the 1940s”). Forman also notes that class and education play a large role in the impact of race on the likelihood of spending time in prison or jail. For example, “[a] black man born in the late 1960s who dropped out of high school has a 59% chance of going to prison in his lifetime whereas a black man who attended college has only a 5% chance.” *Id.* at 54; see also George Lipsitz, “*In an Avalanche Every Snowflake Pleads Not Guilty*”: *The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights*, 59 UCLA L. REV. 1746, 1752 (2012) (“The incarcerated population was 70 percent white and 30 percent nonwhite in 1950 and is now 70 percent nonwhite and 30 percent white. But there has been no change in the rates of criminality between the groups. Instead, residential segregation combined with new forms of racially differentiated policing, charging, and sentencing accounts for the disparate impact of mass incarceration on aggrieved racialized communities and individuals.”).

20. See AM. CIVIL LIBERTIES UNION, WRITTEN SUBMISSION OF THE AMERICAN CIVIL LIBERTIES UNION ON RACIAL DISPARITIES IN SENTENCING 2 (2014) (citing Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. SUPPLEMENT 87S (2011)), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf [<https://perma.cc/GTL2-ALH7>]; LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 43 (2000), <http://www.protectcivilrights.org/pdf/reports/justice.pdf> [<https://perma.cc/8NNN-XVTC>] (“Minorities who violate the law are more likely to be targeted for arrest, less likely to be offered leniency and are subject to harsher punishment when compared to similarly situated white offenders.”).

21. See Kropf, *supra* note 18, at 82.

22. DAVID A. HARRIS, PROFILES IN INJUSTICES: WHY RACIAL PROFILING CANNOT WORK 55 (2002) (citing JOHN LAMBERTH, REVISED STATISTICAL ANALYSIS OF THE INCIDENCE OF POLICE REPORT STOPS AND ARRESTS OF BLACK DRIVERS/TRAVELERS ON THE NEW JERSEY TURNPIKE BETWEEN EXITS OR INTERCHANGES 1 AND 3 FROM THE YEARS 1988 THROUGH 1991, at 20 (1994), <http://www.mass.gov/eopss/docs/eops/faip/new-jersey-study-report.pdf> [<https://perma.cc/4MZ6-W27P>]); Kropf, *supra* note 18, at 82 (citing *State v. Soto*, 734 A.2d 350, 352–56 (N.J. Super. Ct. Law Div. 1996)).

23. HARRIS, *supra* note 22, at 53–60, 80; Kropf, *supra* note 18, at 82 (citing ALEXANDER,

have a higher rate of illegal drug use, sixty percent of those imprisoned for drug charges in 1998 were Black.²⁴

The racial disparities in the justice system continue after arrest, and extend into trial, jury selection, sentencing, and post-conviction relief.²⁵ Public policies, such as the “war on drugs,” an emphasis on “law-and-order” political rhetoric, the explosion of sentencing guidelines, and lobbying efforts from entities such as private prison corporations and correctional officers’ unions fueled the “prison boom” in the United States.²⁶ For drug crimes as well as other types of crime, criminal courts divert fewer offenders, send more offenders to prison, and hand down much longer sentences than courts did prior to the 1970s.²⁷ It is now clear that the increase in the prison population during the 1980s, 1990s, and 2000s was not, as previously thought, due to a substantial increase in criminal behavior.²⁸

Mass incarceration’s disproportionate impact on African Americans affects not only the individuals who are sent to prisons or jails, but also the communities from which those individuals came.²⁹ One author compared the effect mass incarceration has had on low-income African American communities to the impacts associated with “losses due to epidemics, wars, and terrorist attacks” in terms of the effects on the “survivors” and the social structures in communities.³⁰ The depopulation of minority communities due to mass incarceration has a “destabilizing effect on community life, so that the most basic underpinnings of informal social control are damaged

supra note 16, at 121); *see also* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004) (“The extraordinary prison expansion involved young black men in grossly disproportionate numbers. Achieving another historic record, most of the people sentenced to time in prison today are black. . . . The gap between black and white incarceration rates, moreover, has deepened along with rising inmate numbers.”).

24. Roberts, *supra* note 23, at 1275.

25. *See generally* WILLIAM RHODES, RYAN KLING, JEREMY LUALLEN & CHRISTINA DYOUS, BUREAU OF JUSTICE STATISTICS, FEDERAL SENTENCING DISPARITY: 2005–2012 (2015), <http://www.bjs.gov/content/pub/pdf/fsd0512.pdf> [<https://perma.cc/3ZXB-29QD>] (examining racial disparities in prosecutorial decision making and sentencing); Nina Totenberg, *Supreme Court Takes On Racial Discrimination in Jury Selection*, NPR (Nov. 2, 2015, 5:00 AM), <http://www.npr.org/2015/11/02/452898470/supreme-court-takes-on-racial-discrimination-in-jury-selection> [<https://perma.cc/KY45-7MHM>] (noting that prosecutors use peremptory strikes to remove African American jurors).

26. *See, e.g.*, Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 561 (2015); *see also* NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 70–157 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

27. Forman, *supra* note 19, at 48.

28. *Compare id.* (noting that the explosion in the prison population is not related only to the “war on drugs”), *with* Roberts, *supra* note 23, at 1275 (“The War on Drugs is responsible for [the high] level of black incarceration.”); *see also* NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, *supra* note 26, at 104.

29. *See* Gottschalk, *supra* note 26, at 560.

30. Roberts, *supra* note 23, at 1277 (quoting Ernest Drucker, Commentary, *Population Impact of Mass Incarceration Under New York’s Rockefeller Drug Laws: An Analysis of Years of Life Lost*, 79 J. URB. HEALTH 1, 7–8 (2002)).

... [and this], in turn, reproduces the very dynamics that sustain crime.”³¹ Removing some criminals from communities may support social order, but high levels of imprisonment have been found to shift social norms in such a way that social pressure to avoid crime is diminished.³² Indeed, one scholar posits that “imprisonment is now a key social institution in many black neighborhoods” and that incarceration has become a “‘rite of passage’ imposed upon African American teenagers.”³³

B. Denying Housing as a Means of Social Control After Incarceration

The effects of mass incarceration on African Americans are felt long after individuals leave jails and prisons, particularly in the arena of housing. Even first-time offenders and those who committed no crime, but plead “guilty” to avoid the possibility of long prison sentences, are often subjected to the denial of many of the core benefits of citizenship. Those with criminal records may be ineligible for many federally funded health and welfare benefits, food stamps, and federal education assistance.³⁴ They may be denied the right to vote, to enlist in the military, or to obtain security clearances needed for jobs.³⁵ And, most relevant to this Article, they may be denied both public and private housing.

With technological advances in recent years, criminal records have become more widely available and, as a result, are being used for non-law enforcement purposes with increased frequency.³⁶ In fact, as criminal records have become available electronically, an entire industry has arisen to respond to the demand for this type of information from housing providers.³⁷ One company, for example, boasts in its brochure that it is capable of combining criminal, proprietary, and credit data for over “200 million convictions associated with more than 62 million unique individuals, to

31. *Id.* at 1285.

32. *See id.* at 1286–87.

33. *Id.* at 1288; *see also* Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 594 (2006) (“Overwhelmingly, commentators and statistics demonstrate that the primary recipients of prison sentences during the height of the war on drugs and the war on crime have been African Americans. This high rate of incarceration has placed added stresses on low-income communities of color. The loss of young men who are potential wage earners and supports for families has a detrimental effect on the social organization of poor communities while the offender is in prison. After the offender is released, the problems of lack of employment and lack of meaningful connection with the community can persist.”).

34. *See* Pinard & Thompson, *supra* note 33, at 613; Roberts, *supra* note 23, at 1291 (quoting Marc Mauer & Meda Chesney-Lind, *Introduction*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 5 (Marc Mauer & Meda Chesney-Lind eds., 2002)).

35. Roberts, *supra* note 23, at 1291.

36. *See* SHARON M. DIETRICH, EXPANDED USE OF CRIMINAL RECORDS AND ITS IMPACT ON RE-ENTRY 3 (2006).

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

which it adds approximately 22,000 new records daily.”³⁸ Another company gives landlords access to over “200+ million criminal records” from state and national databases within minutes.³⁹

Landlords have not always been so focused on tenants’ criminal histories. One study found that among twenty popular “how-to-landlord” books available for purchase in 2008, all of the ones published after 1990 advised landlords to conduct criminal background screenings and include questions about criminal history in the sample rental application.⁴⁰ Conversely, none of the titles published before 1990 contained recommendations related to criminal background checks; instead, the books published prior to 1990 focused primarily on finding tenants who presented the fewest financial risks—for example, applicants with good employment histories, rental histories, and credit.⁴¹

Unfortunately, even as housing providers have relied more heavily on criminal background checks, the data provided in such checks is sometimes inaccurate and often misunderstood by housing providers.⁴² Poor data integrity sometimes results in the attribution of an offense to the wrong individual, a listing of an incorrect offense, and reports in which the disposition of arrests has not been entered even after charges were dropped.⁴³

C. A Slight Shift Toward Decarceration?

For the first time since the prison population began its exponential increase in the 1970s, the prison population in the United States decreased for three consecutive years from 2010 through 2013, a response, in part, to the financial costs of housing so many prisoners.⁴⁴ The financial downturn and subsequent housing crisis prior to 2010 made the astronomical cost of housing so many prisoners even more unpalatable to many Americans, and legislatures in many areas of the country have responded by enacting early release bills and decriminalizing low-level offenses such as marijuana possession.⁴⁵ Twenty-three states have passed laws repealing or shortening

38. Rebecca Oyama, Note, *Do Not (Re)enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 187–88 (2009).

39. *Criminal Report*, TRANSUNION SMARTMOVE, <https://www.mysmartmove.com/SmartMove/tenant-background-report.page> [https://perma.cc/WNQ4-KGXR].

