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Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act

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DO NOT (RE)ENTER: THE RISE OF CRIMINAL BACKGROUND TENANT SCREENING AS A VIOLATION OF THE FAIR HOUSING ACT

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Increased landlord discrimination against housing applicants with criminal histories has made locating housing in the private market more challenging than ever for individuals with criminal records. Specifically, the increased use of widely available background information in the application process by private housing providers and high error rates in criminal record databases pose particularly difficult obstacles to securing housing. Furthermore, criminal record screening policies disproportionately affect people of color due to high incarceration rates and housing discrimination.

This Note examines whether the policies and practices of private housing providers that reject applicants because of their prior criminal records have an unlawful, disparate impact on racial minorities by denying such individuals the benefits of housing in violation of the federal Fair Housing Act, 42 U.S.C. § 3600, et. seq. The author compares existing enforcement guidance under Title VII employment discrimination law and suggests solutions for balancing the concerns of private housing providers and strong policy reasons behind increasing access to private housing for individuals with criminal records.

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INTRODUCTION

> *"Conduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment to replace the ghettos 'by truly integrated and balanced living patterns.'"*
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> —*Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 368 (1972) (citing Senate floor testimony of Senator Mondale, co-sponsor of the Fair Housing Act of 1968)

Over the last five to ten years, the enormous challenges facing incarcerated individuals upon reentry to the community has become the focus of national attention. Prisoner reentry initiatives have stirred debate among policy makers, legislators, and legal advocates, and have even prompted federal legislation.[1] The recent U.S. economic downturn has illuminated further the need to support prisoner reentry initiatives as budget-strapped state governments facing high incarceration costs grant early release to thousands of low-level offenders.[2] Notwithstanding the early release cases, in a typical year, about 725,000 people are released into

1. *See, e.g.*, Second Chance Act of 2007, Pub. L. 110-199, 122 Stat. 657 (2008); President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union, (Jan. 20, 2004), *in* 150 CONG. REC. H20 (2004).

2. *See, e.g.*, Jennifer Steinhaur, *To Trim Costs, States Relax Hard Line on Prison*, N.Y. TIMES, Mar. 25, 2009 at A1.

the nation's communities from state and federal prisons—a figure that has steadily increased alongside incarceration rates.[3] For newly released prisoners entering the long reentry process, finding 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."[4] Individuals who do not find stable housing are more prone to recidivism than those who do; one study determined that each move after release from prison increased a person's likelihood of re-arrest by 25%.[5]

The private housing market makes up 97% of the total U.S. housing stock.[6] For many individuals with criminal records, both the recent growth in tenant screening practices and high expense make renting in the private market extremely difficult. Although privately-owned housing is often too costly for prisoners returning to the community,[7] the private rental market is often the only option for these individuals, either because they are ineligible for governmentally subsidized housing through the U.S. Department of Housing and Urban Development (HUD) or because owning property is not economically feasible.[8] For most individuals bearing a criminal record (recent or dated), increased landlord discrimination against applicants with criminal histories has made the private housing market less hospitable than ever. Not only are landlords more likely to rely on widely available background information in their application process, but also the powerful organizing tools of the Internet allow neighborhood associations and community groups to garner opposition

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3. *See* HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2007 3, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf (last visited Sept. 6, 2009).

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

5. REENTRY POLICY COUNCIL, COUNCIL ON STATE GOVERNMENTS, PUBLIC HOUSING AUTHORITIES AND PRISONER RE-ENTRY 1, (July 28, 2006), *available at* http://www.reentry.net/library/item.110320-Public_Housing_Authorities_and_Prisoner_Reentry.

6. JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 121 (2003).

7. This is due to a general lack of affordable housing in many cities and communities nationwide. *See id.* Affordable housing is generally defined as housing in which the household pays no more than 30% of its annual income on housing costs.

8. Substantial literature has been written on the discriminatory effect of HUD *public housing* regulations governing eligibility and evictions that result in a ban or eviction from public housing facilities for many individuals. *See, e.g.*, CORINNE CAREY, HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING (2004) [hereinafter HUMAN RIGHTS WATCH]; Corinne A. Carey, *No Second Chance: People With Criminal Records Denied Access To Public Housing*, 36 U. TOL. L. REV. 545 (2005); Lauren E. Burke, Comment, *"One Strike" Evictions in Public Housing and the Disparate Impact on Black Public Housing Tenants in Washington, D.C.*, 52 HOW. L.J. 167 (2008). This Note will focus on the private rental market, an area that according to one expert, has been "virtually ignored in discussions about reentry." ANTHONY C. THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS 83 (2008).

to other special housing arrangements, such as transitional homes, more effectively.[9]

The lack of housing choice is a social force that both impedes individuals' successful reentry and insulates high populations of individuals with criminal records. Without wide access to affordable and secure housing choices, avoiding a transitory lifestyle in homelessness becomes a primary preoccupation for many individuals, especially recent parolees. This challenge diverts attention from other essential reentry goals, such as finding employment and repairing social bonds with friends and family. Communities also suffer when supporting large reentry populations.

This Note will examine whether the policies and practices of private housing providers that reject applicants because of their prior criminal records have an unlawful, disparate impact on racial minorities by denying such individuals the benefits of housing in violation of the federal Fair Housing Act, 42 U.S.C. § 3600, et. seq. (also referred to as Title VIII). Part I will present a statistical examination of the increased use of criminal background searches in the privately-owned housing market. Part II will briefly discuss the compounded impact of exclusionary criminal record policies and racial discrimination in housing for racial minorities. Part III will describe both the courts' treatment of the Title VIII disparate impact claims of racial discrimination modeled after employment discrimination laws in Title VII of the Civil Rights Act of 1964 and an enforcement disparity that exists with respect to criminal record policies. Part IV will evaluate current private criminal-history screening practices as a violation of Section 3604 of the Fair Housing Act (FHA) under a disparate impact theory. Part IV will discuss potential challenges and limitations of securing additional protections for persons with criminal records.

I. THE RISE IN CRIMINAL BACKGROUND SEARCHES AND ITS EFFECT ON THE PRIVATE HOUSING MARKET

A. *Higher Incarceration Rates Have Increased the Population of Racial Minorities Living with Criminal Records*

Incarceration rates have been on the rise in the United States over the past four decades. From 1970 (two years after the FHA became law) to 2007, the number of inmates in state and federal prisons *has increased nearly seven-fold*,[10] and by 2008, roughly 1.6 million men and women were

9. *See* TRAVIS, *supra* note 4, at 224.

10. Press release, U.S. Dep't of Justice Bureau of Justice Stat., "Prison Inmates at Midyear 2008—Statistical Tables and Jail Inmates at Midyear—Statistical Tables," Mar. 31, 2009, *available at* http://www.ojp.usdoj.gov/bjs/pub/press/pimjim08stpr.htm (last visited Sept. 6, 2009); THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (2006),

under state or federal detention, while 7.3 million men and women were "under correctional supervision," which includes those on probation or parole.[11] The latter number represents 3.2% of the U.S. adult population or one in every thirty-one adults.[12] A recent report from the Department of Justice concludes that if current incarceration rates remain unchanged, about one in every fifteen Americans will serve time in prison during their lifetime.[13]

People of color are disproportionately affected by high incarceration rates and their collateral consequences. While African Americans make up only 12.3% of the overall population,[14] more than six in ten inmates in federal and state jails are racial or ethnic minorities.[15] Black males have 6.5 times the imprisonment rate of White males and 2.5 times that of Hispanic males.[16] Current incarceration rates indicate that an estimated 32% of Black males will enter state or federal prisons during their lifetime, compared with 5.9% of White males.[17] In recognition of this disproportionate impact on minority individuals, protections against discrimination on the basis of a criminal record have begun to emerge, albeit slowly, in other civil rights arenas, such as employment. Similar protections, however have not materialized thus far in housing.[18]

The disproportionately high number of individuals of color with criminal backgrounds has many root causes, several of which are economic. However, studies have found that racial discrimination, which occurs at various points in the criminal justice system, including policing, arrest, conviction, and sentencing, also contributes to higher rates of convictions for people of color than non-minorities.[19] For example, although household surveys show that the vast majority of drug users are White,[20]

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available at http://www.sentencingproject.org/detail/publication.cfm?publication_id=83 (last visited Sept. 6, 2009).

11. LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES 2007, 2007 STATISTICAL TABLES 1, *available at* http://www.ojp.usdoj.gov/bjs/abstract/ppus07st.htm (last visited Sept. 6, 2009).

12. *Id.*

13. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL OFFENDER STATISTICS: PREVALENCE OF IMPRISONMENT IN THE UNITED STATES (1974–2001), http://www.ojp.usdoj.gov/bjs/crimoff.htm#data.

14. U.S. CENSUS BUREAU, UNITED STATES CENSUS 2000, *available at* http://www.census.gov/main/www/cen2000.html.

15. CRIMINAL OFFENDER STATISTICS, *supra* note 13.

16. PRISON INMATES AT MIDYEAR 2008, *supra* note 10, at 4.

17. CRIMINAL OFFENDER STATISTICS, *supra* note 13.

18. *See infra* Part III.B.

19. TODD CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 64 (2007) ("Some studies seem to show that small racial biases at successive stages in the criminal justice process may result in substantial racial differences at the end of the process."); *see also* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 20, 170 n.44 (2007).

20. PAGER, *supra* note 19, at 20.

Blacks are five times more likely than Whites to be arrested for drug offenses, and they receive three quarters of the prison sentences for drug possession.[21]

The total population of people whose criminal histories may affect their access to housing is unknown; however, a few calculations suggest its enormous scale. There are several million ex-felons in the U.S.[22] One estimate calculates that about five million are barred from public housing for having a federal conviction within five years.[23] Far more individuals have a criminal history record on file with state authorities—one recent count totaled 59 million individual offenders, or 29% of the U.S. adult population.[24] Other estimates conclude that about 25% of the U.S. population lives with a criminal record at some point in their lives.[25] That figure suggests that under current law, private landlords at some point in their lives may be permitted to deny housing to as much as one quarter of the U.S. population, the majority of whom are people of color, due to a past criminal record.

Along with the increased size of the segment of society under incarceration, the profile of those who leave prisons has also shifted. Compared with the early 1980s, today's released prisoners are older and more likely to be first-time offenders.[26] Such statistical changes lessen the absolute need for a private landlord to turn away all applicants with some form of

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21. Letter from Theodore M. Shaw, President and Director-Counsel of the NAACP to Richard A. Herlting, Deputy Assistant Attorney General, Office of Legal Policy, "Re: Civil Rights Implication of Criminal Background Checks in the Employment Context" 2 (Aug. 2, 2005), *available at* http://www.usdoj.gov/olp/pdf/naacpldfcomments_a.pdf; *see also* PETERSILIA, *supra* note 6, at 28.

22. *See, e.g.*, Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 938 (2003) (quoting an estimate of 12 million); *see also* ERIKA WOOD & RACHEL BLOOM, BRENNAN CTR. FOR JUSTICE AND ACLU VOTING RIGHTS PROJECT, DE FACTO DISENFRANCHISEMENT 1 (2008) (estimating that four million former felons are still affected by felon-disenfranchisement laws), *available at* http://www.brennancenter.org/content/resource/de_facto_disenfranchisement (last visited Sept. 9, 2009).

23. HUMAN RIGHTS WATCH, *supra* note 8, at 34 (averaging the number of felons convicted each year and multiplying by 5).

24. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE 30 (2001) (quoting a survey that found more than 59 million individual offenders were in the criminal history files of the State central repositories as of December 31, 1999). The same report states that the FBI also maintains about 43 million entries in its master name index, though it is unclear how many of these entries overlap with state records. *Id.* at 6.

25. Debbie A. Mukamal &Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1502 (2003).

26. For example, since 1994, serious violent crime levels, violent crime rates and property crime rates continue to decline. Meanwhile, the estimated number of arrests for drug violations for adults continued to increase, from 322,300 in 1970 to 1,693,100 in 2005. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, KEY CRIME & JUSTICE FACTS AT A GLANCE, *available at* http://www.ojp.usdoj.gov/bjs/glance.htm; *see also* PAGER, *supra* note 19, at 38.

criminal record because these records may have little bearing on their success as a tenant. In light of the vast expansion of the community of individuals with criminal records and the racial consequences of discriminating against individuals with criminal convictions, the policy reasons for courts and legislatures to ensure that these individuals are afforded equal opportunity to find stable and affordable housing are more compelling than ever.

B. *The Burgeoning Use and High Error Rates of Public and Commercial Criminal Background Services*

Lifelong stigmatization of released prisoners has not always been a part of the U.S. tradition.[27] But over the last 10 years, criminal records have become more widely available and, as a result, are being used for non-law enforcement purposes more than ever.[28] Advances in technology now allow for near-instant results drawn from multiple databases. With these technical breakthroughs in screening, today's individuals with criminal records face unprecedented stigmatization.[29]

By 2003, 94% of the criminal history records maintained by the state criminal history repositories were automated (71 million records).[30] Post-9/11 screening requirements have contributed to an "explosion" in the demand for criminal background checks in employment and tenant placement.[31] The growth of this practice is evidenced by a giant commercial sale industry that has emerged to fulfill this demand.[32] For example, the brochure of a leading company boasts in its brochure that its

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27. In fact, in certain early colonies, such as Georgia, many early settlers were formerly incarcerated individuals who had been released from English prisoners and were given full, unrestricted status as citizens upon arrival in the U.S. Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 153 (1999). Before computer records were easily accessible, most criminal records were obtained by calling the courts in an individual's local jurisdiction to request his or her file be pulled and examined.