40. David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5, 12–13 (2008).

41. *Id.*

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

43. Oyama, *supra* note 38.

44. Eisenberg, *supra* note 9, at 86; *see also* Gottschalk, *supra* note 26, at 564–65 (analyzing the decline in the incarceration rate between 2009 and 2013).

45. Eisenberg, *supra* note 9, at 86.

mandatory minimum sentences, and many states have increased opportunities for early release and worked to reduce reincarceration through parole violations.⁴⁶

On a federal level, Congress also seems to have shifted its focus from a pure “tough on crime” model to a model that takes into account some of the financial and societal costs of mass incarceration. For example, in 2010, Congress passed the Fair Sentencing Act, which reduced the weight ratio of the amount of crack and powder cocaine needed to trigger mandatory sentencing from 100:1 to 18:1.⁴⁷ The Fair Sentencing Act also eliminated the mandatory minimum for first-time possession of crack cocaine, resulting in a decrease in those sent to prison for a first-time minor offense.⁴⁸

In 2011, the U.S. Supreme Court also weighed in on the era of mass incarceration in *Brown v. Plata*, ruling that overcrowding in California prisons was unconstitutional.⁴⁹ In a five-to-four decision, a majority of the Justices found that inadequate medical and mental healthcare and other conditions were responsible for one inmate dying each week due to neglect.⁵⁰ In response, the Supreme Court required that California decrease its prison occupancy rate to 137.5% of the design capacity of the buildings by 2013.⁵¹ While about half of the current numerical trend towards decarceration is driven by California’s court-mandated reduction in its prison population, the impact of the *Brown v. Plata* decision has been felt nationwide.⁵²

Despite the legislative and judicial push to limit the explosion of the prison population, it is important not to overstate the trend towards decarceration. America still maintains the highest per population incarceration rate in the world, and, even with the current rates of decarceration, the Sentencing Project estimates that it would take almost 100 years for the incarceration rate to return to the rate that existed in 1980.⁵³

46. *Id.* at 87–88.

47. Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§ 2–3, 124 Stat. 2372, 2372; *see also* Eisenberg, *supra* note 9, at 88.

48. Fair Sentencing Act of 2010 § 3. African American men were more closely identified as using and selling crack cocaine, and those who sold the drug were perceived as “hardened criminals” who should be sentenced to lengthy terms of imprisonment. *Id.* As a result of the frequent media coverage of the negative effects of crack cocaine, Congress decided to punish more harshly the sale of crack cocaine than the sale of powder cocaine, despite the fact that crack cocaine cannot be made without powder. Nekima Levy-Pounds, *Vulnerable Population: Par for the Course?: Exploring the Impacts of Incarceration and Marginalization of Poor Black Men in the U.S.*, 14 J.L. Soc’y 29, 38–41 (2013).

49. 563 U.S. 493, 502–07 (2011).

50. *Id.* at 507.

51. *Id.* at 509–10.

52. Marc Mauer & Nazgol Ghandnoosh, *Fewer Prisoners, Less Crime: A Tale of Three States*, SENTENCING PROJECT 2 (July 23, 2014), <http://www.sentencingproject.org/publications/fewer-prisoners-less-crime-a-tale-of-three-states> [<https://perma.cc/UY7S-VVYM>].

53. *See* Eisenberg, *supra* note 9, at 89–90. The Executive Director of the Sentencing Project, Marc Mauer, maintained “[p]roducing meaningful reductions in the prison population will require broader sentencing reforms that reconsider who we send to prison and how long we keep them there.” *U.S. Prison Population Declines for Third Consecutive Year*, SENTENCING PROJECT (Dec. 19, 2013), <http://perma.cc/S546-XAPY>; *see also* Gottschalk, *supra* note 26, at 559 (“[R]eforms to reduce the number of people in jail and prison have been

Further, while some efforts have been made to limit the growth of the prison population, there are significant forces, both public and private, that are resisting the decarceration trend. Correctional officers' unions and private prison corporations, for example, spend millions of dollars in lobbying efforts each year in efforts to block legislation that might decrease prison populations.⁵⁴ Additionally, while the *Brown v. Plata* litigation did result in an overall reduction in the prison population in California, some California counties have responded to the requirement to reduce overcrowding, not by reducing the population of prisoners, but by building more prisons.⁵⁵

D. The Problem: Barriers to Housing for Those with Criminal Records Decreases Public Safety, Increases Rates of Recidivism, and Disproportionately Impacts Minorities

With a recent, limited shift towards decarceration, nearly 650,000 individuals with criminal records are released each year.⁵⁶ Many of those with criminal records pled guilty to or were convicted of minor misdemeanors such as shoplifting, disorderly conduct, or trespass—crimes that may have little bearing on whether an individual will fulfill his or her obligations under a lease or prove him/herself to be a good tenant and neighbor. Millions more individuals have arrest records, but were never convicted of a crime.⁵⁷ Regardless of the nature of the crime, its recency, or its relation to an individual's likelihood to fulfill his or her obligations as a tenant, such criminal records (or in many cases, even an arrest record with no ultimate conviction) have often served as an absolute bar to finding housing, particularly public housing.⁵⁸

remarkably modest so far.”); Marc Mauer, *Can We Wait 88 Years To End Mass Incarceration?*, HUFFPOST (Dec. 20, 2013, 3:40 PM), http://www.huffingtonpost.com/marc-mauer/88-years-mass-incarceration_b_4474132.html [https://perma.cc/B9QR-U56Z].

54. Eisenberg, *supra* note 9, at 103–07 (noting that three corporations within the private prison industry spent over forty-five million dollars in the last decade on pro-incarceration lobbying); *see also* Gottschalk, *supra* note 26, at 563 (noting that the “limited sentencing reforms enacted so far have been directed almost exclusively at the non, non, nons—that is, the nonserious, nonviolent, non-sex related offenders”).

55. Gottschalk, *supra* note 26, at 580, 583 (noting that, in anticipating the Supreme Court's decision in *Plata*, Governor Jerry Brown signed the Public Safety Realignment Act into law, which dedicated states funds to reducing overcrowding in California's prisons; some counties have used said funds to build new county jails instead of using the funds for reentry programs).

56. DEP'T OF JUSTICE, CIVIL LEGAL AID SUPPORTS FEDERAL EFFORTS TO HELP PEOPLE WITH CRIMINAL RECORDS MAKE A SUCCESSFUL REENTRY 1 (2014), <https://www.justice.gov/sites/default/files/atj/pages/attachments/2015/03/13/reentry.pdf> [https://perma.cc/2JFL-44FM].

57. Tina Rosenberg, *Have You Ever Been Arrested? Check Here*, N.Y. TIMES (May 24, 2016) (“At least 70 million Americans have a criminal record Roughly 20 million of those have a felony conviction. The rest were either convicted of misdemeanors (often without a lawyer present) or never convicted of anything”), <https://www.nytimes.com/2016/05/24/opinion/have-you-ever-been-arrested-check-here.html> [https://perma.cc/ZSD3-PDEV].

58. Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 546 (2005). Bill Clinton provided momentum to

Though the goal of those who support denying housing to individuals with criminal records may be to increase safety or decrease crime in their communities, denying housing to those with criminal records has the predictable, but absurd effect of increasing rates of recidivism and harming public safety.⁵⁹ Individuals with conviction records who cannot find stable housing have a greatly increased chance of being rearrested compared with individuals with conviction records who are able to find stable housing.⁶⁰

Homelessness is often a direct path to arrests for crimes both consequential and minor. Without housing, individuals are more likely to engage in crimes of survival, such as burglary, and are also more likely to seek money through illegal means, such as the drug trade.⁶¹ Additionally, homelessness is a predictor for more minor crimes, as homeless individuals are forced to “live private lives in public spaces,” leading to arrests for offenses such as urinating or drinking in public.⁶² One study in New York

the federal government’s one-strike policy, which provided that if you break the law once, you are no longer eligible to have public housing. The one-strike policy resulted in the encouraged use to screen all applicants’ criminal records and to develop criteria for exclusion. *See* Thacher, *supra* note 40, at 7 (citing KATHARINE H. BRADLEY, R. B. MICHAEL OLIVER, NOEL C. RICHARDSON & ELSPETH M. SLAYTER, CMTY. RES. FOR JUSTICE, NO PLACE LIKE HOME: HOUSING AND THE EX-PRISONER 8 (2001)) (ex-convicts cite “discrimination due to a criminal record” more often than anything else when asked about the primary barriers to finding housing).

59. Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 356 (2015); *see also* SOC. EXCLUSION UNIT, OFFICE OF THE DEPUTY PRIME MINISTER, REDUCING RE-OFFENDING BY EX-PRISONERS 94 (2002), http://www.prisonstudies.org/sites/default/files/resources/downloads/reducing_report20pdf.pdf [<https://perma.cc/5MZ4-NPLL>] (noting that research suggests that stable accommodation can make a huge difference in reduction in reconviction); Carey, *supra* note 58, at 566–68.

60. CORP. OF SUPPORTIVE HOUS., SUPPORTIVE HOUSING FOR RETURNING PRISONERS: THE RETURNING HOME OHIO PROJECT, http://www.csh.org/wp-content/uploads/2014/02/RHO_Pilot_FactSheet.pdf [<https://perma.cc/EVF5-LURC>] (finding that participants in the supportive housing pilot were forty percent less likely to be rearrested for any crime); *see also* Bell, *supra* note 7, at 11 (“Next to employment, the second most important factor affecting recidivism is stable housing. A ‘study in New York reported that a person without stable housing was seven times more likely to re-offend after returning from prison.’”); Oyama, *supra* note 38, at 183 (“[F]inding stable housing presents an early obstacle, one that is so critical it has been referred to as the ‘linchpin that holds the reintegration process together.’ . . . [O]ne study determined that each move after release from prison increased a person’s likelihood of re-arrest by 25%.”); *Fair Criminal Record Screening for Housing Act of 2016*, *supra* note 13 (“Housing instability is one of the best predictors for whether someone will reoffend.”).

61. Bell, *supra* note 7, at 12–13 (“Lack of employment and housing are significant causes of recidivism; people who are employed and have stable housing are significantly less likely to be re-arrested.”); *see also* Carey, *supra* note 58, at 566.

62. Carey, *supra* note 58, at 566 (“Recidivism becomes a self-fulfilling prophecy when offenders are released from incarceration with scant survival options.”); *see also* ALEXANDER, *supra* note 16, at 142 (“Once labeled a felon, the badge of inferiority remains with you for the rest of your life, relegating you to a permanent second-class status. . . . Even if the defendant manages to avoid prison time by accepting a ‘generous’ plea deal, he may discover that the punishment that awaits him outside the courthouse doors is far more severe and debilitating than what he might have encountered in prison.”); Jason A. Cade, *Deporting the Pardoned*,

revealed that “a person without stable housing is seven times more likely to re-offend after returning from prison” than a person who has stable housing.⁶³ One report by the Sargent Shriver National Center on Poverty Law found that “overly restrictive policies against people with criminal records can lead to a vicious cycle where ‘the difficulties in reintegrating into the community increase the risk of homelessness for released prisoners, and homelessness in turn increases the risk for subsequent re-incarceration.’”⁶⁴

As one scholar put it:

[C]lassification by past-conviction status for public safety ends has a perverse, self-fulfilling effect. People excluded from employment, housing, and civic participation on the basis of a past conviction are more likely to commit future crimes. The resulting recidivism statistics are invoked to justify further exclusion. The classification thus relies for justification on a state of affairs for which it is partly responsible and aggravates the very risk that it purports to address.⁶⁵

Creating barriers to obtaining housing for those with criminal convictions does not just increase the recidivism rate; such barriers also cause a host of other problems for those seeking to reenter society after release from prison. One author, for example, compiled the following list (paraphrased below) of consequences that often flow from the denial of housing upon reentry:

Lacking stable housing, parents returning from incarceration are unable to regain custody of their children. Child welfare officials remove children from families that cannot provide them with stable housing. Families are forced to choose between staying together or excluding a member of the household with a criminal record, in order to secure affordable housing for the rest of the family.⁶⁶

46 U.C. DAVIS L. REV. 355, 396 (2012) (“Even after release, a criminal record makes it difficult for many offenders to find employment, retain low-income housing or other benefits, or obtain loans. These and other collateral consequences impede offenders’ abilities to provide for their families and themselves, often leading to cycles of recidivism and incarceration.”).

63. Bell, *supra* note 7, at 11 (quoting S.F., CAL., POLICE CODE art. 47 (2013)).

64. MARIE CLAIRE TRAN-LEUNG, SARGENT SHRIVER NAT’L CTR. ON POVERTY LAW, WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING, at iv (2015), <http://povertylaw.org/sites/default/files/images/publications/WDMD-final.pdf> [<https://perma.cc/4S57-U445>].

65. Mayson, *supra* note 59, at 356; *see also* Bell, *supra* note 7, at 2 (“We know from long experience that if [former prisoners] can’t find work, or a home, or help, they are much more likely to commit more crimes and return to prison.”); *see also* Carey, *supra* note 58, at 566 (“As one substance abuse treatment provider explained, exclusionary policies need to be changed ‘not just because it’s the humane thing to do, but because it’s the smart, public safety thing to do.’”); Eisenberg, *supra* note 9, at 82–83 (noting that over the past four decades, the rate of incarceration due to parole violations has increased even faster than rates of incarceration for new crimes, meaning that mass incarceration phenomena is related, in large part, to parolees returning to prison, often for minor parole violations).

66. Carey, *supra* note 58, at 564–65.

Transient living disrupts a child's education, emotional development, and sense of well-being. . . . [A]n estimated 1.5 million minor children have at least one parent in prison on any given day in the United States, and over ten million had a parent in prison at one point in their lives.⁶⁷

Women may be forced to choose between returning to an abuser to avoid homelessness or remaining vulnerable to rape and violent crime on the streets. Many women, along with other struggling individuals, find themselves exchanging sex for protection, money, or a place to stay.⁶⁸

People who are inadequately housed, especially those living on the streets or in homeless shelters, are at a higher risk for communicable diseases such as HIV and tuberculosis. Living in conditions that are unsanitary, without cooking facilities or refrigeration, or not knowing where the night will be spent make it extremely difficult to manage a regimen of treatment for chronic diseases such as diabetes, tuberculosis, and asthma. Existing mental health conditions are exacerbated by the stress of rejection and housing instability, and depression is common.⁶⁹

Struggling with addiction in even the most ideal circumstances is difficult. But many treatment professionals argue that without stable housing, relapse is almost certain.⁷⁰

Because of racial injustices in our criminal law system, the burdens caused by the denial of housing to those with criminal or arrest records is disproportionately shouldered by individual minorities and by minority communities.⁷¹

E. The Problem in the Public Housing Context

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

67. *Id.* at 565 (citing CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN 2 (2000), <http://www.bjs.gov/content/pub/pdf/iptc.pdf> [<https://perma.cc/YBA6-XJJR>]).

68. *Id.*

69. *Id.*

70. *Id.* at 566; *see also* Lipsitz, *supra* note 19, at 1761–62 (“Mass incarceration and other instruments of disciplinary subordination that are intricately linked to housing discrimination create chaos inside aggrieved communities and perpetuate their subordination. They remove parents from families; send children into foster care; displace productive workers and neighbors from localities; disrupt social networks; interrupt work histories; and misallocate resources by diverting expenditures away from education, job training, housing, and health care to fund the criminal justice system.”).

71. Carey, *supra* note 58, at 594.

government-subsidized housing.⁷² Unfortunately, however, individuals with criminal records often face insurmountable obstacles when attempting to access public housing.

In the “tough on crime” era of the 1980s, Congress kicked off the so-called “war on drugs” with a series of legislative efforts that both expanded the prison population and limited opportunities for those who would ultimately be released from prison. In 1986, for example, Congress passed the Anti-Drug Abuse Act, which equated one gram of crack cocaine to one hundred grams of powdered cocaine for purposes of sentencing.⁷³ That year, Congress also passed the Narcotics Penalties and Enforcement Act, which included mandatory minimum sentencing guidelines.⁷⁴ Two years later, the legislative effort to crack down on drugs was broadened by the Anti-Drug Abuse Act of 1988 and in HUD’s implementing regulations.⁷⁵ This Act and accompanying regulations included a provision requiring public housing authorities to issue leases with the condition that tenants who engage in any drug-related criminal activity may be subject to eviction (commonly known as the “one-strike policy”).⁷⁶ The Act was eventually amended to subject public housing tenants to possible eviction not only if the tenant does drugs, but also if any guest under the tenant’s control engages in illegal drug activity on or off the premises.⁷⁷

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

[A] public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.⁷⁸

72. See Reed Karaim, *Ex-Offenders*, NPR: HOUSING FIRST, <http://www.npr.org/news/specials/housingfirst/whoneeds/ex-offenders.html> [<https://perma.cc/Y5DS-AU3H>]; see also John Wildermuth, *Ex-Offenders Compete for Low-Income Housing*, SF GATE (Feb. 17, 2013, 9:01 PM), <http://www.sfgate.com/bayarea/article/Ex-offenders-compete-for-low-income-housing-4286606.php>.

73. 21 U.S.C. § 841 (2012); see also Jim Moye, *Can't Stop the Hustle: The Department of Housing and Urban Development's "One Strike" Eviction Policy Fails To Get Drugs Out of America's Projects*, 23 B.C. THIRD WORLD L.J. 275, 278–79 (2003).

74. 21 U.S.C. § 801 (2012).

75. 21 U.S.C. § 1501 (repealed 1988); 24 C.F.R. § 966.4 (2017).

76. 24 C.F.R. § 966.4.

77. 42 U.S.C. § 1437d(l)(6) (Supp. III 2016) (“[C]riminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy”); 24 C.F.R. § 982.310(c)(1) (2017); see also Moye, *supra* note 73, at 280–82.

78. 42 U.S.C.A. § 1437d(l)(6); Robert Hornstein, *Litigating Around the Long Shadow of Department of Housing and Urban Development v. Rucker: The Availability of Abuse of Discretion and Implied Duty of Good Faith Affirmative Defenses in Public Housing Criminal Activity Evictions*, 43 U. TOL. L. REV. 1, 5 (2011).

Under the required lease language, neither a tenant's lack of knowledge of a guest's criminal activity nor the tenant's lack of ability to prevent a guest from engaging in criminal activity is a defense to an eviction. Further, under HUD's implementing regulations, neither the filing of criminal charges nor a resulting conviction are required prior to an eviction; a mere accusation of criminal activity or drug-related activity can trigger an eviction.⁷⁹ Accordingly, it is entirely possible, for example, for a local public housing authority to evict an entire family because a tenant's guest was suspected (but never convicted) of selling drugs at a nearby location.

Though Congress required that public housing authorities include the so-called one-strike provision in all leases, no statute or regulation mandated that housing authorities exercise their right to evict in all cases; instead, local housing authorities retained broad discretion when deciding whether to evict individual tenants. That said, most local housing authorities either seem to think that eviction is mandatory or they exercise their discretion quite aggressively.⁸⁰

Local housing authorities have also used the one-strike language to bar household members from rejoining their families upon returning from prison, making the entire family's tenancy dependent on the family's willingness to forego having their returning father, mother, brother or sister rejoin the household. Often, public housing tenants have to decide between giving up secure housing for an entire family or permanently barring a family member with a criminal record from the household forever. One scholar described the dilemma as follows:

More than just adversely affecting the individual, the one-strike provision has had a profound impact on families. It has fractured family structures and increased pressure on already at-risk communities by limiting housing options for those who have convictions or are returning from incarceration. Families who reside in public housing often have had to sign agreements that ex-offender family members not only could not live with them but also would not visit the public housing unit.⁸¹

The one-strike policy is not the only public housing policy that creates obstacles for those with criminal records. In addition to having the authority to evict entire families for one household member or guest's criminal (or suspected criminal) activity and to bar existing tenants who are arrested, convicted, or suspected of criminal activity, public housing authorities also have the discretion to bar any *applicant* with certain types of criminal convictions.⁸²

79. 24 C.F.R. § 966.4(l)(5)(iii)(A); *see also* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134–36 (2002) (holding that the housing authority went too far in trying to evict a tenant for drug-related activity that took place off the premises); Hornstein, *supra* note 78, at 4.