28. SHARON M. DIETRICH, EXPANDED USE OF CRIMINAL RECORDS AND ITS IMPACT ON RE-ENTRY, PRESENTED TO THE AMERICAN BAR ASSOCIATION COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS (March 3, 2006), *available at* http://meetings.abanet.org/webupload/commupload/CR209800/sitesofinterest_files/Dietrichpaper.pdf

29. PETERSILIA, *supra* note 6, at 106–08.

30. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS (2003).

31. DIETRICH, *supra* note 28, at 3.

32. BUREAU OF JUSTICE STATISTICS SEARCH, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 7 (2005), *available at* www.search.org/files/pdf/RNTFCSCJRI.pdf It is estimated that there are hundreds, maybe even thousands, of regional and local companies, in addition to several large industry players who provide these services. Some examples of the major companies include: First Advantage, http://www.fadvsaferent.com; LexisNexis Resident Data/ChoicePoint, https://www.residentdata.com; LeasingDesk, http://www.realpage.com/leasingdesk.

"Resident Data" screening service combines criminal, proprietary, and credit data for over 200 million convictions associated with more than 62 million unique individuals, to which it adds approximately 22,000 new records daily.[33]

Private housing providers have embraced the boom in available background data. While aiming to maintain safety on their property is reasonable, the widespread adoption of tenant-screening practices based on criminal convictions is problematic for several reasons. A major concern that arises with this increased dependence on criminal history information is the degree of accuracy.[34] Commercial criminal record databases and services, especially name-based searches, have been found to be rife with error[35] and may report irrelevant arrest records or outdated convictions that have been expunged[36] from an individual's history.[37] Poor data integrity may result in the attribution of an offense to the wrong individual (also referred to as a "false positive"), a listing of the wrong offense, an offense listed more than once, and reports in which the disposition of arrests has not been entered long after charges were dropped.[38] Furthermore, declines in funding have led to even less oversight and clean-up of the federal

33. ChoicePoint "Resident Data" Brochure, http://www.choicepoint.com/business/tenant_family_screening.html (click on "Brochure") (last visited Sept. 9, 2009).

34. For example, a report from National Association of Professional Background Screeners stated that "serious problems remain in the process to link dispositional information to the proper case and charge." CRAIG N. WINSTON, THE NATIONAL CRIME INFORMATION CENTER: A REVIEW AND EVALUATION 6 (2005) (stating further that only 45% of 174 million arrest cycles have dispositions reported), *available at* http://www.reentry.net/search/item.88782.

35. *Id.*; *see also*, OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 40, 53–55, (June 2006), www.usdoj.gov/olp/ag_bgchecks_report.pdf.

36. Forty states allow arrests to be expunged/sealed if they did not lead to conviction. Debbie A. Mukamel & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URBAN L.J. 1501, 1509 (2003).

37. A leading commercial service admitted that the initially perceived value from the "very low price" associated with static databases or online court indexes may be offset by the relevance and accuracy of the information. SEARCH, *supra* note 32, at 12 n.61 (quoting ChoicePoint, "[c]lients who retrieve records through direct vendor access are usually provided raw data or record information . . . [which] requires additional effort by the client to validate the accuracy of the record and its connection with the subject").

38. While fingerprint searches are known to be far more precise and thus accurate, many repositories operate on name-matching criteria. KELLY R. BUCK , DEP'T OF DEF. PERSONNEL SECURITY RESEARCH CTR., GUIDELINES FOR IMPROVED AUTOMATED CRIMINAL HISTORY RECORD SYSTEMS FOR EFFECTIVE SCREENING OF PERSONNEL 3 (2002), *available at* http://www.siacinc.org/documents.aspx ("Fingerprint-based checks, as opposed to name-based checks, maximize the likelihood that criminal conduct is associated with the actual person who committed the crimes and that all crimes committed by an individual are identified"); *see also* SEARCH, *supra* note 32, at 9; DIETRICH, *supra* note 28, at 8.

records databases.[39] If a false positive shows up, an applicant may not be aware of the mistake nor have the opportunity to prove that the public record is incorrect. Criminal record searches differ from credit reports in this respect.[40]

Furthermore, especially with regard to private landlords who are not knowledgeable about predictors of future criminal behavior, the easy availability[41] of such a report makes it a tempting but misunderstood method of tenant selection. Criminal records are technically complex and often use abbreviations known only to the law enforcement field. Inexperienced recipients of criminal background reports may be unsure of and unwilling to analyze the relevancy of the information supplied.[42] In fact, many commercial screening services are designed precisely so that

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39. As the usage of criminal background data increases, the costs of maintaining its integrity would expectedly go up. However, from 2000 to 2007, the amount of federal spending by the Department of Justice's Bureau of Justice Statistics (BJS) through its National Criminal History Improvement Program (NCHIP) grants—aimed at maintaining an accurate and complete criminal records system—considerably declined, from 47 states receiving 40 million dollars in 2000 to 27 states receiving less than 10 million in 2007. U.S. GOV'T ACCOUNTABILITY OFFICE, BUREAU OF JUSTICE STATISTICS FUNDING TO STATES TO IMPROVE CRIMINAL RECORDS 6 (2008), www.gao.gov/new.items/d08898r.pdf.

40. It is unclear what legal remedies are available to individuals whose information may be inaccurate and related sanctions exist for commercial agencies that report bad criminal history information. Other areas of the law provide redress for inaccuracies disseminated by consumer reporting agencies. *See* Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681v (2009). The FCRA requires that employers taking adverse action against employees based on information obtained in a credit report provide the consumer with a copy of the report and a written description of the consumer's rights. These rights include the right to: (1) be told if credit report information is used against them; (2) see the information in the agency's file; (3) dispute information in their file; (4) correct or delete inaccurate information if it cannot be verified; (5) delete outdated information; (6) refuse to consent to an employer's request for their report; (7) exclude the individual's name from the list the agency provides to unsolicited credit and insurance providers; and (8) seek damages from those violating the FCRA. 15 U.S.C. § 1681(m). Additionally, the Fourth Circuit has held that under the FCRA, a credit reporting agency may have violated federal law when it erroneously stated that a prospective employee was a felon, and the prospective employee's conditional offer of employment was revoked. *See* Dalton v. Capital Associated Indus., Inc., 257 F.3d 409 (4th Cir. 2001).

41. In most states, criminal record information is available through online databanks that can be checked by the public for free or at a low cost. Some state and local governmental agencies have discovered the profitability in offering the service at a price. For example, the Indianapolis Police Department makes criminal histories available at $15 per search on their web site, http://www.civicnet.net/allservices.html; the South Carolina Law Enforcement Division charges $25 per name to perform a statewide criminal check on a name, http://www.sled.sc.gov/CATCHHome.aspx?MenuID=CATCH.

42. For example, a ten-year-old non-violent conviction may have little to no reliable indication of future criminal conduct. *See* Megan C. Kurlychek, Robert Brame, & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, 53 CRIME & DELINQ. 64, 84 (2007) (concluding that "if a person remains crime-free for a period of about 7 years, his/her risk of a new offense is similar to that of a person without any criminal record").

landlords do not have to spend time considering the individual's specific criminal history.[43]

Federal guidance for how these automatic determinations are to be administered may ensure fairer results and avoid landlords' fears of liability.[44] Housing providers may set unreasonably stringent screening policies because they are uninformed about the relevant risk factor associated with various criminal records.[45] Furthermore, uniform federal guidance could answer basic questions such as "What counts as a criminal record?" that have yet to be answered by any one source.[46]

C. *Private Housing Provider Screening Policies and Practices*

Researchers see the growth in tenant background checks as the result of several changes in the expectations of landlord duties and corresponding liabilities over time.[47] The first shift—liability standards—followed the 1970 case *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, in which a tenant prevailed in a suit against her landlord after being

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43. Whether such automated processes screen out only those applicants with substantially related criminal convictions or overly broad convictions is an important question that may determine their legality. For example, the product description for one service ("Registry CrimSAFE™") offered by First Advantage SafeRent claims it is "designed for clients who want First Advantage SafeRent to analyze criminal reports and provide a clear accept/decline leasing decision to their staff based on the client's own predetermined criteria. CrimSAFE ensures consistent decisions, improves Fair Housing compliance, and frees your staff from interpreting criminal reports." Registry CrimSAFE Product Brief (on file with author).

44. Comprehensive and exact restrictions will allow for clearer analysis in the courtroom, which may dispel employers' fears of liability. *See* Ford v. Gildin, 613 N.Y.S.2d 139, 141–142 (N.Y. App. Div. 1994) (dismissing a negligent hiring claim when an employee with a nine-year-old manslaughter conviction sexually abused a minor living in the residential building where he worked, since it was not directly related to the employee's position as a porter in a residential building and doing so would result in subjecting the employer to "potentially catastrophic liability for any crime committed by that employee which was even minimally connected to the place of his employment"); *see also* Smith v. Howard, 489 So. 2d 1037, 1038 (La. Ct. App. 1986) (dismissing tenant civil complaint against landlord after being shot by another tenant) (relying on the "well settled law" that unless a special relationship exists "there is no duty to control the actions of a third person and thereby prevent him from causing harm to another").

45. *See* discussion *infra* Part IV.A.

46. No single definition exists to differentiate between the many complex dispositions that can result from an initial charge. For example, a Department of Labor training manual informs employers that they may legally consider convictions in making hiring decisions, but can only look at arrest records if there is a business justification for doing so. DEBBIE MUKAMAL, U.S. DEP'T OF LABOR, FROM HARD TIME TO FULL TIME: STRATEGIES TO HELP MOVE EX-OFFENDERS FROM WELFARE TO WORK (2001).

47. *See, e.g.*, David Thacher, *The Rise of Criminal Background Screening in Rental Housing* 33 LAW & SOC. INQUIRY 5 (2008).

robbed and assaulted in her building's hallway.[48] That case represented a shift from the traditional view, that the landlord was protected from any wrongdoing of tenants, to the modern position, which places a public policing responsibility with landlords.[49] As localities began to erect various nuisance penalties for property owners, "how-to" landlord guides and training programs emerged to instruct landlords on methods they can use to investigate criminal history information and legally consider criminal history information for prospective tenants.[50]

The second key development that has driven the expanded use of criminal records is the professionalization of the real estate industry and the increasing use of property management firms to handle daily on-site logistics. As one author puts it, the real estate market has become "increasingly concentrated in the hands of people who view landlording as a full-time job, and it is increasingly supported by a network and an industry of supportive services and expertise."[51] This has created the infrastructure necessary to disseminate detailed guidance about the use of tenant screening. Additionally, it has: 1) allowed the costs of such screening methods to be borne collectively, 2) given the managers political capital with local and national legislatures, and 3) provided for the development of legal education materials to advise managers on screening practices that purportedly do not expose landlords to civil liability.[52]

As has been the trend in the employment field, private landlords are taking advantage of greater access to criminal record data in their screening procedures. This is particularly true among larger national rental companies.[53] In a study conducted by the National Multi-Housing

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48. 439 F.2d 477 (D.C. Cir. 1970).

49. *See* Thacher, *supra* note 47, at 15. State and local governments adopted these changes by passing public nuisance laws and using civil sanctions (e.g., building code enforcement) to pressure landlords to control crime. Today, most states allow government or private parties to bring nuisance claims against the owner of an apartment building for high levels of criminal activity.

50. *See, e.g.*, Rosales v. Stewart, 169 Cal. Rptr. 660 (Ct. App. 1980) (holding in case where a young girl was shot through the window by neighbor that landlord's knowledge of the acts of the tenant and of the danger he posed was not in itself sufficient to impose liability, but also that plaintiffs might have been successful if the landlord had the opportunity and the ability to eliminate the dangerous condition being created by the tenant). *But see* Anaya v. Turk, 199 Cal. Rptr. 187 (Ct. App. 1984) (holding that the mere fact that the tenants knew that a guest third party had been in federal prison was an insufficient basis to support a finding that the third party's dangerous propensities and his shooting the guest were foreseeable to the tenants).

51. *Thacher, supra* note 47, at 20.

52. *Id.* at 22–23. For example, advising landlords to question all distributing sample forms for notifying rejected applicants why they were rejected, as required by the Fair Credit Reporting Act.