80. TRAN-LEUNG, *supra* note 64, at iii.

81. Pinard & Thompson, *supra* note 33, at 594–95.

82. While local public housing authorities generally have the discretion to determine whether to accept an applicant with a criminal record, there are a few circumstances under which they are required by federal law to reject applicants. For example, federal law requires local housing authorities to impose permanent bans on (1) applicants who have been convicted of manufacturing methamphetamine on public housing property and (2) applicants who have been required to register as sex offenders for life. *See* 42 U.S.C.A. § 1437n(f)(1) (West Supp. 2017); 42 U.S.C. § 13663(a)–(b) (2012).

Generally, federal law permits local housing authorities to develop admissions policies regarding three types of criminal activity: (1) drug-related criminal activity, (2) violent criminal activity, and (3) criminal activity that poses a threat to the health, safety, and welfare of other residents.⁸³ Many local public housing authorities interpret the third category extremely broadly or go beyond these categories to deny admission to applicants with other types of criminal records as well.⁸⁴ One local housing authority, for example, has a policy requiring it to deny applicants if their criminal record includes “civil disobedience” within the past ten years, meaning that a ten-year-old arrest record related to a political protest could result in a denial of housing.⁸⁵

Other local housing authorities have policies that seemingly bar anyone who has ever interacted with the criminal justice system in any way. The Buffalo Municipal Housing Authority, for example, considers the following in its admissions determinations:

Crimes of violence against people . . .
 Crimes against property . . .
 Crimes or offenses that impose a financial cost . . .
 Crimes or offenses that involve disturbing the peace
 Other criminal or unlawful acts that affect the health, safety, or right of peaceful enjoyment of the premises by other residents;
 Drug-related criminal activity . . .
 Drug-related criminal activity involving personal use or possession for personal use, illegal sale, distribution, or possession with intent to sell or distribute marijuana.⁸⁶

Other private housing providers who operate federally funded project-based Section 8 properties bar tenants with a wide variety of types of felony convictions, many of which seem to have little bearing on whether an applicant is likely to be a good tenant. For example, one of the largest owners of apartment buildings in the country lists the following types of criminal activities that would trigger a denial for applicants in its project-based Section 8 buildings:

public intoxication
 cable theft
 truancy
 theft by check or worthless check
 littering
 shoplifting
 petty theft
 curfew violation
 failure to pay fare

83. See 34 U.S.C.A. § 12491 (West Supp. 2017); TRAN-LEUNG, *supra* note 64, at 22.

84. TRAN-LEUNG, *supra* note 64, at 22.

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

86. TRAN-LEUNG, *supra* note 64, at 22–23.

fishing/hunting without a license
loitering
public swearing
jaywalking
no seat belt
ordinance violation
overgrown grass⁸⁷

While housing providers have the ability to exercise discretion and while HUD has admonished local housing authorities to implement an individualized approach to reviewing applications as opposed to using bright line rules, in practice, “individualized review [has often been] the exception rather than the rule.”⁸⁸ Many local housing authorities have “zero tolerance” policies when it comes to certain types of crime, particularly drug crimes (even low-level ones). One leader of a housing authority in New Hampshire said “[a]nyone who has a criminal record with any sort of violence or drug-related crime is pretty much excluded from getting housing,”⁸⁹ suggesting that a person who, for example, pled guilty to a simple possession of marijuana charge at age twenty would be denied housing at age sixty, even if that person had no further interactions with the criminal justice system.

Even if local housing authorities do exercise discretion and provide individualized reviews of applications, with written policies like the ones mentioned above, many would-be applicants with criminal records are dissuaded from applying, even when their criminal records relate to minor crimes that occurred years ago.⁹⁰

The impact of local housing authorities’ often blanket denials based on criminal records cannot be overstated. In a study of over 300 local housing authorities, the Sargent Shriver National Center on Poverty Law found that the vast majority of the study housing authorities had policies on criminal records that were overly broad, that relied on arrest records in addition to records of convictions, or that barred applicants whose crimes were committed a long time ago.⁹¹

Given the racial disparities in arrests, convictions, and sentencing discussed in Part II, these types of blanket bans on those with criminal convictions are likely to

87. *Id.* at 25 (citing AIMCO, OneSite Criminal Classifications (Jan. 22, 2013)).

88. *Id.* at 10.

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

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

91. *Id.* at 4 (showing that after examining over 300 local housing authorities’ policies, the report identified four areas where policies regarding the admission of applicants with criminal records are overly restrictive:

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

have a vastly disparate impact on minorities. This disparity is what HUD takes up in its recently issued 2016 Guidance.

II. THE GUIDANCE

A. Context Leading Up to Issuance

Aware of the disparate impact that barring those with criminal records may have on minorities, advocates have been urging HUD to soften this impact since the early days of the implementation of the one-strike policy.⁹² As noted above, with the exception of a few areas, local housing authorities have always had the discretion to admit applicants with criminal records and to allow tenants who commit crimes (and their families) to remain housed. That said, until recently, many leaders of local housing authorities seemed to assume that HUD required strict enforcement of bans on all individuals with criminal records.⁹³

Upon urging from advocates, in 2011, then-Secretary of HUD Shaun Donovan issued a letter to local public housing authorities to use their discretion to “seek a balance between allowing ex-offenders to reunite with families that live in HUD subsidized housing, and ensuring the safety of all residents of [their] programs.”⁹⁴ Secretary Donovan noted that the Obama administration believed “in the importance of second chances—that people who have paid their debt to society deserve the opportunity to become productive citizens and caring parents, to set the past aside and embrace the future.”⁹⁵ In order to provide those “second chances,” Secretary Donovan wrote, ex-offenders must be able to “gain access to one of the most fundamental building blocks of a stable life—a place to live.”⁹⁶ Despite Secretary Donovan’s 2011 letter to local housing authorities urging them to adopt policies that balanced safety concerns with a philosophy of second chances, few local housing authorities appeared to alter their policies barring applicants with criminal records and strictly enforcing the one-strike lease provision in response to the Secretary’s letter.⁹⁷

Also in 2011, the Sargent Shriver National Center on Poverty Law issued a report focusing on the criminal records policies of nearly every public housing provider in Illinois. This report identified four areas in which local public housing authorities

92. See generally MARIE CLAIRE TRAN-LEUNG, SARGENT SHRIVER NAT’L CTR. ON POVERTY LAW, WHEN DISCRETION MEANS DENIAL: THE USE OF CRIMINAL RECORDS TO DENY LOW-INCOME PEOPLE ACCESS TO FEDERALLY SUBSIDIZED HOUSING IN ILLINOIS 25–27 (2011), <http://povertylaw.org/files/docs/when-discretion-means-denial.pdf> [https://perma.cc/7RQD-6MVY] (examining the criminal records policies for Illinois’s public housing and Housing Choice Voucher Program).

93. See generally *id.* at 3–5, 12.

94. Letter from Shaun Donovan, Sec’y, U.S. Dep’t of Hous. & Urban Dev., & Carol J. Galante, Acting Assistant Sec’y for Hous., U.S. Dep’t of Hous. & Urban Dev., to Owners & Agents, <http://nhlp.org/files/HUD%20Letter%203.14.12.pdf> [https://perma.cc/EB8M-ECUV].

95. *Id.*

96. *Id.*

97. See TRAN-LEUNG, *supra* note 64, at 5, 9–10.

utilized overly aggressive and potentially illegal criminal background policies, and urged HUD to issue guidance to local housing authorities to clarify HUD's "second chance" philosophy and its stance on the use of arrest and criminal conviction records in the provision of housing.⁹⁸

In February of 2015, the Shriver Center issued a second influential report (the "2015 Report"), this time focusing on the criminal records policies of 300 housing authorities across the country. The 2015 Report again identified four areas in which HUD-funded programs used criminal records in ways that seemed out of alignment with HUD's stated policies regarding balancing the need for safe communities with the needs of ex-offenders seeking housing.⁹⁹ Further, the 2015 Report emphasized that local housing authorities' policies related to criminal records were likely to have a disparate impact on racial minorities because of the overrepresentation of racial minorities in the criminal justice system.¹⁰⁰ The report also expressed the frustration of many fair housing advocates, noting that in the "more than three years [since the 2011 report] HUD [took] no foreseeable steps towards addressing this problem [or] to place limits on the criminal records policies of the public housing authorities and private owners participating in the federally subsidized housing programs" under HUD's control.¹⁰¹

In March of 2013, HUD issued a much-anticipated rule on disparate impact under the Fair Housing Act (the "HUD Rule").¹⁰² The HUD Rule states that "[l]iability may be established under the Fair Housing Act based on a practice's discriminatory effect . . . even if the practice was not motivated by a discriminatory intent."¹⁰³ A practice has a "discriminatory effect," according to the rule, if "it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."¹⁰⁴ The HUD Rule explained the burden-shifting analysis required in disparate impact claims, unifying slight differences between the approaches used in lower courts.¹⁰⁵

98. TRAN-LEUNG, *supra* note 92, at 3–4.

99. TRAN-LEUNG, *supra* note 64, at iii–iv, 35–37.

100. *Id.* at 3 ("Because people of color are disproportionately represented in the American criminal justice system, admissions policies that automatically bar people with criminal records will necessarily result in a disparate racial impact. In the absence of more narrowly-tailored screening criteria, PHAs and project owners will have a difficult time justifying the broad nature of their criminal records policies.").

101. *Id.* at iii.

102. 24 C.F.R. § 100.500 (2017).

103. *Id.*

104. *Id.*

105. *Id.* § 100.500(b)(1)(i)–(b)(2):

(1) A legally sufficient justification exists where the challenged practice:

(i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3612, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and

(ii) Those interests could not be served by another practice that has a less discriminatory effect.

(2) A legally sufficient justification must be supported by evidence and

Relying, in part, on deference to the HUD Rule, in June of 2015, the Supreme Court handed down its decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*¹⁰⁶ The Supreme Court's five-to-four decision upheld over forty years of Fair Housing jurisprudence allowing for disparate impact claims under the Fair Housing Act.¹⁰⁷

The case was brought by a Texas nonprofit, Inclusive Communities Project, Inc., focused on helping individuals find affordable housing in integrated neighborhoods. The group brought suit over how the Texas Department of Housing and Community Affairs distributed tax credits for low-income housing, arguing that the Department's policy caused almost all affordable units to be built in racially segregated low-income areas, providing minorities with few opportunities to move to integrated or wealthier areas.¹⁰⁸ Though the creators of the tax credit policy had no racial intent, the Inclusive Communities Project argued that the policy had a racially disparate impact that served to confine minorities to segregated areas.¹⁰⁹

While it remanded the case to the lower court to determine whether the Inclusive Communities Project would prevail in substance of its particular claim,¹¹⁰ the Supreme Court held that disparate impact claims are, indeed, cognizable under the Fair Housing Act (as lower courts had held for over forty years). In doing so, the Supreme Court acknowledged that decision makers may need to consider race in some circumstances in order to ensure compliance with the Fair Housing Act. To eliminate the disparate impact of some housing policies, the Court acknowledged, the impact of policies on minorities "may be considered in certain circumstances."¹¹¹ Mere awareness of race in attempting to address the ills of racial segregation would not, according to the Court, "doom that endeavor at the outset."¹¹²

Five months after the *Inclusive Communities* decision was announced, the HUD Office of Public and Indian Housing issued a notice to HUD-funded housing providers directing housing providers to avoid using arrest records alone as evidence of criminal activity, as arrest records alone are "not evidence that [an applicant for housing] has engaged in criminal activity."¹¹³ This communication from HUD (the "2015 Guidance") also noted that HUD does not require public housing authorities to adopt

may not be hypothetical or speculative. The burdens of proof for establishing each of the two elements of a legally sufficient justification are set forth in paragraphs (c)(2) and (c)(3) of this section.

106. 135 S. Ct. 2507 (2015).

107. *Id.* at 2518.

108. *Id.* at 2514.

109. *Id.*

110. *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 U.S. Dist. LEXIS 114562, at *3 (N.D. Tex. Aug. 26, 2016) (finding that although disparate impact claims are cognizable under the Fair Housing Act, Inclusive Communities Project did not prove a prima facie case of disparate impact liability).

111. *Inclusive Cmty. Project*, 135 S. Ct. at 2525.

112. *Id.*

113. OFFICE OF PUB. & INDIAN HOUS., U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE PIH 2015-19, GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 3 (2015), <https://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf> [<https://perma.cc/7GY6-LGES>].

or enforce one-strike policies.¹¹⁴ The 2015 Guidance reiterated what had always been HUD's policy: in most cases, local housing authorities "have discretion to decide whether or not to deny admission to an applicant with certain types of criminal history" or to "evict a household if a tenant, household member, or guest engages in . . . criminal activity on or off the premises."¹¹⁵ To the frustration of many advocates, the 2015 Guidance did not address the potential disparate impact on minorities of strict enforcement of one-strike policies and blanket bans based on criminal records.

Buoyed by the *Inclusive Communities* decision, in April of 2016, the Office of General Counsel for HUD *finally* addressed the racially disparate impact of criminal records on housing opportunities for minorities by issuing long-awaited guidance on the use of criminal records by housing providers.¹¹⁶ Unlike HUD's previous communications regarding the use of criminal background information in housing-related decisions, the 2016 Guidance specifically acknowledges the overrepresentation of minorities in the criminal justice system and addresses the racially disparate impact of denying those with criminal records housing opportunities.¹¹⁷

B. The Guidance Explained

After the long lead-up to the issuance of the 2016 Guidance, fair housing advocates view this communication from HUD as a potential sea change in HUD's stance on the use of criminal records in housing decisions. While in the past, HUD has remained mostly silent as HUD-funded housing providers have vigorously enforced the one-strike policy and adamantly refused entry to applicants with criminal records,¹¹⁸ through this most recent guidance, HUD urges local housing authorities to

114. *Id.* at 2.

115. *Id.*

116. OFFICE OF GEN. COUNSEL, U.S. DEP'T OF HOUS. & URBAN DEV., GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016), https://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogeguidappfhastandcr.pdf [<https://perma.cc/A9KF-RDPY>] (addressing the omission of the disparate impact implications from the November 2015 notice).

117. *Id.*

118. At the time of this writing, the author was unable to find any case brought by HUD or a private plaintiff that claimed that a housing provider's criminal records policy or a one-strike rule had a disparate impact based on race, despite the fact that such claims were available even before the HUD rule on disparate impact was issued or the *Inclusive Communities* case was decided. It appears that, prior to the issuance of the HUD rule and/or the decision in the *Inclusive Communities* case, HUD (and perhaps most fair housing advocates) were concerned that a negative decision on this issue might foreclose the possibility of bringing disparate impact claims in other areas. One fair housing expert, Michael Allen, described the "application of the disparate impact standard to criminal background checks" as a new "frontier" in fair housing litigation after the HUD rule was issued. Michael G. Allen, Jamie L. Crook & John P. Relman, *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. C.R.-C.L.L. REV. 155, 190 (2014). Another leading fair housing scholar notes that, even without disparate impact analysis, a landlord with a "no criminal record" rule might be liable under § 3604(c), which prohibits the publication of any statement that "'indicate[s] any preference, limitation or discrimination' based on [race]." Robert G. Schwemm, *Fair Housing Litigation*

take a much more nuanced approach to the use of criminal records, and it warns housing providers of the risk of liability if policies with racially disparate impacts remain in place.

The 2016 Guidance begins by recognizing that “[a]cross the United States, African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population.”¹¹⁹ As a result, “criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers.”¹²⁰ “A housing provider,” the 2016 Guidance warns, “violates the Fair Housing Act when the provider’s policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.”¹²¹

Step 1: Does the Policy Have a Discriminatory Effect?

Relying on the burden-shifting framework established in HUD’s 2015 rule (and echoed in the *Inclusive Communities* case), the 2016 Guidance states that the initial burden will always be on a plaintiff to demonstrate that a particular criminal history policy results in a disparate impact on a protected class—that is, where the practice “actually or predictably results in a disparate impact.”¹²² To prove this, the 2016 Guidance states plaintiffs may rely on national, state, or local data regarding racial discrepancies in arrests and incarceration, depending on the availability of such data and the likelihood that, for example, local data might differ from national data in a particular geographical region.¹²³

Step 2: Is the Policy Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest—I.e., Is there a Business Justification?

Once a plaintiff has established that a criminal records policy has a disparate impact on members of a protected class, the burden shifts to the housing provider to prove that the challenged policy is “necessary to achieve a substantial, legitimate, nondiscriminatory interest.”¹²⁴ The interest proffered must “not be hypothetical or speculative, meaning the housing provider must provide evidence proving both that [it] has a substantial, legitimate and nondiscriminatory interest . . . and that the challenged policy actually achieves that interest.”¹²⁵ This is essentially equivalent to the “business justification” defense in the Title VII context.¹²⁶

After Inclusive Communities: What’s New and What’s Not, 115 COLUM. L. REV. SIDEBAR 106, 115 (2015). Given that the overrepresentation of minorities in the criminal justice system is common knowledge, such complete bans on all applicants with a criminal record could be interpreted, according to Schwemm, as a statement of preference for nonminority applicants. *Id.* at 116.

119. OFFICE OF GEN. COUNSEL, *supra* note 116, at 2.

120. *Id.*

121. *Id.*

122. *Id.* at 3.

123. *Id.* at 4.

124. *Id.*; accord 24 C.F.R. § 100.500(c)(2) (2017).

125. OFFICE OF GEN. COUNSEL, *supra* note 116, at 4.

126. See generally *Ricci v. DeStefano*, 557 U.S. 557 (2009) (“Once a complaining party

What might be considered a substantial, legitimate, nondiscriminatory interest? It is most likely that housing providers will point to their need to collect rent and their obligation to ensure the safety, well-being, and comfort of other tenants as their substantial interest. While a court would likely consider these legitimate interests, the housing provider must show that its utilization of criminal records is actually *necessary* to accomplish those interests. The 2016 Guidance makes clear 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 likely to satisfy this burden.¹²⁷

The 2016 Guidance points out two frequently used policies that would not be considered “necessary” to achieve the substantial, legitimate, nondiscriminatory interest of protecting the well-being of other tenants. First, the 2016 Guidance reiterates that exclusions of applicants based on arrest records alone will never pass muster under the second prong of the burden-shifting analysis. Pointing to a number of Supreme Court cases, the 2016 Guidance states 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 Without more, a housing provider cannot assert that barring applicants with arrest records is necessary to protect its interest in the safety of other tenants.¹²⁹

The second type of policy that would likely fail the “necessary” to achieve a substantial, legitimate, and nondiscriminatory interest test, according to the 2016 Guidance, is a blanket prohibition on any person with any conviction record, no matter the recency of the conviction, the type of conviction, or what the convicted person has done since the time of the conviction. In the employment discrimination context, one federal court of appeals held that such blanket bans violate Title VII, stating that

demonstrates that an employment practice causes a disparate impact, amended Title VII states, the burden is on the employer ‘to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.’”); *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005) (noting that the business necessity test “asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“The [Civil Rights Act of 1964] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”).