53. *See, e.g.*, Choicepoint *supra*, note 33. ChoicePoint's Resident Data, performs the background screening for more than one million rental units in thousands of communities. *Id.*

Council (NMHC)—an organization of large apartment companies—of their members' crime-prevention practices, 80% reported that they screen prospective tenants for criminal histories.[54] Those that conduct background searches often publicize this information for marketing purposes.[55]

Some cities now fully encourage landlords to participate in police-run certification programs for "crime-free" housing programs, which often include daylong training sessions on how to screen tenants based on background information.[56] Local groups may add pressure to complete such programs by publishing the names of those who do not participate or by charging higher licensing fees for those that do not enroll.[57] The growth of these programs suggests this trend will continue.

D. *Private Housing Providers and Federal Funding: Housing Choice Voucher Program*

While not generally considered a matter of private housing, the convictions prohibitions found in the regulations of HUD's Housing Choice Voucher (HCV) program (formerly known as "Section 8") involves an intersection of private rental companies and public funding support.[58] The HCV program provides approximately 2 million low-income families with subsidized housing.[59] Because the federal government funds HCV programs, the HUD disqualifications based on criminal records apply to HCV participants. The federal funding scheme usually

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54. Thacher, *supra* note 47, at 12.

55. For example, Choice Point®, a leading provider of such services, states that its client, JMG Realty, has a policy of conducting background checks on "each of the nearly 25,000 applicants seeking to rent or renew leases on over 20,000 apartment units it owns or manages across seven states." Choice Point Customer Feedback Testimonial, http://www.choicepoint.com/business/tenant_family_screening.html. "Technology has enhanced the accuracy of resident screening far beyond the simple credit checks and employment histories of the past, stopgap measures that were porous enough to allow convicted criminals and child abusers to pass unnoticed and put innocent and unsuspecting residents in thousands of communities at risk." *Id.*

56. Thacher, *supra* note 47, at 18. For example, Portland's "landlord training programs" became a national model to be replicated by 400 other cities, and Mesa, Arizona's "Crime-Free Multi-Housing Program" (CFMH) has conducted trainings for 2,000 cities in the U.S., Canada, and abroad. A recent survey conducted by the National Multi-Housing Council found that 77% of its apartment owner members participated in some kind of "crime prevention/safety awareness program" with local police, and 40% participated in CFMH alone. *Id.*; *see also* International Crime-Free Association, Crime Free Rental Housing, *available at* http://www.crime-free-association.org/rental_housing.htm (last visited Nov. 15, 2009).

57. *Id.*

58. *See* 42 U.S.C. §§ 13661–64 (2008).

59. U.S. DEP'T OF HOUS. & URBAN DEV., FISCAL YEAR 2009 BUDGET SUMMARY, *available at* http://www.hud.gov/about/budget/fy09/fy09budget.pdf (last visited Dec. 20, 2008).

provides for local public housing authorities to administer the distribution of the housing vouchers. In considering applications for housing vouchers, these local authorities are allowed to expand upon federal prohibitions to include more types of convictions if so desired.[60]

Once an HCV program applicant has survived HUD's required criminal record disqualifications, and his or her eligibility for the program has been established based on income and other factors, the recipient typically is put on a waiting list.[61] When a voucher becomes available, he or she is then responsible for finding a landlord who is willing to enter into the voucher arrangement with the tenant.[62] Because the housing search takes place outside the monitoring of the local public housing authority, PHA, it is likely that private landlords who choose to discriminate against regular (non-voucher) renters based on past convictions would apply a similar disqualification criterion to HCV program participants.[63] Thus, though the public housing authorities are ostensibly under certain federal guidelines for the use of criminal convictions, private landlords may discriminate against certain federal housing voucher program participants through their own screening practices. The impact of private providers' screening practices on recipients of federal housing assistance may grow as the national model for public housing continues to shift from concentrated high-rise developments to HCV programs and "mixed-use" private developments.[64]

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60. *See* HUMAN RIGHTS WATCH, *supra* note 8, at 3. No consistent national data is available on how many people are rejected from eligibility due to their convictions, but around four-fifths of public housing agencies participating in the HCVP (Section 8) surveyed by the HUD reported that they have or were about to adopt a process for disqualifying applicants based on criminal background. DEBORAH J. DEVINE ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., THE USES OF DISCRETIONARY AUTHORITY IN THE TENANT-BASED SECTION 8 PROGRAM 15 (2000), *available at* http://www.huduser.org/publications/pdf/sec8da.pdf. However, these numbers do not accurately reflect the number of ex-prisoners affected because those coming out of prison are often informed of their ineligibility and chose not to apply.

61. U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHERS FACT SHEET, http://www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm.

62. *Id.* According to HUD's literature, "[w]hen the voucher holder finds a unit that it wishes to occupy and reaches an agreement with the landlord over the lease terms, the PHA must inspect the dwelling and determine that the rent requested is reasonable." *Id.*

63. The practice of purposeful nonparticipation in the housing search process might be construed as a Title VI violation (by maintaining a federally funded system of housing in a manner that has an unlawful disparate impact on the basis of race, color, or national origin); however, the avenue for a private right of action on a disparate impact theory was cut off by the Supreme Court in 2001 in *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). For that reason, the FHA remains the only appropriate federal statute under which to challenge widespread landlord practices on a disparate impact theory.

64. *See generally* Judith Brown-Dianis & Anita Sinha, *Exiling the Poor: The Clash of Redevelopment and Fair Housing Post-Katrina*, 51 How. L.J. 481 (2008). Screening practices also affect victims of federal disaster emergencies who have lost their housing, some of whom rely on government vouchers to relocate. *See* Eloisa C. Rodriguez-Dod & Olympia

II. THE COMPOUNDED EFFECTS OF EXCLUSIONARY POLICIES ON RACIAL MINORITIES

The predictable consequence of this increased availability of criminal history information is a greater likelihood that an individual will be removed from the consideration process due to a past record.[65] Under federal law, private landlords are generally at liberty to reject individual applicants from housing eligibility on account of a criminal record.[66] Landlords typically request such a disclosure in an application form,[67] which presents potential renters with criminal histories with a "prisoner's dilemma" of sorts:[68] telling the truth will result in immediate rejection[69] and lying may result in constant vulnerability for eviction based on the earlier cover-up. While fair housing advocacy has led to some standardized practices that prevent such policies from being carried out in a discriminatory manner—for example, requiring landlords to conduct background searches of all applicants instead of only certain individuals[70]—few alternatives exist for those turned away from private housing solely due to a blanket rule against leasing to individuals with criminal records.

State and local legislative bodies have taken steps to begin to reduce the many barriers to reentry. In states such as New York, Wisconsin, and Hawaii, individuals with criminal records are afforded extra protection from discrimination in employment, where statutory safeguards liken their status to that of other protected categories under Title VII (such as

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Duhart, *Evaluating Katrina: A Snapshot Of Renters' Rights Following Disasters*, 31 NOVA L. REV. 467, 477–84 (2007).

65. *See e.g.*, PETERSILIA, *supra* note 6. While little testing has been published on housing search, studies in the employment area have shown that most employers, if provided with information that an applicant had a criminal record would not hire that person, regardless of the particular crime committed and its relation to employability. One study showed individuals with criminal records were only one-third as likely to be employed as equally qualified individuals without a record. PAGER, *supra* note 19, at 5.

66. *See* 42 U.S.C. 3601. However, the amount and extent of criminal justice record information that can be relied upon by the rental housing industry can vary by local housing nondiscrimination laws, which can affect the extent to which a landlord can refuse to rent to someone merely because of a criminal record. SEARCH, *supra* note 32.

67. However, tenant screening may also be conducted informally, on an individual face-to-face basis, which makes detection of discriminatory application of the screening policy harder to detect.

68. *See* TRAVIS, *supra* note 4, at 223.

69. J. Helfgott, *Ex-Offender Needs Versus Community Opportunity in Seattle, Washington*, 61 FED. PROBATION 12, 20 (1997) (finding in a survey of 196 landlords in Seattle, 43% said they would be inclined to reject an applicant with a criminal conviction).

70. General industry knowledge advises that landlords should be consistent in screening practices and have a written policy on file that details the reasons they would reject an applicant including criminal history to avoid a discrimination suit. However, this type of suit differs from the disparate impact claim explored in this note. *See* discussion *infra* Part IV.A.

racial minorities and women).[71] The California Supreme Court has interpreted the state's Unruh Act to "protect all persons from any arbitrary discrimination by a business establishment," regardless of membership in a protected class.[72] In a few localities, ordinances specifically prohibit against discriminating on the basis of criminal convictions in tenant screening.[73]

A. *Effects on the Individual*

The mark of a criminal record, unlike that of a prestigious degree or license, creates a "negative credential" of a stigmatized social status that results in limited opportunity and access in social, economic, political, and other activities.[74] Furthermore, the compound effect of being both a racial minority, particularly an African American, and an individual with a criminal record may result in a "double strike."[75] At least one controlled study has found a statistically significant difference in employment between being a White individual with a criminal record and being a Black individual with a criminal record, finding that Black individuals with a

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71. *See* HAW. REV. STAT. § 378-2.5 (2009); N.Y. EXECUTIVE LAW § 296 (McKinney 2009); N.Y. CORRECT. LAW § 750 (McKinney 2009); WIS. STAT. ANN. § 111.321 (West 2009).

72. Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 120 (Cal. 1982) (noting that the state's Unruh Act, Cal. Civ. Code § 51 (2007) has been held to apply with full force to the business of renting housing accommodations).

73. For example in Madison, Wisconsin, the local ordinance code prohibits discrimination in housing to persons with arrest/conviction records older than two years or not involving offenses such as drug-related criminal activity, disturbance of neighbors, destruction of property or criminal activity involving violence to persons or property. MADISON, WIS. GENERAL ORDINANCES § 39.03 (2007). Dane County, Wisconsin, only allows consideration of a conviction record in housing based on a reasonableness standard: "where the nature of the offense is such given the nature of the housing, so as to cause a reasonable person to have justifiable fear for the safety of residents or employees." DANE COUNTY, WIS. FAIR HOUSING ORDINANCE § 31.11 (2007).

74. For this reason, many cities and some states, such as Boston, Chicago, Minneapolis, San Francisco and the state of Hawaii have joined the "Ban the Box" campaign, which aims to remove the criminal conviction question on job applications for prospective employees. Other models aim to delay the question until a later stage in the hiring process, so that a job offer can be made contingent on a criminal background check. The EEOC is currently considering recommendations to implement this provision in new employment discrimination enforcement guidance. *See* Transcript, Commission Meeting of November 20, 2008 on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (January 29, 2009), http://www.eeoc.gov/abouteeoc/meetings/11-20-08/transcript.html. The presumptive benefit of the later introduction of criminal record information is that, after selecting the individual for a conditional offer, the employer may be more willing to overlook the conviction or at least try to balance the relevance of the record in light of the job position. *See* Recent Legislation Establishing Standards for Hiring People with Criminal Records, http://www.saferfoundation.org/docs/Hiring_Standards_Matrix_Final_(2).pdf.

75. PAGER, *supra* note 19, at 69–71.

criminal record received only 5% job callbacks compared with 17% of White individuals with the same record.[76] The same study also demonstrated that the Black individuals fared particularly poorly in suburban job searches: White testers fared 2:1 to Black testers for callbacks in the cities, but 5:1 in the suburbs.

Finding housing in the initial months up to the first three years out of prison is critical to an individual's successful reintegration to society.[77] Many experts say that lack of housing alone operates as a predictor for recidivism.[78] An unsuccessful housing search will have a profoundly negative effect upon the quality and safety of the housing that these individuals are able to secure.[79] The inability to locate his or her own accommodations often may lead a recently released prisoner right back into crime.[80] Forcing them to stay with family can also negatively impact their families in both legal ways (threatening their own housing stability if in public housing) and non-legal ways (in the case of detrimental relationships). The individual may also suffer mentally because living with family may hurt his or her chances of having a new sense of responsibility and positive self-esteem.[81]

Homelessness—immediate or eventual—among parolees and ex-offenders is a serious problem nationwide.[82] Housing assistance is not typically provided in pre-release process and the vast majority of released prisoners are left to find their own housing and employment upon re-

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76. *Id.* at 110.

77. THOMPSON, *supra* note 8, at 86.

78. Id.

79. For example, a study conducted in New York City of recently released men and women found that due to high rents, subjects were often unable to rent private housing in their old neighborhoods. Instead they were forced to find housing in areas where they had no support network and through less traditional search methods, such as word of mouth, room rentals, unprofessional advertisements, and online classifieds, which in many cases are particularly ripe for fraud and if not fraudulent, were found to be of substandard quality and safety. *See* POLICY WORK GROUP OF THE HARLEM COMMUNITY AND ACADEMIC PARTNERSHIP, HOUSING AND REINTEGRATION IN EAST AND CENTRAL HARLEM: COMING HOME AND NO PLACE TO LIVE 15–16 (2007), http://www.reentry.net/ny/library/item.160511 (last visited Sept. 6, 2009).

80. *See id.*

81. *See* CLEAR, *supra* note 19, at 136.

82. *See* THOMPSON *supra* note 8, at 68. A study of Los Angeles and San Francisco found between 30% and 50% of parolees in those cities are homeless. Furthermore, shelters and homeless areas require parolees to quickly break a condition of parole: that they are not to associate with others with criminal backgrounds. *Id.* One national study found that 49% of homeless individuals interviewed had spent five or more days during their lifetime in a city or county jail and 18% had been in state or federal prison. Martha R. Burt et al., HOMELESSNESS: PROGRAMS AND THE PEOPLE THEY SERVE 25 (1999), *available at* http://www.urban.org/publications/310291.html (last visited Sept. 9, 2009).

lease.[83] In many urban areas, service providers will not consider recently released individuals "homeless" until they have lived on the streets for 21 days, thus barring them from access to homeless programs and services.[84]

Great attention has been brought to the difficulties of finding housing for sex offenders, who are often subject to registration and notification laws,[85] which make them ineligible for public housing and subject to immediate exclusion.[86] While this Note encompasses a population broader than the sex-offender community, it should be noted that communities go to great lengths to keep sex offenders out and force the offender to find housing elsewhere.[87] Data suggest this has contributed to growing populations of homeless sex offenders forced into destructive living arrangements.[88]

B. *Effects on Communities*

Pushing a high number of formerly incarcerated individuals into whatever housing they can find—often low-income, urban areas—results in "imprisoned communities" of color that lack the grounding social forces that typically bond communities together.[89] Often the burden of the reentry process is absorbed by the communities that take them in, which may already be struggling with other social problems, such as unemployment, limited opportunities, lack of good health care, and homelessness.[90] When formerly incarcerated individuals are spatially concentrated, particularly in low-income communities, this burden may become too much to carry.[91]

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83. CATERINA GOUVIS ROMAN & JEREMY TRAVIS, THE URBAN INSTITUTE, TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY 6 (2004), *available at* http://www.urban.org/UploadedPDF/411096_taking_stock.pdf (last visited Nov. 15, 2009).

84. *See* POLICY WORK GROUP, *supra* note 79, at 16.

85. There is little research on how notification laws reduce re-arrest and recidivism rates. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 58–59 (2007), *available at* http://www.hrw.org/en/reports/2007/09/11/no-easy-answers (last visited Sept. 9, 2009).

86. TRAVIS, *supra* note 4, at 224.

87. One study showed that 83% of sex-offenders interviewed who were subject to notification laws were rejected from specific residences. *Id.* at 225.

88. *See e.g., id.* at 226 (describing homeless population of Pioneer Square in Seattle). The threat of homelessness may even lead a released sex-offender to revoke his or her parole. *See* ASSOCIATED PRESS, *Homeless, Jobless Sex Offender Decides to Revoke Parole, Returns to Prison*, May 14, 2003.

89. *See generally* CLEAR *supra* note 19.

90. *See, e.g.*, PAGER, *supra* note 19, at 25.

91. To illustrate the high costs that are associated with highly concentrated communities of ex-offenders, the Justice Mapping Center is a Columbia University-based group that examines patterns of incarceration costs using spatial map technology. Their project "Million Dollar Blocks," shows that a disproportionate number of the more than 2 million people in prisons or jails across the nation come from a small number of neighborhoods in

The effects of dense ex-offender populations on both the individual and community can be described in social, emotional, political, and economic terms. Theories of "concentrated disadvantage" and "coercive mobility" (Which argues that after a certain point, high incarceration rates concentrated in impoverished communities will cause crime to increase)[92] describe the host of ways in which life becomes harder for those who live in these communities, including the impact on political power,[93] community interactions,[94] affluence and access to jobs,[95] health,[96] stigma,[97] peer influence and education,[98] children and family stability,[99] marriage and relationships,[100] and victimization rates.[101] These additional problems

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big cities. The Center found that in 2003, it would cost over $35 million to incarcerate people from 35 blocks in Brooklyn, New York. Most of the incarcerated returned to the same concentrated areas after release. *See* Jennifer Gonnerman, *Million-Dollar Blocks: The Neighborhood Costs of America's Prison Boom*, VILLAGE VOICE, Nov. 9, 2004; *see also* Gary Fields, *Hidden Costs: Communities Pay Price Of High Prison Rate—Phoenix Neighborhood's Missing Men*, WALL ST. J., July 10, 2008 at A1.

92. *See* CLEAR *supra* note 19, at 149.

93. As of 1998, an estimated 3.9 million Americans were permanently unable to vote because they had been convicted of a felony. Of these, 1.4 million were African American men—13% of all Black men. PETERSILIA, *supra* note 6, at 1.

94. Studies show that involvement with the criminal justice system leads to distrust and disrespect for government systems, and may erode residents' commitment to their community and willingness to participate in community activities. *Id.* at 30. Another basic presumption is that communities are better equipped to thwart off a threat when they have a developed network of political and social institutions prior to its occurrence. In this light, incarceration affects "collective efficacy," the ability to act on the behalf of the common good through community solidarity. *See* CLEAR *supra* note 19, at 115–16.

95. Incarceration impacts lifelong earning potential. High incarceration rates directly affects the market for goods and services and property values erode labor market opportunities for the whole community (resulting in fewer adults as role models and higher likelihood of illegal markets). Additionally, job discrimination against those with criminal records may lower employment too. CLEAR *supra* note 19, at 94–120.

96. Nicholas Freudenberg et al., *Coming Home From Jail: The Social and Health Consequences of Community Reentry for Women, Male Adolescents, and Their Families and Communities*, 95 AMER. J. OF PUB. HEALTH 1725, 1734 (2005) (showing that individuals leaving jail may contribute to health inequities in the low-income communities to which they return).

97. High concentrations of offenders affects property values and encourages stereotypes, especially with respect to law enforcement officials, who may draw inferences from a person's address alone, or businesses that might not want to open there. CLEAR *supra* note 19, at 94–120.

98. Young people are especially influenced by shared anti-social behavior such as indifference to education, interpersonal violence, etc. *Id.*

99. Children learn about social interaction from their parents, and are most impacted by their parents' ability to garner social resources and interact with community-level agencies. *Id.*

100. Over 90% of inmates are men—removing them leaves an imbalanced ratio of women to men. *Id.*

101. Living where there is a greater chance of being victimized can cause higher stress levels, and trauma in the case of actual victimization. *Id.*

are damaging not only to the other members of the community, but also to the recovering individual, whose stability and rehabilitation goals may be affected by living in a stigmatized, economically depressed, or politically crippled community.

III. DISPARATE IMPACT TREATMENT OF CRIMINAL BACKGROUND SEARCHES UNDER TITLES VII AND VIII

As previously demonstrated in Parts I and II, the vast majority of those with conviction records are people of racial and ethnic minority groups, particularly African Americans. Racial and ethnic minorities suffer disproportionately from exclusionary policies in private housing because of their overrepresentation among those who experience arrest and prosecution, seek public housing, and live in poverty.

A. *The Sister Acts: Title VII and Title VIII*

The Fair Housing Act, also referred to as Title VIII of the Civil Rights Act of 1968,[102] was passed only four years after its closely related predecessor, Title VII of the Civil Rights Act of 1964.[103] Both acts were intended to combat societal discrimination in public and private domains (Title VII in employment, Title VIII in housing).

Because of the statutes' similar aims and construction, courts frequently borrow the legal precedent and enforcement standards of Title VII principles for guidance in applying Title VIII, and vice versa.[104] The Supreme Court demonstrated the appropriateness of such a practice in *Trafficante v. Metropolitan Life Insurance Co.*, where it relied on evidence of congressional intent in the passage of Title VII to find a similar congressional intent under Title VIII.[105] Following *Trafficante*, courts

102. 42 U.S.C. § 3601 *et seq.* (2009).

103. 42 U.S.C. § 2000e *et seq.* (2009).

104. *See, e.g.*, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972); Bellwood v. Dwivedi, 895 F.2d 1521, 1529 (7th Cir. 1990) (stating "[t]he mental element required in a [Title VIII racial] steering case is the same as that required in employment discrimination cases challenged ... under Title VII of the Civil Rights Act of 1964 ... on a theory of disparate treatment"); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934–35 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (asserting that Title VII analysis is persuasive in interpreting Title VIII); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1288–89 (7th Cir. 1977) (reasoning by analogy to a Title VII case); *see also* Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 295 (7th Cir. 2000) (stating that "courts have recognized that Title VIII is the functional equivalent of Title VII"). *But see* Curtis v. Loether, 415 U.S. 189 (1974) (finding that Title VII jurisprudence is inappropriate when the language cited in the two statutes differs).

105. *See Trafficante*, 409 U.S. at 209 (finding Congress' Title VII intent "to define standing as broadly as is permitted by Article III of the Constitution" also applies to Title VIII).

confronted with a challenging legal question under one of the two acts will regularly borrow from the jurisprudence of the other.[106] Countless examples of this joint jurisprudence can be found in prior cases deciding discrimination on the basis of race,[107] sexual orientation,[108] religion,[109] familial status,[110] and national origin.[111]

B. *Existing Discrepancy Between Title VII and Title VIII Enforcement Measures*

Despite the routinely similar treatment given to discrimination claims under Title VII and Title VIII, a striking disparity currently exists between the enforcement of the acts with respect to discriminatory policies dealing with criminal history information. Twenty years ago, the federal agency responsible for enforcing Title VII, the Equal Employment

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106. See cases cited supra note 104. In addition to case precedent, courts deciding FHA claims have referenced EEOC regulations and guidance in their decisions—the importance of which will become clear in Part III.B. *See, e.g.*, Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 299 (7th Cir. 2000) (citing EEOC policy guidance on tester standing) ("The EEOC's analysis, of course, does not bind us. But as the agency charged with enforcing Title VII, the Commission has experience and familiarity in this field which bestow upon its judgment an added persuasive force. The Commission's view that testers have standing to pursue Title VII claims both informs and supports our holding today.") (citation omitted); Washington v. Krahn, 467 F. Supp. 2d 899, 904 (E.D. Wis. 2006); Hirschmann v. Hassapoyannes, 811 N.Y.S.2d 870, 876 (N.Y. Sup. Ct. 2005).

107. *See* Stewart v. Hannon, 675 F.2d 846, 849 (7th Cir. 1982) (citing *Trafficante* definition of Title VIII standing and stating that "similar analysis of standing should hold true under Title VII which, like Title VIII, has the purpose of outlawing discrimination based on race, religion, national origin, and sex").

108. *See, e.g.*, Williams v. Poretsky Mgmt., 955 F. Supp. 490, 495 (D. Md. 1996) (finding that sexual harassment should be actionable under Title VIII "[b]ecause Title VII and Title VIII share the same purpose—to end bias and prejudice"); Abrams v. Merlino, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988) (same as previous; reasoning that "Title VII cases are relevant to Title VIII cases on recognition of the fact the two statutes are part of a coordinated scheme of federal civil rights laws enacted to end discrimination" (citation omitted)).

109. *See* Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 90 (2d Cir. 2000) (applying Title VII disparate impact analysis to Title VIII), *abrogated on other grounds by* Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

110. *See* Pfaff v. U. S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 744 (9th Cir. 1996) (relying on Title VII age discrimination jurisprudence in deciding Title VIII familial status discrimination claim); Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1250–51 (10th Cir. 1995) (looking to Title VII disparate impact claim for guidance with regard to Title VIII familial status discrimination claim).

111. *See* Espinoza v. Hillwood Square Mut. Assoc., 522 F. Supp. 559, 567–68 (E.D. Va. 1981) (holding that a Title VII ruling on national origin applies to the Fair Housing Act because "the analogy between the discrimination provisions of Titles VII and VIII is extremely close").

Opportunity Commission (EEOC),[112] promulgated enforcement guidance[113] that prohibited both private and public employers from forming employment decisions on the basis of a criminal record absent a relation between the job and the conviction or "business necessity."[114] However, the same safeguards do not exist under Title VIII, and private landlords may freely use a prior conviction or arrest record as the sole basis for denying an application for housing.[115] Among the possible explanations for this divergence is the long tradition of the "right to exclude" in the U.S.[116] and landlords' concerns about tenant safety.[117]

The EEOC's position is that an employer's policy or practice of denying employment on account of a criminal record can have an adverse impact on Blacks and Hispanics.[118] This view is based on the well-known type of discrimination claim called disparate impact, or discriminatory effect.[119] Instead of focusing on the defendant's intent, the disparate impact

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112. Created in 1964 with the enactment of Title VII, the EEOC's jurisdiction currently extends over all of the federal statutes that prohibit employment discrimination, including Title VII, the Age Discrimination in Employment Act of 1967 (ADEA), and Title I of the Americans with Disabilities Act of 1990 (ADA). *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LAWS ENFORCED BY EEOC, *available at* http://www.eeoc.gov/laws/statutes/index.cfm (last visited Nov. 15, 2009).

113. The EEOC's enforcement and policy guidances, compliance manuals, and the like are not promulgated through a formal notice and comment process, and typically are not treated as controlling authority. See, e.g., Melissa Hart, *Skepticism and Expertise: the Supreme Court and the E.E.O.C.*, 74 FORDHAM L. REV. 1937 (arguing that the Court has consistently refused to define what level of deference the agency's regulations are owed, preferring to retain a broad and undefined discretion to accept or reject agency analysis). Nonetheless, Courts do routinely refer to the Commission's interpretations for guidance. *See* SEPTA discussion, *infra* Part III.D.