127. OFFICE OF GEN. COUNSEL, *supra* note 116, at 5.

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

129. *See id.* at 5–6 (noting HUD’s stance that policies barring applicants with arrest records will not pass muster under the second prong of the burden-shifting analysis is in line with jurisprudence from the employment discrimination context; “[T]he Equal Employment Opportunity Commission has explained that barring applicants from employment on the basis of arrests not resulting in conviction is not consistent with business necessity under Title VII because the fact that an individual was arrested does not establish that criminal conduct occurred.”); *see also Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that the employer’s policy of excluding from employment persons with arrests without convictions unlawfully discriminated against African American applicants in violation of Title VII and that there was no business necessity for such a policy), *aff’d*, 472 F.2d 631 (9th Cir. 1972).

it could not “conceive of any business necessity that would automatically place every individual convicted of any offense . . . in the permanent ranks of the unemployed.”¹³⁰ Similarly, it is hard to imagine that any interest proffered by a housing provider would require an absolute ban on anyone with any criminal record regardless of whether that criminal record resulted from something minor, such as a traffic offense twenty years prior. While blanket bans on all individuals with criminal records are likely to fail the “necessary to achieve a substantial, legitimate, nondiscriminatory interest” test, HUD recognizes that housing providers may be able to show that more tailored policies that take into account the nature, severity, and recency of a criminal conviction are necessary to protect the safety of other tenants. To do this, a housing provider must “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.”¹³¹

Step 3: A Less Discriminatory Alternative?

If the housing provider successfully proves that its criminal history policy is necessary to achieve its substantial, legitimate, nondiscriminatory interest, the burden shifts back to the plaintiff to prove that such interest could be served by another practice with a less discriminatory effect.¹³² In many cases, the “less discriminatory alternative” will simply be a policy that is more nuanced and individualized than a blanket or broad ban on applicants with criminal record. For example, a policy that ignores old convictions, takes an applicant’s record of rehabilitation into account, or allows an applicant to present mitigating information is likely to have a less discriminatory effect than a broad ban on anyone with any type of criminal record. Additionally, a policy that is evidence based, in that it relies on valid studies regarding the likelihood of recidivism related to certain types of crimes, is less likely to have a discriminatory effect than one that bars applicants with convictions for all types of crimes. Additionally, as HUD points out in the 2016 Guidance, delaying consideration of criminal history until after an individual’s financial and other qualifications have been analyzed could have the dual effect of limiting the discriminatory impact of a criminal history policy and minimizing costs for the housing provider.¹³³

C. Statutory Exemption for Certain Drug Crimes

The Fair Housing Act does contain one relevant exemption from disparate impact liability. Section 807(b)(4) of the Fair Housing Act allows housing providers to bar any person who “has been convicted . . . of the illegal manufacture or distribution of a controlled substance as defined in Section 102 of the Controlled Substances Act.”¹³⁴ Accordingly, even if blanket bans on applicants who have been convicted of one of the drug crimes specified in the Controlled Substances Act has a disparate impact on racial minorities, a housing provider will not face liability under the Fair

130. *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975).

131. OFFICE OF GEN. COUNSEL, *supra* note 116, at 6.

132. 24 C.F.R. § 100.500(c)(3) (2017); *id.* at 7.

133. OFFICE OF GEN. COUNSEL, *supra* note 116, at 7.

134. 42 U.S.C. § 3607(b)(4) (2012).

Housing Act for such a policy. The “exemption to disparate impact liability is limited to disparate impact claims based on drug *manufacturing* and *distribution* convictions, and does not provide a defense to disparate impact claims based on other drug-related convictions, such as the denial of housing due a [] conviction for drug *possession*” or drug use.¹³⁵

III. WHAT IS MISSING?

The 2016 Guidance has been lauded by fair housing advocates and those working in the field of prisoner reentry as a welcome (if belated) recognition of the vastly disparate impact one-strike policies and bans on applicants with criminal records have on individual minorities and minority communities.¹³⁶ As explained in detail in prior sections of this Article, at all levels of the criminal justice system, African Americans and other minorities are targeted for harsher treatment than white Americans, and when minorities with criminal records seek housing, the disparate impact of criminal background checks become even more stark. HUD’s recognition of this disparate impact and its forceful warning regarding potential liability under the Fair Housing Act should serve as a wake-up call to local public housing authorities (and private landlords) who currently employ overly harsh or broad policies related to criminal convictions.

While the 2016 Guidance provides a much-needed warning to housing providers that employ potentially discriminatory criminal background check policies, the Guidance could be strengthened in a number of significant ways that are discussed below.

A. A Hard Look at “Business Justifications”

The 2016 Guidance makes it clear that in order to prove that a criminal record policy with a racially disparate impact is permissible, a housing provider must demonstrate that the policy or practice is necessary to achieve a legitimate purpose—that is, the housing provider must show that it has a sufficient “business justification”

135. OFFICE OF GEN. COUNSEL, *supra* note 116, at 8 (emphasis in original).

136. See, e.g., Editorial Board, *A Fair Chance After a Conviction*, N.Y. TIMES (Apr. 9, 2016), <http://www.nytimes.com/2016/04/10/opinion/sunday/a-fair-chance-after-a-conviction.html> [<https://perma.cc/X6JP-U6Q9>] (praising the 2016 Guidance opining that the Obama administration “is leading the country away from policies that once wrote off millions of people and cast them permanently aside”); Penny Starr, *New Guidance Warns Landlords They Could Face Discrimination Charges for Turning Down Tenants with Criminal Records*, CNSNEWS (Apr. 6, 2016, 6:40 PM), <http://www.cnsnews.com/news/article/penny-starr/new-guidance-warns-landlords-they-could-face-discrimination-charges-turning> [<https://perma.cc/6LBU-46RL>] (noting a New Orleans fair housing organization welcomed the new guidance because the high incarceration in Louisiana creates barriers for families seeking housing); *Looking Ahead: Opening Doors to Affordable Housing for People with Criminal Records*, REENTRY & HOUSING COALITION (Nov. 30, 2016), <http://www.reentryandhousing.org/new-events> [<https://perma.cc/5R4Z-SUXD>] (“HUD’s new guidance has set the stage for continued advocacy and litigation to pursue implementation of just housing policies and practices for individuals with criminal records in both federally subsidized housing and the private market.”).

for the practice.¹³⁷ Housing providers will likely argue that choosing tenants who will abide by lease terms is a legitimate business goal and that relying on criminal records screenings to weed out bad applicants is necessary to achieve this goal.

On the surface, using criminal background checks to weed out “bad” potential tenants seems reasonable, but many housing providers employ broad policies that bar potential tenants even when an applicant’s criminal record is not predictive of whether he or she would be a bad tenant. A past conviction for drunk driving, for example, may not be predictive of an applicant’s behavior as a tenant—there is no real business justification for barring applicants who have criminal records that lack any predictive value. The 2016 Guidance would be strengthened by making it clear that, if a housing provider points to its interest in weeding out bad tenants as its business justification for a criminal records policy that has a racially disparate impact, it must be able to demonstrate that its policy really does weed out tenants who are unlikely to abide by the terms of a lease.

Recall that tenants’ obligations under most leases, including leases for public housing, are quite minimal, and can be boiled down to two requirements: first, tenants must pay rent on time (most individuals receiving housing assistance pay some portion of their rent), and second, tenants must abide by the terms of the lease, which usually includes provisions requiring tenants to avoid disturbing the quiet enjoyment of other tenants and to avoid harming the property (beyond normal wear and tear).¹³⁸ The problem is that many types of criminal convictions that are currently used to screen tenants bear little or no relationship to an applicant’s ability to satisfy his or her obligations as a tenant.¹³⁹

The factors most predictive of a tenant’s ability to meet the first obligation (paying rent on time) are typically financial in nature—for example, employment history, rental history, credit history, etc.¹⁴⁰ There is little evidence that many types of crim-

137. The “business justification” terminology is borrowed from employment discrimination cases in which courts have held that the defense requires that the discriminatory practice be necessary to safe and efficient job performance. Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 390 (1996). “Before rejecting a business justification—or a governmental entity’s analogous public interest—a court must determine that a plaintiff has shown that there is ‘an available alternative . . . practice that has less disparate impact and serves the [entity’s] legitimate needs.’” *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2511 (2015) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009)) (omission and alteration in original). In the housing context, a “business justification” for a policy or practice with a discriminatory effect would be the legitimate, nondiscriminatory interest that the housing provider seeks to pursue. *Id.* at 2518 (“Applied here, the [business necessity] logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims.”).

138. As discussed in Part I.E, public housing leases also provide that tenants and their guests may not conduct any criminal activity on or off the property.

139. See *Fair Criminal Record Screening for Housing Act of 2016*, *supra* note 13 (“[H]aving a criminal history does not accurately predict whether someone will make a good tenant.”).

140. Sara Thompson, *7 Tips for Collecting Rent and Getting Paid on Time*, LANDLORDOLOGY (June 12, 2014), <https://www.landlordology.com/collecting-rent-on-time> [<https://perma.cc/UZ5N-RWAB>]; see also EXPERIAN, RISK VERSUS REWARD: IDENTIFYING THE HIGHEST-QUALITY RESIDENT USING RENTAL PAYMENT HISTORY 5 (2013), <https://www>

inal convictions are predictive of a tenant failing to meet his or her financial obligations.¹⁴¹ For example, while evidence *may* show that an applicant with a conviction for a financial crime such as passing fraudulent checks may be less likely than other applicants to abide by a lease's requirement to pay rent,¹⁴² it does not seem reasonable to assume that a person convicted of driving while intoxicated or other minor, nonfinancial crimes would be any more likely to skip a rent payment than any other applicant.

Similarly, while some types of criminal behavior may be predictive of an applicant failing to abide by the second obligation—avoiding disturbing other tenants or harming the property—many types of criminal convictions bear no relationship to the likelihood that a tenant will violate this obligation of his or her lease. For example, certain convictions for violent crimes or destruction of property-related crimes may be relevant to evaluating the likelihood of a tenant disturbing the peaceful enjoyment of others, while convictions for petty theft may not be relevant to the same inquiry.