114. *See infra* notes 121–126.

115. The Fair Housing Act does prohibit an overtly discriminatory application of such a policy (i.e., exclusively applying the criminal history screening to minority applicants).

116. The "right to exclude" is protected by the Fair Housing Act "Mrs. Murphy" exception, which exempts dwellings intended to be occupied by four or fewer families from Section 3604 coverage (other than 3604(C)) if the owner lives in one of the units. This exception is grounded in the landlord's First Amendment right not to associate. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977) (recognizing the First Amendment right to refuse to associate); *see also* remarks by Senator Mondale, 114 Cong. Rec. 2495 (1968). For a detailed background on the history of the "Mrs. Murphy" exception, *see generally* James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605 (1999).

117. See discussion Part I.B on alleviating landlord liability.

118. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000e *et seq.* (Feb. 4, 1987) [hereinafter "Conviction Records"].

119. See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC Compliance Manual Section 15: Race and Color Discrimination 20 (2006), available at http://www.eeoc.gov/policy/docs/race-color.html (last visited Nov. 15, 2009).

theory looks to the effect of a challenged policy on a protected group as evidence of discrimination.[120]

The first policy statement the EEOC issued on the topic of criminal histories explicitly recognized that a disparate impact should be presumed in certain cases: "[A]n employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on [African American and Latino workers] in light of statistics showing that they are convicted at a disproportionately higher rate than their representation in the population."[121] Following the release of that initial statement, the EEOC has issued two additional guidelines notifying employers that wholesale restrictions against individuals with criminal convictions will render them liable to Title VII claims.[122]

The EEOC compliance manual offers further instruction, stating that an employer whose criminal record policy rejects minority applicants disproportionately must show their rejection policy considers the following three factors: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job sought or held.[123] Further, it states: "a blanket exclusion of persons convicted of any crime thus would not be job-related and consistent with business necessity."[124]

The EEOC treats exclusion on the basis of an *arrest* record differently and requires even greater justification for such practices, as an arrest record does not establish that a person actually engaged in alleged misconduct.[125] Thus, an employer whose policy or practice of considering arrest records results in a disparate impact on a protected class must show

120. After the 1988 Amendments to the law, plaintiffs may bring claims of housing discrimination under three legal theories: (1) disparate treatment (purposeful discrimination) claims, (2) disparate impact claims, and (3) reasonable accommodation claims, which argue that a person has not been afforded an equal opportunity to use and enjoy a dwelling as a result of his or her handicap. It is generally more difficult to prevail against a defendant on a showing of discriminatory impact than a showing of discriminatory treatment.

121. CONVICTION RECORDS, supra note 118.

122. *See id.*; *see also* EEOC, POLICY STATEMENT ON THE USE OF STATISTICS IN CHARGES INVOLVING THE EXCLUSION OF INDIVIDUALS WITH CONVICTION RECORDS FROM EMPLOYMENT, (July 29, 1987).

123. *See* EEOC COMPLIANCE MANUAL, *supra* note 119, at 29–30.

124. *Id.* at 30.

125. *See id.* at n.101; Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (Sept. 7, 1990); *see also* Gregory v. Litton Sys. Inc., 316 F. Supp. 401, 402–03 (C.D. Cal. 1970) (finding that there is no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees).

that the arrest was not only related to the job at issue, but that the applicant "actually engaged in the misconduct."[126]

C. *Disparate Impact Theory in Application Under Title VIII*

While the Supreme Court has never directly decided whether the FHA welcomes disparate impact claims,[127] every federal circuit has agreed that it does.[128] However, courts have relied on different lines of reasoning in reaching the general agreement that discriminatory effect should suffice under Title VIII. As a result, Title VIII disparate impact jurisprudence has become "an increasingly incoherent body of case law" and courts and commentators alike struggle to form a uniform standard as to when landlords will be liable.[129]

One of the first courts to apply a disparate impact standard under Title VIII was the Seventh Circuit in *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (*Arlington Heights II*).[130] In reaching its determination that a plaintiff need not show proof of discriminatory intent under Title VIII, the *Arlington II* court scrutinized Title VIII language, specifically the statute's language prohibiting a person "to refuse to

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126. *See* EEOC COMPLIANCE MANUAL, *supra* note 119, at 30. Such an inquiry may require the employer to provide the applicant with an opportunity to explain the arrest record and perform any follow-up necessary to verify the truth of the account given.

127. However, the Court has affirmed a Title VIII case that applied disparate impact. *See Huntington Branch*, 488 U.S. 15 at 18 (1988) (stating that the Court would not decide whether the disparate-impact test is the appropriate one, since appellants conceded the applicability of that test).

128. *See* Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1250–51 (10th Cir. 1995); Jackson v. Okaloosa County, 21 F.3d 1531, 1543 (11th Cir. 1994); Casa Marie, Inc. v. Superior Court, 988 F.2d 252, 269 n.20 (1st Cir. 1993); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 933–34 (2d Cir. 1988); Keith v. Volpe, 858 F.2d 467, 482–84 (9th Cir. 1988); Arthur v. City of Toledo, 782 F.2d 565, 574–75 (6th Cir. 1986); Betsey v. Turtle Creek Assocs., 736 F.2d 983 (4th Cir. 1984); United States v. Mitchell 580 F.2d 789 (5th Cir. 1978); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3rd Cir. 1977), *cert. denied* 435 U.S. 908; Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974); Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 79 (D.D.C. 2002); *see also* Langlois v. Abington Hous. Auth., 207 F.3d 43, 49 (1st Cir. 2000) (noting consensus among the circuit courts that the FHA provides a cause of action for disparate impact).

129. *See* Villas West II of Willowridge Homeowners Ass'n, Inc. v. McGlothin, 885 N.E.2d 1274, 1280 (Ind. 2008) ("There is wide agreement in the federal circuit courts that the FHA allows disparate impact claims, but no consensus about the proper framework for analyzing such a claim.") (*citing* John E. Theuman, Annotation, *Evidence of Discriminatory Effect Alone as Sufficient to Prove, or to Establish Prima Facie Case of, Violation of Fair Housing Act*, 100 A.L.R. Fed. 97, § 3 (1990)); *C.H.R.O. v. Ackley*, No. CV99550633, 2001 WL 951374, at *3 (Conn. Super. Ct. July 20, 2001) (citing the Theuman annotation and concluding that "a cursory reading of that article and many of the cases cited set forth . . . a morass of differing opinions in the federal cases on fundamental issues).

130. 558 F.2d 1283 (7th Cir. 1977) (upon remand).

sell or rent . . . or to otherwise make unavailable or deny, a dwelling to any person because of race." This language closely mimicked the critical language in Title VII that makes it illegal for employers to fail or refuse to hire or discharge a person "because of" membership in a particular protected group.[131] The *Arlington II* court interpreted the Fair Housing Act's "because of race" language broadly, relying heavily on the Title VII decision, *Griggs v. Duke Power*, which was the first case to recognize the disparate impact standard in employment discrimination.[132] In following *Griggs*, the court adopted the view that an act is discriminatory "whenever the natural and foreseeable consequence of that act is to discriminate between races, instead of [] intent."[133]

The *Arlington II* court applied a four-factor test in finding a disparate impact violation of the FHA.[134] Although one of the factors included intent, the court concluded that it was the least important, noting that "[a] strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry."[135] Following *Arlington II*, most circuits have abandoned the *Arlington II* factors and instead follow a version of the Second Circuit's disparate impact test in *Huntington Branch, NAACP v. Town of Huntington*,[136] which rejects any consideration of intent.[137]

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131. 42 U.S.C. 2000e(2)(a)(1).

132. *Arlington II*, 558 F.2d at 1289 n.6 (citing Griggs v. Duke Power, 401 U.S. 424, 436 (1971)) ("The important point to be derived from *Griggs* is that the Court did not find the "because of race" language to be an obstacle to its ultimate holding that intent was not required under Title VII. It looked to the broad purposes underlying the Act rather than attempting to discern the meaning from its plain language.").

133. *Id.* at 1288.

134. The four prongs were: (1) the strength of the plaintiff's showing of discriminatory effect; (2) whether any evidence indicates discriminatory intent; (3) the defendant's interest in taking the challenged action; and (4) whether the plaintiff seeks to compel the defendant to affirmatively provide housing to a protected class or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing. *Id.* at 1290.

135. *Id.* at 1289.

136. *Huntington Branch*, 844 F.2d at 934 (2d Cir. 1988) (stating that a plaintiff establishes a prima facie case of disparate impact by showing that the "challenged practice of the defendant actually or predictably results in racial discrimination" and that the "plaintiff need not show that the decision complained of was made with discriminatory intent") (citations omitted)); *see, e.g.*, Charleston Hous. Auth. v. U.S. Dept. of Agric., 419 F.3d 729, 740–41 (8th Cir. 2005); Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 575 (2d Cir. 2003); Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment, 284 F.3d 442, 466 (3d Cir. 2002); Langlois v. Abington Hous. Auth., 207 F.3d 43, 51 (1st Cir. 2000) ("True, one circuit court decision did refer to balancing, but the few later circuit court decisions on point come closer to a simple justification test, and we think this is by far the better approach.") (citations omitted); Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 302 (2d Cir. 1998); Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1252 (10th Cir. 1995); Arthur v. City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986). At least one circuit has continued to balance the *Arlington II* factors. *See* Reinhart v. Lincoln County, 482 F.3d 1225, 1229 (10th Cir. 2007).

137. *Huntington Branch*, 844 F.2d at 934.

Lower courts have generally recognized two types of discriminatory effect claims under Title VIII.[138] The first involves a municipal regulation or decision, such as exclusionary zoning, that is claimed to perpetuate existing housing segregation in the region.[139] The other type of claim argues a particular practice has a greater adverse impact on a protected group and is modeled after the Title VII disparate impact case established in *Griggs*.[140]

Both types of claims are usually reviewed under a burden-shifting analysis, in which a plaintiff first establishes a prima facie case of discrimination by showing that an outwardly neutral practice has a significantly adverse or disproportionate impact on minorities or perpetuates segregation.[141] A prima facie case merely raises an inference that the facts alleged are true, so only a minimal showing is necessary to establish the prima facie case.[142]

Discriminatory effect, in both the fair housing and employment discrimination contexts, is typically established with demographic statistics. This statistical inquiry is crucial to prevailing in a discriminatory effect case, because it supplies the foundation for a court's finding of discriminatory conduct. Courts usually apply a form of proportional comparison of the minority population adversely affected by the policy and either a regional population or narrowly drawn subsection of the region.[143] For example, a plaintiff may present "applicant flow data," which compares the racial composition of persons qualified for selection with those actually selected by the defendant. Another method of proof presents population statistics from the region to show that the policy has a discriminatory effect in a particular area.[144]

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138. Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987 n.3 (4th Cir. 1984).

139. *See, e.g.* Fair Hous. in Huntington Comm. v. Town of Huntington, 316 F.3d 357, 366 (2d Cir. 2003).

140. *E.g.*, Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 741 (8th Cir. 2005); *see* Villas West II of Willowridge Homeowners Ass'n v. McGlothin, 885 N.E.2d 1274, 1281–82 (Sup. Ct. Ind. 2008) (providing a recent history of disparate impact Title VIII tests used in the federal court system).

141. *See* Huntington Branch, 844 F.2d at 935–36.

142. *See* United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974). It has been shown that the *Swierkiewicz* standard, which describes the Title VII pleading requirements, should apply in Title VIII cases. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 122 (2002) (stating that "a short and plain statement of the claim showing that the pleader is entitled to relief" is all that is needed under section 8(a) of Title VII).

143. *See Huntington Branch*, 844 F.2d at 937–38; Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 302 (2d Cir. 1998) (applying *Huntington* to private defendant).

144. The court in *Arlington II* found liability for housing discrimination under a type of statistical comparison that examined the general population of minority members and whether a zoning policy had a greater adverse impact, in absolute numbers, on one racial group than another. 558 F.2d at 1286. Clearly such a showing will be near impossible if the members of the affected protected group constitute a minority in the affected area.

If the plaintiff has established a prima facie case of discriminatory effect, the burden then shifts to the defendant to demonstrate that its actions furthered a justified purpose. In the employment context, this standard is called "business necessity," and the employer must show that the challenged policy has a "manifest relation" to the specific job performance. In Title VIII disparate impact cases, private and public defendants are subject to differing burdens of proof. In cases involving a private defendant, such as a landlord or developer, most courts use a construction similar to the Title VII business necessity standard.[145] This has been described as an inquiry into "whether a compelling business necessity exists, sufficient to overcome the showing of disparate impact."[146] Other courts have avoided using business necessity language and simply require a "bona fide and legitimate justification[] for [the defendant's] action."[147] For example, in *Pfaff v. U.S. Department of Housing & Urban Development* the court found that a housing provider's occupancy limitation for a particular property may be "reasonable," despite a potentially discriminatory effect based on familial status—barring families with several children—if its purpose is to preserve the value of the property.[148] In cases involving public defendants, the business necessity inquiry is pointless, and courts have used a variety of language describing the type of reasonable governmental interest that will justify a challenged policy or decision.[149]

Finally, if the defendant is able to show some non-discriminatory purpose or business necessity, some courts will shift the burden back to the plaintiff to show that an alternate policy or selection process could achieve the same objective without the same discriminatory effect.[150]

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145. *See Betsey*, 736 F.2d at 989 (4th Cir. 1984) ("we have 'frequently cited and applied' the business necessity formulation in employment discrimination cases arising under Title VII") (citing Wright v. Olin Corp., 697 F.2d 1172, 1188 (4th Cir. 1982); Robinson v. Lorillard, 444 F.2d 791, 798 (4th Cir. 1971)).

146. *Id.* at 988.

147. *Huntington Branch*, 844 F.2d at 939. *See also* Mountain Side, 56 F.3d at 1254 (to satisfy the 'business necessity' test [defendant] must demonstrate only that its challenged practice has a 'manifest relationship to the housing in question').

148. 88 F.3d 739, 749 (9th Cir. 1996) ("It is certainly reasonable to seek to preserve the value of one's property, as [defendants] sought to do, and a numerical limitation on occupancy here advances this legitimate business purpose").

149. *See Arlington II*, 558 F.2d at 1293 (introducing the lenient rule that, "if a governmental body is acting within the ambit of legitimately derived authority, [the court] will less readily find [a violation]" . . . a factor which "weakens plaintiffs' case for relief"); Langlois v. Abington Hous. Auth., 207 F.3d 43, 51 (1st Cir. 2000) (holding that there the challenged policy must be "a legitimate and substantial goal"); *Huntington Branch*, 844 F.2d at 936 (requiring a "legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect").

150. *E.g.*, Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., 417 F.3d 898, 902–03 (8th Cir. 2005); Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1254 (10th Cir. 1995).

Due to the similar treatment of Title VII and Title VIII precedent, a recent development in Title VII disparate impact theory has set off debate surrounding the appropriate corresponding Title VIII standard. In 1991, in reaction to the Court's increasing hostility to disparate impact claims, Congress amended Title VII to preserve these claims under Title VII and "codify the concepts of 'business necessity' and 'job related' disparate impact standard in *Griggs v. Duke Power Co.*"[151]

Subsequently, in the case *Smith v. City of Jackson, Mississippi*, the Supreme Court upheld the availability of disparate impact claims under the Age Discrimination in Employment Act of 1967 (ADEA).[152] The decision cited the absence of Congressional amendment like that of Title VII, and conducted an inquiry into whether disparate effects are actionable under the ADEA. Some have interpreted the *Smith* case to mean that other civil right statutes that do not contain specific "effects" language, such as Title VIII, should not include disparate impact claims.[153] This theory has not been supported by any courts presented with it.[154]

In finding a disparate effects test under the ADEA, the *Smith* Court considered several factors: the legislative history of the ADEA, the purpose of the ADEA compared to that of Title VII, deference to regulating authorities' interpretation and enforcement of the statute, unique provisions of the ADEA, the nature of the discrimination the ADEA regulates (age-based), and unanimous circuit court treatment of the ADEA that allowed disparate impact claims.[155] As several courts and commentators have noted, while statutory text is a consideration for courts' interpretations, courts must also consider the legislative history, agency interpretation, and previous courts' interpretation of the statute—and previous courts that have inquired into these factors unanimously have held that disparate impact claims are available under Title VIII.[156]

D. *Disparate Impact Claims Addressing Criminal Record Screening:* El v. Septa

As described above, the EEOC has advised that an employer likely violates Title VII when it denies a job opportunity solely on the basis of a

151. Civil Rights Act of 1991, PL 102-166, 105 Stat 1071 (1991). Specifically, Congress was reacting to the Court's decision in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), which heightened the disparate impact standard and made it virtually impossible for a plaintiff to prevail.

152. 544 U.S. 228, 243 (2005).

153. See Michael Aleo & Pablo Svirsky, Foreclosure Fallout: the Banking Industry's Attack on Disparate Impact Race Discrimination Claims Under the Fair Housing Act and the Equal Credit Opportunity Act, 18 B.U. Pub. Int. L.J. 1, 41–44 (2008).

154. See Relman, HDISPRMAN § 2:26 (2009).

155. 544 U.S. at 232–67; Aleo, *supra* note 153, at 44.

156. Relman, supra note 154.

criminal record without any nexus to the job position. Whether a plaintiff would prevail on a Title VIII disparate impact case under a Title VII theory would ultimately depend on a statistical showing that a landlord or secondary leasing agent has discriminated against him or her on the basis of his or her criminal record and reasonability of justification for doing so. Scant Title VII precedent exists with respect to appropriate relatedness of employer criminal record screening selection criteria, but a handful of cases are instructive.

The relatively recent decision by the Third Circuit in *El v. SEPTA* provides the most up-to-date guidance on the parameters that might apply to a claim of discrimination on the basis of criminal record.[157] The appellate court upheld summary judgment against a plaintiff who claimed that his employer wrongfully discharged him from his position as a paratransit driver on the basis of a 40-year old conviction for second-degree murder.[158] The employer's hiring policy disqualified applicants with various types of convictions, some of which were disqualifying only within specified time limits.[159] In comparing the hiring policy to the job requirements of a paratransit driver, the court found that a reasonable juror would necessarily find that the employer's policy was consistent with business necessity.[160] Although the court recognized the EEOC's guidance policies, it granted these policies a "*Skidmore*" deference,[161] which takes into account the thoroughness of its research and persuasiveness of its reasoning, and found them too "terse" to provide anything of substance.[162]

Several lessons from *El*, however, leave open the possibility that a landlord's policy of disqualification on the basis of any criminal record could be found to violate Title VIII, just as courts have found overly broad

157. *See* 479 F.3d 232 (3rd Cir. 2007).

158. *Id.* at 235. Although the EEOC had found the complaint in the plaintiff's favor under a disparate impact on race theory, he eventually filed a class action in district court when the commission was unable to resolve the dispute. *Id.* at 237.

159. *Id.* at 236. The policy disqualified an applicant for any of the following: a record of driving under [the] influence (DUI) of alcohol or drugs; any felony or misdemeanor conviction for any crime of moral turpitude or of violence against any person(s); a conviction within the last seven (7) years for any other felony or any other misdemeanor in certain listed categories, and currently serving a sentence of probation or parole for the any crimes, no matter how long ago the conviction for such crime.

160. *Id.* at 247–48.

161. *Id.* at 244 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (finding that courts and litigants may properly resort to non-controlling rulings, interpretations and opinions for guidance and that "the weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control") (superseded by statute on unrelated grounds).

162. *Id.* at 248 ("The E.E.O.C. determination is terse and simply asserts the relevance of El's youth and the remoteness of his conviction without explanation, analysis, or authority. It provides nothing of substance. . . .").

employer screening policies to violate Title VII. The court, in revisiting the business necessity defense, found "particularly noteworthy" the Supreme Court's position in the Title VII case *Dothard v. Rawlinson*.[163] It stated that the "[*Dothard*] lesson is that employers cannot rely on rough-cut measures of employment-related qualities; rather they must tailor their criteria to measure those qualities accurately and directly for each applicant."[164] It also reiterated that a simple preference-based reasoning would not justify an overly discriminatory policy; "rather, the employer must present real evidence that the challenged criteria 'measure the person for the job and not the person in the abstract.' "[165]

The court's guidance on business necessity, while helpful, may not have contributed to its ultimate ruling. The court next observed that past business necessity cases are not exactly on point, since an employer's policy regarding criminal convictions—unlike standard qualification standards that measure ability to perform a job—are focused on the potential harm to other employees. It then applied the standard from two other disparate impact cases, *Lanning v. SEPTA (I and II)*, that involved female transit workers who were disqualified from consideration for transit officer patrol jobs based on an aerobic test that revealed the risk of failing to perform the duties expected of a transit officer.[166] Since the question in both employer contexts is one measuring "risk," the court stated that the applicable standard in a criminal conviction policy is that such "discriminatory hiring policies [must] accurately but not perfectly distinguish between applicants' ability to perform successfully the job in question."

In applying the *Lanning* "risk"-focused test, the *El* court made several observations:

a. "Risk-relatedness"

The *El* court emphasized the importance of the public safety concern surrounding a paratransit driver position, in which the driver would be left alone with "vulnerable members of society." The court then appeared to apply a business necessity closely tailoring the requirement to the *Lanning* risk test, distinguishing the paratransit driver position from "an office job at a corporate headquarters" denied on the basis of "an extremely broad exclusionary policy that fails to offer any empirical

163. 433 U.S. 321 (1977) (finding that hiring criteria for prison guard position that specified height and weight requirements violated Title VII).

164. *Id.* at 240.

165. *Id.* (citing *Dothard*, 433 U.S. at 332 (quoting *Griggs*, 401 U.S. at 436)).

166. Lanning v. SEPTA, 181 F.3d 478 (1999) (explaining that the purpose of the 1.5 mile run was to screen out applicants who would pose a risk to public safety by not being able to perform the duties of a transit officer).

justification for [its job relatedness]."[167] In its reference to a "corporate office job," the *El* court was referring to the sole reported appellate case visiting the disparate impact of exclusionary criminal record screening in employment decisions, *Green v. Missouri Pacific Railroad Co.*[168] In that case, the plaintiff prevailed on the Title VII disparate impact claim that his sheet metal employer's "standard policy"—denying employment to any applicant who has been convicted of a crime other than a minor traffic offense—illegally discriminated against him and other applicants. The court found the employer's policy unlawful, stating that "a sweeping disqualification, resting solely on past behavior can violate Title VII where that ... practice has a disproportionate racial impact and rests upon a tenuous or unsubstantial basis."[169] Applied to a rental apartment, one might consider physical boundaries of a rental unit more analogous to a corporate office than the interior of a special needs transportation vehicle.

Similarly, in *Gregory v. Litton Systems*, a California district court found the employer's policy of "not hiring applicants who have been arrested on a number of occasions other than minor traffic offences" in violation of Title VII.[170] The *Gregory* court found that the plaintiff provided "overwhelming and utterly convincing" arrest statistics in proving his case that African Americans were disproportionately arrested compared with Caucasians, resulting in a "substantial and disproportionally large number of [African American applicants]" to be excluded from the defendant's employment opportunities.[171] The court further remarked that the hiring policy failed a business necessity inquiry, since there was "no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees."[172]

Other district court decisions have similarly spoken of a correlation between the criminal conviction and the risk allegedly posed.[173] In one (non-disparate impact) disability claim brought under Title VII, a court found a local public housing authority had the discretion to bar an individual with a criminal history based on the policy view that individuals

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167. *El*, 479 F.3d at 243 (citing Green v. Mo. Pac. R.R. Co., 523 F.2d 1290 (8th Cir.1975)).

168. 523 F.2d 1290 (8th Cir.1975).

169. *Id.* at 1296.

170. 316 F. Supp. 401, 402 (C.D. Cal. 1970). During litigation, the employer stipulated to the fact that it had rescinded an offer of employment solely based on previous arrest information the plaintiff had disclosed on an application form.

171. *Id.* at 403.

172. *Id.* at 402.

173. *See id.* at 401 (finding that defendant employer's policy of excluding from employment persons with arrests but no convictions unlawfully discriminates against Black applicants).

"with a history of convictions for property and [assault] crimes would be a *direct threat* to other tenants."[174]

b. Unanswered Relevance of Older Convictions

Equally important in *El* was the Court's apparent willingness to visit the relevancy of older convictions. The court noted weaknesses in the testimony of the defendant's three expert witnesses offered on the relevancy of old criminal convictions to future recidivism.[175] Noting the plaintiff's failure to present expert testimony to rebut the defendant's assertions as "fatal," the court went so far as to express examples of testimony it would have been receptive to hearing from a witness for the plaintiff. It ultimately took the defendant's unrebutted testimony at face value, as required upon consideration of a motion for summary judgment.[176]

c. Unanswered Relevance of Nature of Crime

The *El* court rejected the plaintiff's argument that recidivism cannot be predicted exactly, "because it is also impossible to predict which non-criminal will commit a crime." "What matters is the risk that the individual presents, taking into account whatever aspects of the person's criminal history are relevant." Thus, the court commented, "if screening out applicants with very old violent criminal convictions accurately distinguishes between those who present an unacceptable risk, then reliance on this factor is

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174. Talley v. Lane, 13 F.3d 1031, 1034 (7th Cir. 1994) (emphasis added) ("The Fair Housing Act does not require that a dwelling be rented to an individual who would constitute a direct threat to the health and safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."). *But see* Evans v. UDR Inc., No. 7:07-CV-136-FL, 2009 U.S. Dist. LEXIS 31844, at *24–25 (E.D.N.C. Mar. 24, 2009) (finding that accommodating an applicant's criminal history is not equivalent to accommodating a mental disability and that a disability-related conviction was not found to require a "reasonable accommodation" under Title VIII to require in a departure from a criminal conviction tenant screening policy).