Gut instinct may tell us that those without any criminal convictions must be “rule followers” who are, in general, less likely to violate a lease, but there appears to be no evidence that those who failed to follow the “rules” of certain types of criminal laws are more likely to fail to follow the rules included in a lease.¹⁴³ Gut instinct may also tell us that those who break any criminal law norms are inherently dangerous, but again, there is little evidence to support this proposition.

The 2016 Guidance makes it clear that housing providers must rely on evidence, not gut instinct or “[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,”¹⁴⁴ but it does not make clear what types of criminal records

.experian.com/assets/rentbureau/white-papers/experian-rentbureau-rental-history-analysis.pdf [https://perma.cc/4Y3S-MPDX] (“A person’s credit score . . . is an effective input for screening as it is highly predictive of rental default.”).

141. TRAN-LEUNG, *supra* note 64, at 22 (“Some admissions policies broadly eliminate anyone with a criminal history, even if that history may only be tenuously related to being a good tenant.”); Eric Dunn & Merf Ehman, *Rental Housing’s Elephant in the Room: The Probable Disparate Impact of Unlawful Detainer Records*, WASH. ST. B. NEWS 35, 36 (July 2011), <http://landlordsolutionsinc.com/2012/02/rental-housings-elephant-in-the-room/> (“The uniform treatment of applicants with [] records therefore causes some prospective tenants to be denied housing for arbitrary or unjust reasons—that is, on grounds unrelated to their fitness as residential tenants.”).

142. The author did not find any study showing a connection between convictions for financial crimes and likelihood of missing rent payments and uses this anecdote only by way of example. As discussed in this Part, little data exists on the connection between certain types of convictions and success as a tenant. On the other hand, as noted in *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, there is ample evidence of the connection between lack of housing and recidivism. TRAN-LEUNG, *supra* note 64, at 2 (“[T]he difficulties in reintegrating into the community increase the risk of homelessness for released prisoners, and homelessness in turn increases the risk for subsequent re-incarceration.”).

143. See, e.g., *id.* at 1 (“[A] person’s criminal background does not predict whether that person will succeed or fail at staying housed.”).

144. OFFICE OF GEN. COUNSEL, *supra* note 116, at 5.

policies would pass muster. Further, the 2016 Guidance sets the bar relatively low; we know that racially disparate policies based on “generalizations or stereotypes” are not permissible, but what if the racially disparate policy is based not on stereotypes, but instead on ease of administration or efficiency? Stronger guidance would set a high bar for a housing provider’s justification of a policy that has a disparate impact based on race.

Specifically, in order to encourage housing providers to be thoughtful about the “business justification” of policies with a disparate impact, HUD should advise housing providers that their policies related to criminal background screenings of potential tenants *must* consider (1) the recency of a criminal conviction; (2) the type of criminal conviction; and (3) any mitigating factors that suggest that the applicant may be as likely as other applicants to succeed as a tenant.¹⁴⁵ Additionally, in order to craft policies that are less likely to have a disparate impact based on race, housing providers should be encouraged to consider criminal convictions only *after* considering the rest of the applicants’ qualifications.

1. Recency Matters

Despite its strong language on disparate impact, the 2016 Guidance does not provide any information regarding how recent a criminal conviction must be in order to be reasonably relevant to a housing provider’s decision whether to accept a particular applicant. Currently, some public housing admission policies provide no limit on the “lookback period,” allowing rental applications to be rejected for decades-old convictions. Even policies that contain such lookback periods often do not connect the time period to the nature of the crime. One project-based Section 8 property in Virginia, for example, allows for denial of an application based on a seven-year-old conviction for minor crimes such as public intoxication and other misdemeanors.¹⁴⁶ Though many housing authorities employ policies with long or nonexistent “lookback periods” or fail to tailor the length of the “lookback” period to the nature of the crime, research in the field of reentry and criminology has demonstrated that, as time from the date of commission of a crime passes, criminal records become unreliable as predictors of future risk of recidivism.¹⁴⁷

145. These suggestions were made by the Shriver report, which was released prior to the 2016 Guidance, but, unfortunately, HUD did not incorporate all of the Shriver report’s suggestions into the 2016 Guidance.

146. TRAN-LEUNG, *supra* note 64, at v.

147. Kimani Paul-Emile, *Reconsidering Criminal Background Checks: Race, Gender, and Redemption*, 25 S. CAL. INTERDISC. L.J. 395, 397 (2016) (discussing the use of criminal record checks in the employment context) (“Studies have cast doubt on the assumption that the existence of a criminal record correctly forecasts one’s work behavior, and data show that individuals with criminal records who stay clean for a few years are no more likely than anyone else to have a future arrest.” (footnote omitted)); *see also* Oyama, *supra* note 38, at 211 n.175 (“But what about someone who has been released from prison and violence-free for 40 years? The DOJ statistics do not demonstrate that someone in this position—or anything like it—is likely to recidivate.”).

2. Overly Broad or Vague Policies Cannot Serve as a Sufficient Business Justification

In order for HUD to provide more specific guidance about what types of criminal records policies are not “based on stereotypes,” HUD should gather and disseminate data about which types of crimes are not predictive of lease violations, allowing housing providers to exclude such crimes from any criminal records policy. For example, if research shows that convictions for shoplifting, petty theft, or other minor crimes are not predictive of a tenant’s ability to pay rent and to abide by the terms of the lease, then convictions for such crimes should be excluded from any policy regarding the use of criminal records.¹⁴⁸

Currently, some public housing authorities explicitly ban all applicants who have a criminal record of any type,¹⁴⁹ and others include categories that essentially accomplish the same thing.¹⁵⁰ The housing authority in Little Rock, Arkansas, for example, rejects all applicants with misdemeanor convictions for three years and felony convictions for seven years, essentially barring everyone with any sort of criminal record for some period of time;¹⁵¹ it does not distinguish, for example, between those convicted of misdemeanor assault (possibly predictive of a tenant’s likelihood to interfere with the quiet enjoyment of other tenants) and those convicted of driving without a license (unlikely to be predictive of a tenant’s likelihood of success in a tenancy).¹⁵²

Even policies that limit automatic rejections to those with felony convictions can be overly broad. During the “law and order” era of the 1980s and 90s, many state legislatures relabeled crimes that were once considered misdemeanors as felonies, making the category of “convicted felon” broad enough to include crimes that are, in many cases, nonviolent and not predictive of one’s behavior as a tenant. In Illinois, for example, two convictions for shoplifting goods with a value of less than \$300 may result in a felony conviction.¹⁵³

In addition to being overly broad, some policies are so vague that an applicant might be discouraged from applying for housing for fear that the vague standard might apply. For example, in Norfolk, Virginia, convictions for “‘immoral conduct of any type’ are grounds for denial of public housing assistance for a period of 3-10 years, depending on the number of convictions.”¹⁵⁴ The term “immoral conduct” is

148. Mayson, *supra* note 59, at 323 (“It is hard to predict future harm. It is especially hard to accurately predict that a given person will commit a specific future crime.”).

149. TRAN-LEUNG, *supra* note 64, at ix (finding one apartment building owner that denies admission to any applicant with a felony record, including littering, shoplifting, and failure to pay a fare).

150. *Id.* at 24 (noting that some PHAs impose a ban on applicants whose “arrest or conviction record [. . .] indicates that the applicant may be a [. . .] negative influence [on] other residents.”).

151. *Id.* at 22.

152. As noted elsewhere in this Article, there appears to be little research into which types of crimes are actually reliable predictors of an applicant’s success as a tenant.

153. TRAN-LEUNG, *supra* note 64, at 26–27 (citing 720 ILL. COMP. STAT. 5/16-25(f)(1) (2012)).

154. *Id.* at 24 (quoting NORFOLK REDEV. & HOUS. AUTH., HOUSING CHOICE VOUCHER PROGRAM: ADMINISTRATIVE PLAN 15-17 (2013), <http://www.nrha.us/sites/default/files/HCV->

not defined, and, as a result, potential renters are not able to determine if the policy will result in an automatic denial of their application.

HUD should make it clear that criminal records policies must be nuanced; such policies must be based on research showing that the policy is likely to weed out applicants who are most likely to fail to abide by the terms of a lease. Policies that are overly broad or vague fail the “business justification” test, because such policies are not needed to accomplish a housing provider’s legitimate interest in rejecting “bad” tenants.¹⁵⁵

3. Tenants Should Be Able To Present Mitigating Evidence

Even where applicants have a criminal record that might suggest an increased likelihood that the applicant will fail to abide by the terms of the lease, housing is such a critical need for those returning from imprisonment that housing providers should be required to allow potential tenants to present mitigating evidence.¹⁵⁶ For example, a person with a conviction for assault should be able to present evidence that, while in prison, his behavior was perfect, or that he has since been trained in conflict resolution. Potential public housing tenants should be able to present this evidence both as part of an application and, if necessary, at a post-rejection hearing. An individualized assessment of potential tenants could greatly lessen the disparate impact of criminal record checks while ensuring that landlords are able to adequately assess tenants’ likelihood of success in a tenancy.¹⁵⁷

Of course, allowing tenants to present mitigating evidence can be time consuming (and thus costly), but courts have made it clear that inconvenience or cost alone proffered as a “business justification” will not necessarily pass muster.¹⁵⁸

4. Housing Providers Should Look at Criminal Records Last—Efforts To “Ban the Box”

While many housing providers seek information about past criminal convictions in applications themselves, they could provide a more individualized assessment of

Admin-Plan-web_0.pdf [<https://perma.cc/HVW9-9FRE>]).

155. See Mayson, *supra* note 59.

156. Public housing providers are required by law to consider mitigating circumstances when a tenant appeals a denial of housing, yet some written admissions policies lack any reference to these regulations, and many applicants are unaware of this right. See 24 C.F.R. § 960.203(d) (2017); see also TRAN-LEUNG, *supra* note 64, at 29–30.