175. *El*, 479 F.3d at 246 ("All three rely heavily on data from the Department of Justice that tracked recidivism of prisoners within three years of their release from prison. Indeed, those data show relatively high rates of recidivism in those first three years. 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.").

176. *Id.* at 247 ("Had El produced evidence rebutting SEPTA's experts, this would be a different case. Had he, for example, hired an expert who testified that there is time at which a former criminal is no longer any more likely to recidivate than the average person, then there would be a factual question for the jury to resolve. Similarly, had El deposed SEPTA's experts and thereby produced legitimate reasons to doubt their credibility, there would be a factual question for the jury to resolve. Here, however, he did neither, and he suffers pre-trial judgment for it.").

appropriate; if the criterion is inaccurate or overbroad in the case of very old convictions, then it is inappropriate for Title VII purposes." Considering the impact of the drug wars of the 1980s and the disparate impact of sentencing disparities on minority groups,[177] differentiation regarding the type of crime could potentially allow many non-violent offenders access to better living opportunities.[178]

d. Individual Plaintiff

The court noted that El was an individual plaintiff and not litigating the claim as part of a class, and that it would review only the narrow policy his subcontractor employer used against him and not the other hiring policies of other SEPTA subcontractors.[179] As such, the legality of less narrow and more exclusionary hiring policies remains unknown.

IV. CURRENT PRIVATE HOUSING PROVIDER POLICIES AS A VIOLATION OF TITLE VIII

A. *Blanket Bans on Criminal Histories as Overly Broad*

The growing practice of private landlord and third party realty services[180] to reject applicants on the basis of arrest and conviction records, discussed in Part II of this Note, violates Title VIII. Such practices erect a barrier to desirable living conditions so wide that they cannot justify the disparate impact that they impose on members of certain protected classes.

Many private housing screening policies allow for little to no individualization when considering the threat posed by the applicant's record to the desired housing. Such generalization is at odds with other areas of discrimination law, especially those protections designed for individuals

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177. For example, the drug laws enacted between 1980 and 1991 created a ten-fold increase in those crimes. In 2005, drug offenses were responsible for the highest number of those incarcerated, at 3x more than the next category, burglary. Western, 2005 table 2.3 (cited in TRAVIS, *supra* note 4).

178. For example, in 2002, 1 in 4 jail inmates was in jail for a drug offense, compared to 1 in 10 in 1983; drug offenders constituted 20% of state prison inmates and 55% of federal prison inmates in 2001. 76% of those sentenced to state prisons in 2002 were convicted of non-violent crimes, including 31% for drug offenses, and 29% for property offenses. THE SENTENCING PROJECT, *supra* note 10.

179. El v. SEPTA, 479 F.3d 232, n.3 (3rd Cir. 2007).

180. For more on third party realty services that may be held accountable under a "third party interference liability" standard applied in the Title VII context to parties who "are not direct employers of complainants, but control access to employment by reference to invidious criteria," see Caston v. Methodist Med. Ctr. of Ill., 215 F. Supp. 2d 1002, 1006 (C.D. Ill., 2002).

whose past behavior similarly stigmatizes them—such as recovering drug addicts and alcoholics.[181] Failure to consider the circumstances surrounding a prior record also contradicts courts' practices under the sentencing schemes, which, in considering a defendant's criminal record score, tend to look at factors such as age at the time of the offense.[182]

Criminological research widely suggests that after a certain number of years, an older criminal record is no longer a reliable indicator of future risk of crime.[183] Many federal and state agencies recognize this decline in the relevance of a past conviction or arrest and thus, tailor hiring and licensing policies to apply only within certain windows of time, typically three to seven years after conviction or release, after which the past record may no longer be used as a basis for rejection.[184] A number of other factors have been shown to be relevant to reducing the risk of recidivism,

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181. For example, the Supreme Court has described the Americans with Disabilities Act as carefully structured "to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments." *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 285 (1987) ("Congress . . . understood the danger of improper discrimination against [addicts and alcoholics] . . . and [excluded] only those alcoholics and drug abusers 'whose current use . . . prevents such an individual from performing the duties of the job in question or whose employment . . . would constitute a direct threat to property or the safety of others).

182. *See, e.g.* U.S. v. Wilkerson, 183 F. Supp. 2d 373 (D. Mass. 2002) (departing downward for overrepresentation of seriousness in the criminal history score of a defendant whose previous crimes had been nonviolent and committed when he was very young). The U.S. Sentencing Commission has recognized overrepresentation of seriousness as one of the inadequacies of the criminal history scoring system. *Id.* at 379–80. *But see* State v. Barber, 760 N.W.2d 183, 183 (Wis. Ct. App. 2008) (finding that inaccurate prior criminal history information did not warrant a sentencing modification because the inaccurate information was not highly relevant to the sentence imposed nor did it frustrate the purpose of the original sentence).

183. In some cases the risk deferential is very high—up to ten times higher—immediately after arrest/contact with the criminal justice system. Time since release from prison, as opposed to time since conviction, may be the most reliable time factor for those that have served time. Assoc. Professor Shawn D. Bushway, Univ. of Albany (SUNY) School of of Criminal Justice, Statement at the U.S. Equal Employment Opportunity Commission's Employment Discrimination Faced by Individuals with Arrest and Conviction Records Meeting (Nov. 20, 2008).

184. Phase-out periods for criminal records already exist in other areas of federal law, including eligibility for sensitive Transportation Security Card issued by the Transportation Security Administration. *See* Maritime Transportation Security Act of 2002, 46 U.S.C. § 70105(c) (2009) (imposing reasonable time limits on disqualifying offenses to seven years since the conviction or five years from the release, whichever is more recent, for most offenses). Time limits are also recommended by the American Bar Association. *See* ABA Resolutions on Criminal Justice, Kennedy Commission Report (2004), http://www.abanet.org/crimjust/policy/cjpol.html.

including age, sex, the number of prior offenses, marital status, stable employment, and abstinence from drugs or alcohol.[185]

Current private housing providers fail to provide safeguards against erroneous reporting that many employers, licensing bureaus, and financial institutions use when checking criminal history information.[186] Applicants should be given notice of an adverse decision[187] and an opportunity to dispute and rectify inaccurate criminal records, as they do under other areas of the law, such as credit report errors.[188] With estimates of error in the FBI database hovering at around 40%, reasonable consideration of this information must allow the applicant an opportunity to prove the mistake. However, private housing provider policies rarely engage in a dialogue with an applicant and instead, they seem to reject the applicant immediately,[189] or, as at least one case demonstrated, permit exclusive opportunities to refute the record on a discriminatory basis.[190]

Similarly, there is little justification for denying applicants with prior criminal histories the opportunity to provide proof of rehabilitation.[191] Researchers have questioned the logic of using general recidivism rates as a rationale for disqualifying applicants with criminal records when the opportunity sought, i.e., employment, housing, etc., has been shown as a factor in reducing recidivism itself.[192] When other more reliable information is available, such as a court- or parole board- issued certificate of

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185. *See* Statement of Shawn D. Bushway, *supra* note 183. It should be noted that some of these factors may violate state and federal fair housing protections if used as criteria for qualification.

186. *See* Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681v (2009).

187. Some state laws provide such a notice requirement. *See, e.g.*, N.Y. CORRECT. LAW § 754 (McKinney 2009) (granting an individual denied employment or a license as a result of a criminal conviction the right to request a written statement setting forth the reasons for the denial).

188. *See* Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681v (2009).

189. *See* Jackson v. Thompson, No. 2:05-cv-00823, 2006 U.S. Dist. LEXIS 41023, at *7 n.3 (S.D. Ohio Jun. 20, 2006) (dismissing FHA discrimination claim of applicant whose credit rating and income qualified him to rent a unit but was rejected on the basis of three criminal record results for the same name—none of which turned out to be his. The court dismissed for the failure to state a claim.)

190. *See* Allen v. Muriello, 217 F.3d 517 (7th Cir. 2000) (finding African American plaintiff established a prima facie case of racial discrimination when a public housing authority treated him differently than other similarly situated White individuals by denying him the same opportunity to "clear his name" and prove the alleged disqualifying criminal records were not his).

191. *See supra* note 181, discussing anti-discrimination policies that protect recovered drug addicts and alcoholics. Public housing regulations do allow for individuals who are drug addicts and alcoholics to be admitted or remain if they can show proof of rehabilitation.

192. *See, e.g.*, Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 346 (2004) (stating that diminished opportunities to reintegrate may increase the odds of recidivism).

rehabilitation, the private housing provider should be obligated to consider it before reaching such a crucial determination.[193]

Lastly, current practices undercut the spirit of the FHA to prohibit baseless stereotyping and discriminatory animus, especially against those already stigmatized by society, such as recovering addicts.[194] In particular, during the passage of the 1988 Amendments—which added provisions to cover disability discrimination—several members of Congress articulated objectives that arguably spoke broadly of fair housing goals and the need to recognize the differences that exist among individuals. A member of the House Judiciary Committee pronounced that the 1988 Amendments "repudiate[] the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals [and g]eneralized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion."[195] This language could easily be extended to apply to those who have had prior contact with the criminal justice system and whose potential threat to society is unclear.

B. *Defendant's Rebuttal*

As described earlier, once the plaintiff establishes a prima facie claim of discrimination, the defendant has the opportunity to rebut with a nondiscriminatory justification for its policy. Most private housing providers cite the safety of other tenants and their property as the paramount concern behind tenant criminal history screening policies.[196] Courts recognize

193. Several states provide methods to obtain certificates of rehabilitation from parole boards or courts. *See, e.g.*, N.Y. CORRECT. LAW § 703(a–b) (McKinney 2009). New York State law further requires potential employers to consider a job applicant's evidence of rehabilitation and states that a certificate of good conduct shall create a presumption of rehabilitation." N.Y. CORRECT. LAW § 753(1)(g), (2) (McKinney 2009).

194. Recovering drug addicts and alcoholics are protected under the disability protections of the FHA. *See* Lakeside Resort Enters., LP v. Bd. of Supervisors of Palmyra Twp., 455 F.3d 154, 156 n.5 (3d Cir. 2006) (noting cases holding that "recovering alcoholics and drug addicts are handicapped, so long as they are not currently using illegal drugs" under the Fair Housing Act); *see also* Schwarz v. City of Treasure Island, 544 F.3d 1201, 1212 (11th Cir. 2008); Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 574 (2d Cir. 2003); Campbell v. Minneapolis Pub. Hous. Auth. *ex rel.* Minneapolis, 168 F.3d 1069, 1072 n.1 (8th Cir. 1999); Samaritan Inns, Inc. v. District of Columbia, 114 F.3d 1227, 1231 n.5 (D.C. Cir. 1997); City of Edmonds v. Wash. State Bldg. Code Council, 18 F.3d 802, 804 (9th Cir. 1994), *aff'd*, 514 U.S. 725 (1995); U.S. v. S. Mgmt. Corp., 955 F.2d 914, 919–23 (4th Cir. 1992).

195. H.R. Rep. No. 100-711, at 18 (1988).

196. *See, e.g.*, Evans v. UDR Inc., No. 7:07-CV-136-FL, 2009 U.S. Dist. LEXIS 31844, at *26 (E.D.N.C. Mar. 24, 2009) ("[The policy against renting to individuals with criminal histories is] based primarily on the concern that individuals with criminal histories are more likely than others to commit crimes on the property than those without

residential safety as a legitimate objective.[197] In rebutting a prima facie case on a disparate impact claim, the onus is often on the defendant to show that the particular policy in question actually assists the housing provider in reaching that aim.[198] Such a showing may be difficult for a provider that practices a blanket prohibition against any and all criminal histories, as there is inconclusive data on whether all of these individuals are more likely to recidivate.[199] Nevertheless, courts often defer to the policies of private actors with leniency, and thus, may not scrutinize such a justification.

Another common method of a defendant's rebuttal of a disparate impact claim is a showing that the exercise of an individual policy is not statistically discriminatory in application. A defendant may present regional or actual data that demonstrates that the impact of the policy would not result in a greater adverse impact against a protected group. Such a defense might succeed in a regional area in which the arrest and conviction rates are not racially skewed.[200] Similarly, if a housing provider were able to show through its applicant records that the policy did not actually result in denying a disproportionate number of racial minorities,

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such backgrounds . . . [and] is thus based [on] concerns for the safety of other residents of the apartment complex and their property.").

197. *See, e.g.*, Talley v. Lane, 13 F.3d 1031, 1034 (7th Cir. 1994) ("[I]t is within the [Chicago Housing Authority]'s discretion to find that individuals with a history of convictions for property and assaultive crimes would be a direct threat to other tenants and deny their applications").

198. *See also* A.B. & S. Auto Serv. Inc. v. S. Shore Bank, 962 F. Supp. 1056, 1061 (N.D. Ill. 1997) (discussing a disparate impact claim against a defendant lending institution that disqualified applicants with certain criminal backgrounds and stating that "the defendant-lender must demonstrate that any policy, procedure, or practice has a manifest relationship to the creditworthiness of the applicant").

199. Under the burden-shifting model, this lack of conclusive data would not damage the plaintiff's claim in the same way, provided that a prima facie claim of disparate impact has been met. The court would not require that the plaintiff prove his or her own lack of dangerousness though evidence of rehabilitation may bolster a claim. A prima facie case alone would trigger the defendant's burden to demonstrate objective evidence of the risk that the prohibitive policy serves to prevent.

200. Courts have generally been less willing to accept general statistics in disparate impact cases involving criminal histories. *See* Matthews v. Runyon, 860 F. Supp. 1347, 1356–57 (E.D. Wis. 1994) (finding that general statistical evidence of higher arrest rates among Blacks than Whites in the Milwaukee area did not prove that the USPS' practice has a disproportionate impact on employment opportunities for Blacks because it failed to provide the requisite causal link between the challenged practice and the disparate impact); Hill v. U.S. Postal Service, 522 F. Supp. 1283 (S.D.N.Y. 1981); *see also* Equal Employment Opportunity Comm'n v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 750–51 (S.D. Fla. 1989) (finding that general population statistics showing that Hispanics were convicted at disproportionally higher rates than non-Hispanics did not make out a prima facie case against an employer that disqualifies applicants with prior convictions because there was no evidence that any specific number of Hispanic applicants were disqualified for employment).

it would not be found to be in violation of the FHA. Lastly, a defendant that is able to present criminological evidence that its screening policy does indeed eliminate only those applicants that pose a direct threat to other tenants would likely pass muster under Title VIII.

C. *Plaintiff's Response: Existence of Less Discriminatory Alternative Policies*

Federal guidelines for the consideration of arrest and conviction in housing screening policies are overdue.[201] While the criteria mentioned in the *El* decision—risk-relatedness to the housing sought, age of conviction, nature of crime—have been recognized by federal agencies, courts, and Congress as variables influencing rate of recidivism, private housing providers need further guidance in order to consider such information effectively. Landlords and realty service companies are in need of reliable studies and federal guidance to properly inform them of which crime-related information is relevant as a basis for screening applicants and ensuring tenant safety. More comprehensive and exact restrictions would allow for clearer analysis in the courtroom and help dispel a landlord's fear of unknown liability.[202] Without further guidance in these areas, private actors will continue to apply overly broad exclusionary policies due to fear of exposure to liability. Nevertheless, even in the absence of such federal policies, various alternative practices currently exist that allow for a more individualized consideration of criminal history information as less-discriminatory alternatives.

As discussed in part III-B, the EEOC already has established three basic factors to be considered by a decision maker when disqualifying an individual from consideration on the basis of an arrest or conviction

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201. Exactly which regulatory body might produce this guidance is unclear, but HUD is the most likely source. In the role of fair housing enforcement entities, HUD and the DOJ traditionally have been less active in publishing guidance to the industry than the EEOC has been in publishing compliance guidance in employment discrimination enforcement. Legislative action would be best and while the ex-offender community traditionally has little political capital in Washington, the growing attention that reentry and rehabilitation has recently received from Congress, *see e.g.*, Second Chance Act, *supra* note 1, suggests that increased housing protections for individuals with criminal records are not unachievable.

202. For example, in *Ford v. Gildin*, the court found that a nine-year-old manslaughter conviction was not directly related to the employee's position as a porter in a residential building, following an unfortunate incident where the employee sexually abused a minor living in the building. 613 N.Y.S.2d 139, 142 (N.Y. App. Div. 1994). The court did not hold the employer liable for negligent hiring, since "[s]uch precedent would effectively compel any employer to deny employment to anyone who was ever convicted of a violent crime . . . [because] the employer would upon hiring face potentially catastrophic liability for any crime committed by that employee which was even minimally connected to the place of his employment." *Id.*

record. These guidelines have served to prevent individuals from being denied employment opportunities whose qualifications bear little relation to the specific criminal record.[203] They also protect those whose outdated convictions are not deemed evidence of a threat.[204] Courts should base Title VIII decisions on the same reasoning used in the Title VII context, as they already have done with standards of proof. Many practitioners in the reentry and employment discrimination legal fields consider the EEOC framework inadequate and in need of reform. Both Congress and the EEOC have heard from proponents of more robust measures to inform both decision makers and applicants of the relevance of certain convictions.[205]

Following the theory that those with criminal convictions may require specific protections,[206] several possible models for the consideration of disabilities could be adapted to consideration of prior records. A long line of "group-home" cases brought under FHA often by those seeking a permit to build a group home in a proposed location have established baseline protections against stereotype on the basis of threat to the community. Defendants against such claims are required to show a "direct threat to public safety" posed by the proposed project.[207] This provision applies equally to individual applicants for housing. Thus, a landlord may reject an applicant under this provision only "[i]f the landlord determines,

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203. *See* Jessie Warner, Fighting for The Employment Rights of Workers with Criminal Records, National Employment Law Project (2008), *available at* http://lsnc.net/equity/category/employment; *see also* EEOC Dec. No. 79-61A (May 8, 1979) (a hit and run conviction is not job-related to a position as a kitchen worker); EEOC Dec. No. 80-18 (August 18, 1980) (delivery of marijuana is not job-related to the position of utility worker in a factory); EEOC Dec. No. 80-10 (Aug. 1, 1980) (unlawful possession of a firearm is not job-related to a factory worker position).

204. *See* EEOC Dec. No. 80-16 (Aug. 8, 1980) (conviction for forgery is job-related to a position requiring the handling of money payments, however, because the conviction occurred six years before applying for the position, rejection of the job application was not justified); EEOC Dec. No. 81-15 (Jan. 9, 1981) (a conviction for retail theft is related to a job with access to cash and merchandise, however, because the offense is "not of a serious nature" and almost four years had elapsed between the conviction and the date of the termination, the termination was not justified)).

205. *See* Transcript of EEOC Meeting, "Employment Discrimination Faced by Individuals with Arrest and Conviction Records" (Nov. 20, 2008), *available at* http://archive.eeoc.gov/abouteeoc/meetings/11-20-08/index.html; *Employer Access to Criminal Background Checks: The Need for Efficiency and Accuracy: Hearing on H.R. 1908 Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2007), *available at* http://judiciary.house.gov/hearings/hear_042607.html.

206. *See, e.g.*, Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 21 (2005).

207. The Fair Housing Act specifically does not protect people "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C.A. § 3604(f)(9) (2009).

by objective evidence that is sufficiently recent as to be credible, and not from unsubstantiated inferences, that the applicant would pose" a § 3604(f)(9) risk.[208]

Perhaps one of the more robust models for "fair screening" in existing federal law is under the Americans with Disabilities Act of 1990 (ADA), which recognizes that the disclosure of certain information may injure an otherwise competitive candidate's employment opportunities and, as such, establishes protective measures to encourage fair employment practices. Under the EEOC's ADA enforcement guidance, an employer is not only barred from asking any disability-related questions[209] until the final stage of the application process, but it is also restricted in the circumstances under which it may consider disability information for the purposes of determining suitability for a particular position.[210]

State and local laws that support tougher protections for individuals with criminal records who seek employment may also be models for nationwide guidance on the use of criminal records.[211] One model that is gaining support among U.S. cities through the nationwide "ban the box" campaign, discussed earlier in this Note, is the "delayed question"

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208. Robert Schwemm, HOUSING DISCRIMINATION LAW, § 11D(3) (2009).

209. Under the ADA a "disability-related question" is a question that is likely to elicit information about a disability, such as asking employees whether they have or ever had a disability, the kinds of medications they may be taking, and, the results of any medical tests they have had.

210. EEOC Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations, (1995), *available at* http://www.eeoc.gov/policy/docs/preemp.html. In the first stage of employment consideration, before an offer is made, the ADA prohibits *all* disability-related inquiries and medical examinations, even those that may be related to the job. During the second stage, which begins after an applicant is offered a conditional job offer), the employer may make disability-related inquiries and conduct medical examinations, *regardless of whether they are related to the job*, as long as it does so for all entering employees in the same job category. However, any decision to reject the applicant on the basis of information provided must be job-related and consistent with business necessity, meaning: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (2000), *available at* http://www.eeoc.gov/policy/docs/guidance-inquiries.html. Lastly, in the third stage, after the applicant has been hired, the employer may only ask disability-related question or require medical examination when he or she reasonably believes that it is "job-related and consistent with business necessity" and must base this belief on objective evidence. *Id.*

211. Several states have job discrimination laws that contain some form of arrest or conviction record prohibition. *See* examples *supra* note 71. Although state and national congressional bodies may be able to achieve similar protections independently, the disparate impact precedent under Title VII may also require courts to find claims of discrimination under such a theory with or without legislative action.

approach.[212] Similar to the ADA model, this policy mandates that public and private employers delay a criminal background inquiry until a conditional job offer is made, after which any criminal-record-based rejection must be justified by business necessity. The rationale for this policy—that employers will begin to see the individual for his or other qualifications and thus be more likely to overlook a past conviction—applies similarly to private housing providers.

V. ENFORCEMENT CHALLENGES

The more exacting screening policies that this Note proposes are not a quick fix for the multitude of housing challenges currently facing ex-offenders in the U.S. Whether such change were to come in the form of enhanced HUD regulations governing private housing provider screening practices, or legislation passed at the state, city, and local level, it is likely that enforcement will be a significant challenge. Even those actions that are currently considered illegal under the FHA are a challenge to monitor. For example, private housing providers are not allowed to treat different applicants' criminal histories discriminatorily, but are required to screen all applicants and apply any disqualifications against all applicants without respect to their backgrounds. Yet, advocacy groups and ex-offender studies provide ample examples of the subjective application of disqualifying characteristics, where a criminal record has operated as a proxy for race.[213] Even when armed with the most blatant evidence of a violation of equal treatment under these policies, ex-offenders of color often may not have the financial or legal resources to litigate, either individually, or as a class.[214] Thus, without widespread education and enforcement programs and greater access to legal services, increased protections for ex-offenders will not automatically result in greater housing opportunities.

One possible means for encouraging more individualized consideration of legitimate factors affecting tenant safety on a wide scale level is through the voluntary educational programs offered by local law enforcement agencies mentioned in Part I. These landlord training programs, which may be partially responsible for the recent upsurge in tenant screening practices, offer wide access to private housing providers

212. *See* discussion *supra* note 74; *see also* Report-Letter, EEOC Compliance Manual No. 188, Jan. 29, 2009, "Group urges ban on early inquiries into criminal background of applicants."

213. This may also be true of private housing providers who, based on past allegations of discriminatory practices under the FHA, have agreed to adhere to a consent agreement. In the wake of a new consent agreement, it is not unusual for the provider to erect a criminal record policy, which under current regulations, can operate as a perfectly legal proxy for race.

214. *See* THOMPSON, *supra* note 8, at 85.

and could act as a powerful force in discouraging over-inclusive disqualification policies. This would be a remarkable shift from current practices, however, because the impetus for these programs focuses on overall neighborhood criminal activity, and not racial integration. Such change may very well have to come from a state or federal authority because local municipalities may be more concerned with keeping ex-offenders out of their community than the problems of homelessness and growing ex-offender communities of color forming elsewhere.

Another possibility is the use of mediation programs funded by HUD grants to local PHAs, which could assist parties in reaching a negotiated resolution that is able to accommodate both the private landlord's safety concerns and the applicant's housing needs.[215] Such programs would act as a form of alternative dispute resolution, and serve to educate private housing providers about policies that may violate Title VIII.[216]

Finally, in order to quash any remaining uncertainty as to whether disparate impact claims are actionable under Title VIII, housing and reentry advocates should lobby Congress to amend the act to include specific "effects" language, as it did in 1991 to Title VII.

CONCLUSION

In recent years, as hundreds of thousands of individuals are released back into society from prison, the importance of improved prisoner reentry and rehabilitation programs has become apparent. As America's prisons have grown, so has electronic access to and use of criminal background checks in providing employment, extensions of credit, and, critically, housing.

This Note has attempted to show the link between race and crime and the resulting impact of housing choices for those with criminal conviction. Up to now, most of the discussion has failed to explore the possible reasons for a race/crime correlation. If the high percentage of racial minorities in prison is caused by environmental factors and structural barriers in communities of color, such as poor quality of education, access to capital, job networking, and unequal treatment in the criminal justice system—as many believe it is—then the consequences of housing choice are enormous. Absent new legal protections to ensure the "fair screening" of criminal records by private housing providers, the vast number of individuals of color who currently have some form of crimi-

215. *See* U.S. Dep't of Hous. & Urban Dev., *Fair Housing Initiatives Program (FHIP)*, http://www.hud.gov/offices/fheo/partners/FHIP/fhip.cfm.

216. Given the immediacy of many individuals' housing needs, such a mediation program must be capable of providing a speedy resolution or it would offer little value to a rejected applicant.

nal record—and thus are barred from a certain quality of living—will continue to heavily undermine the desired goal of fair housing: equal access to decent housing.