157. Tenants whose criminal record relates to a disability should, in particular, be allowed to present information to a housing provider prior to an adverse decision on a rental application. The Fair Housing Act requires that those with disabilities receive “reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B) (2012).

158. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 n.8 (4th Cir. 1971) (“While considerations of economy and efficiency will often be relevant to determining the existence of business necessity, dollar cost alone is not determinative.”).

an applicant's likelihood to abide by the requirements of a lease if the housing provider only investigated an applicant's criminal record *after* evaluating the applicant's suitability in other arenas (e.g., financial capacity, rental history, references, etc.).¹⁵⁹ As one housing advocate has noted, the existence of a criminal record alone does not provide a landlord with enough information to determine that an applicant is more likely to "fail" in housing than one with no history of crime.¹⁶⁰ If HUD pushed public housing providers to delay investigating applicants' criminal records until after the application has been reviewed on other grounds such as rental history, the disparate impact of criminal background checks might be lessened.¹⁶¹

In the employment context, over fifty cities and thirteen states have passed legislation prohibiting public and private employers from asking for criminal record information until after the candidate has been interviewed or given a conditional offer for employment.¹⁶² In municipalities with robust "ban the box" legislation, barriers to employment for those with criminal records have been minimized, and the disparate impact of criminal background checks on racial minorities has been lessened.¹⁶³ A similar movement is afoot in the housing context.¹⁶⁴

159. As noted in Part I.E, federal regulations require public housing providers to screen for a small number of specific criminal convictions, but do not require housing providers to ask for information about all types of criminal convictions during the application process.

160. See *Fair Criminal Record Screening for Housing of 2016*, *supra* note 13 ("Finally, having a criminal history does not accurately predict whether someone will make a good tenant. People with criminal histories are no more likely to 'fail' in housing than those with no history of crime." (citing Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, 60 PSYCHIATRIC SERVICES 224 (2009))).

161. Efforts to encourage housing providers to delay inquiring about criminal records is often referred to as the "ban the box" movement, meaning that rental applications should not contain a "box" inquiring about past criminal records.

162. Christina O'Connell, Note, *Ban the Box: A Call to the Federal Government To Recognize a New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2804 (2015); see also Johnathan J. Smith, *Banning the Box But Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 213 (2014) (noting that in 2013 alone, five jurisdictions adopted "ban the box" legislation).

163. Smith, *supra* note 162, at 211–18; see also U.S. EQUAL EMP'T OPPORTUNITY COMM'N, 915.002, CONSIDERATION OF ARREST AND CONVICTIONS RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 9–20 (2012), https://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf [<https://perma.cc/DYP9-FHUP>] (describing that screening of individuals with criminal records may violate Title VII because of its disparate impact on racial minorities); Schwemm, *supra* note 118, at 116. See generally Garrett A. R. Yursza Warfield & David J. Rini, *New EEOC Guidance: Implications for Ex-Offender Reentry and Employment, or "It is Hard to Articulate the Minimum Qualification for Posing a Low Risk of Attacking Someone."*, 95 MASS. L. REV. 195, 207 (2013) (discussing the EEOC's guidance, which restricts barriers to employment for ex-offenders to criminal histories that are job related and consistent with business necessity).

164. See *Fair Criminal Record Screening for Housing Act of 2016*, Act 21-677, 2015 Sess. (D.C. 2016); Assem. B. 396, 2015–16 Reg. Sess. (Cal. 2015); see also Zoë Melissa Polk, *San Francisco Gives All a Fair Chance at Jobs, Housing*, N.Y. TIMES (Apr. 13, 2016, 3:21 AM), <http://www.nytimes.com/roomfordebate/2016/04/13/should-a-jail-record-be-an-employers->

B. Public Housing as a Public Right—A Change of Perspective

In all of the communications from HUD regarding the use of criminal records, from the 2011 letter from Secretary Donovan to the most recent 2016 Guidance, there is no mention of the fact that public housing should be available to the most vulnerable members of the public.¹⁶⁵ If public housing is truly to serve the *public*, making such housing inaccessible to those with criminal convictions effectively removes those with criminal records from the “public,” compounding the other lasting effects of convictions such as disenfranchisement. Only if we reconceptualize public housing from something that should be a privilege granted only to “good” citizens who have entirely clean criminal records—to something that should be available to *all* (or virtually all) citizens in need—will public housing truly serve the public.¹⁶⁶

How did public housing evolve in such a way that it excludes some of the most vulnerable members of the public? It is important to note that public housing was created not with the poor in mind, but instead it was originally intended to serve members of the working class.¹⁶⁷ But even as the concept of public housing evolved to be focused on the lowest income sectors, housing authorities have distinguished between the “deserving” poor and the nondeserving.¹⁶⁸

first-impression/san-francisco-gives-all-a-fair-chance-at-jobs-housing [https://perma.cc/2KB2-2QDB] (San Francisco); Richard A. Webster, *HANO Approves New Criminal Background Policy*, NOLA (Mar. 29, 2016), http://www.nola.com/politics/index.ssf/2016/03/hano_approves_new_criminal_bac.html [https://perma.cc/BW8G-TCFV] (New Orleans).

165. The HUD website states, “Public housing was established to provide decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities.” *Public Housing*, U.S. DEP’T HOUS. & URB. DEV., HUD.GOV, https://www.hud.gov/program_offices/public_indian_housing/programs/ph [https://perma.cc/WL23-KEAG]. The statute authorizing housing assistance payments states that it was enacted “[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing housing in accordance with the provisions of this section.” 42 U.S.C.A. § 1437f (West Supp. 2017).

166. In the arena of international law and in other countries, housing is often viewed not as a privilege, but instead, as a fundamental right of citizenship. *See* Rep. of S. Afr. v. Grootboom (2000) Case CCT 11/00 (Const. Ct., S. Afr.) (holding the state’s “minimum core obligation” required the realization of the right to housing for the most vulnerable members of the population); G.A. Res. 217 (III) A, Universal Declaration on Human Rights, art. XXV, § 1 (Dec. 10, 1948) (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family . . . including housing.”); Andrea B. Carroll, *The International Trend Toward Requiring Good Cause for Tenant Eviction: Dangerous Portents for the United States?*, 38 SETON HALL L. REV. 427, 428 (2008) (noting France as the only country to governmentally guarantee the right to housing).

167. *See, e.g.*, JA STOLOFF, U.S. DEP’T HOUS. & URBAN DEV., A BRIEF HISTORY OF PUBLIC HOUSING 1 (2004), https://www.researchgate.net/publication/228789405_A_brief_history_of_public_housing [https://perma.cc/7LLD-2B3Z] (“Public housing was not originally built to house the ‘poorest of the poor,’ but was intended for select segments of the working class. Specifically, it was designed to serve the needs of the ‘submerged middle class,’ who were temporarily outside of the labor market during the Depression.”) (citations omitted).

168. *See* Peter Dreier, *Housing the Working Poor*, SHELTERFORCE, Fall 2017, at 9, http://scholar.oxy.edu/cgi/viewcontent.cgi?article=1194&context=uep_faculty

Perhaps housing authorities have distinguished between the “deserving” and “nondeserving” public because the concept of “home” plays such a venerated role in American culture and law; rights related to having a home are protected by the Third and Fourth Amendments in the Constitution,¹⁶⁹ and being in one’s home (whether owned or rented) confers all sorts of legal rights upon an individual that are not necessarily available to those without homes.¹⁷⁰

Despite the fact that having a home is so core to the American ethos (or perhaps because of it), criminal records checks prevents large swaths of Americans who are disproportionately minorities from accessing housing, even housing that is designated as “public housing.”¹⁷¹ HUD’s guidance could be strengthened by affirming that, at its core, public housing is meant to serve members of the public in need without distinguishing between those who “deserve” assistance and those who do not. While excluding some people with criminal records from public housing is reasonable when an individual’s criminal background suggests that such individual is likely to violate the terms of his or her lease by failing to pay his or her portion of rent or by disturbing the well-being of others, blanket exclusions of everyone with criminal records undermines HUD’s purpose of serving the public and unfairly impacts minorities.

[<https://perma.cc/9HFX-8G4G>].

169. U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner . . .”); U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”)

170. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places.”); see also *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting) (“[H]ere we have not an intrusion into the home so much as on the life which characteristically has its place in the home. . . . The home derives its pre-eminence as the seat of family life.”); D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 255 (2006) (“‘Home’ is a powerful and rich word in the English language. As our cultural cliché ‘a house is not a home’ suggests, ‘home’ means far more than a physical structure. ‘Home’ evokes thoughts of, among many other things, family, safety, privacy, and community. In the United States, home and home ownership are held in high cultural esteem, as American as apple pie and baseball. With our society’s evolution beyond its agrarian origins, the home has replaced land as the dominant form of American property. As a result, we have developed something of an ideology of home where the protection of home and all it stands for is an American virtue.” (footnotes omitted)).

171. Without access to housing, those with criminal convictions are denied more than just a roof of their heads; they are also denied all of the rights that flow from having housing, such as an amplified right to privacy and a right to defend one’s property by force and a right to exclude others from entry. *Lawrence*, 539 U.S. at 563 (“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places.”); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (“The State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.”); see also Barros, *supra* note 170, at 271–76.

CONCLUSION

HUD's 2016 Guidance reinforcing that broad use of criminal background checks may result in unlawful disparate impact discrimination was a welcome message for advocates concerned with the racially disparate collateral consequences of criminal records. The 2016 Guidance was particularly timely as it followed a wave of uncertainty regarding the cognizability of disparate impact claims under the Fair Housing Act, and it reinforced the Supreme Court's stamp of approval on disparate impact law in the 2015 *Inclusive Communities* ruling. That said, given the racial components of criminal records, more should be done to curtail their use in matters as fundamental as whether a person will have access to their most critical need: housing.