

A NEVER-ENDING SENTENCE

*The Impact of Criminal Conviction in Project-Based Section 8
Housing Tenant Selection Plans in Cuyahoga County*

JANUARY 2020

REENTRY HOUSING COMMITTEE

Fifty-two years after Dr. Martin Luther King, Jr.'s assassination and the subsequent passage of the Fair Housing Act, we offer this report in gratitude to those who have struggled to create the “beloved community,” a vision that Dr. King so eloquently articulated. He and many people selflessly gave their lives for the fruition of an inclusive community. Their sacrifice challenges us to recommit ourselves to forming a beloved community. Dr. King identified the triad of racism, militarism and materialism as reasons that our country fails to become a beloved community. The intersectionality of these larger problems has numerous manifestations, especially income inequity, lack of affordable housing and mass incarceration. This report explores an aspect of these problems by examining barriers that criminal convictions create for applicants to Project-Based Section 8 housing.

The Shriver Center's 2015 report *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing* by Marie Claire Tran-Leung, J.D., inspired this local examination exclusively on Project-Based Section 8 housing.

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This report is for informational purposes only and does not provide legal advice.

ABOUT THE REENTRY HOUSING COMMITTEE

Since 2005, the Reentry Housing Workgroup of the Cleveland Reentry Strategy Coalition, now the Greater Cleveland Reentry Leadership Coalition, has been dedicated to investigating barriers to successful reentry and advancing housing recommendations that make meaningful change for the reentrant community. The Coalition was remarkable in its grassroots impetus, forming in response to a city-wide passion for increased reentry services and spearheading an in-depth exploration into the best programs and methods for implementation promotion. It benefitted from the decades-long reentry ministry of Charles See and Lutheran Metropolitan Ministry and the Coalition included most, if not all, institutional stakeholders in Cuyahoga County.

Stemming from months of community-oriented discourse and strategic planning, the 2005 Cleveland Reentry Strategy was published. Several goals and action steps were offered for participation by community agencies, the local government, and residents of the Greater Cleveland area. It recommended the creation of a government office of reentry to better serve the reentrant community in Cuyahoga County through program funding and best practice research. The Coalition pared down to convening a Leadership Coalition and multiple working groups that continued their efforts.

The Cuyahoga County Office of Reentry formed and over the years, engaged in community listening sessions and adopted various strategic plans. Under these plans, the work related to housing and reentry continued as a working group, committee and subcommittee. Through the years, the committee struggled against a general trend that has treated housing as secondary to employment. The committee helped establish the Open Door Program, a transitional reentry housing program administered by the YMCA of Greater Cleveland. The committee always has focused on increasing access to permanent, affordable housing. Under the leadership of Peter Iskin, former co-chair, the committee has actively collected tenant selection plans (TSPs) for many years and advocated for HUD-assisted housing providers to open their doors to the full extent permissible under federal regulations.

In 2018, the Northeast Ohio Coalition for the Homeless (NEOCH) began collecting TSPs. NEOCH's success led to the committee's renewed effort in analyzing the TSPs and drafting this report. During the preparation of this report, the Leadership Coalition restructured and adopted by-laws for its governance. This committee will now function as part of the Leadership Coalition's Advocacy & Policy Committee.

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I. INTRODUCTION

In many ways in the United States, a criminal conviction, no matter how minor the crime, is itself a never-ending sentence. Even after a person has served the sentence for a crime, the conviction has collateral consequences. Collateral consequences are “unanticipated, after-the-fact consequences of obtaining a criminal record that include disqualification from jobs, housing, student loans, and college acceptance.”¹ A collateral sanction—or collateral consequence—is an additional penalty or disadvantage imposed after the criminal conviction. Collateral sanctions can affect a person’s ability to gain employment, professional licensing, or access to housing.² A report from the Center for Criminal Justice Research found that Ohio law imposes hundreds of collateral consequences on people convicted of criminal offenses.³ Effective reentry depends upon an individual’s ability to secure stable housing and employment, but obtaining housing and employment become challenging for people because of these collateral sanctions.⁴ “[C]ollateral consequences are methods of state sanctioned discrimination. Once you get a record, you are stripped of many of your individual liberties.”⁵ The purpose of this report is to examine housing-related collateral consequences of criminal convictions as stated in the Tenant Selection Plans (TSP) of Project-Based Section 8 housing providers in Cuyahoga County, Ohio.

Recently, courageous advocates and brilliant scholars have placed the policies and practices of mass incarceration, police brutality, redlining, and evictions into the nation’s conscience. This report is intended to be understood in relation to a sustained dialogue about the legacy of *de jure* racism on housing policy. Although the examination of TSPs is a narrow focus, this report comes from the perspective that any local conversation about reentry and housing must recognize that systemic racism has created and continues to contribute to the local housing crisis and problems.

The State of Ohio incarcerates five Black people to every one white person.⁶ Therefore, housing-related collateral consequences disproportionately impact Black communities. The task after studying and examining collateral consequences, like all manifestations of racism, is to dismantle them. This report is consistent with the U.S. Department of Housing and Urban Development (HUD) April 4, 2016 Office of General Counsel’s *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (The Guidance).⁷ The Guidance, based on the Fair Housing Act (FHA),⁸ states that because of the

1 Aviance BROWN, EQUAL JUSTICE WORKS, *The Harsh Reality of Collateral Sanctions* (2018), <https://www.students-equaljusticeworks.org/single-post/2018/01/16/The-Harsh-Reality-of-Collateral-Consequences>. (Link deactivated.)

2 American Bar Association, *Collateral Consequences of Criminal Convictions: Judicial Bench Book*, 2018 NAT’L CRIM. JUST. REFERENCE SERV. 4, <https://www.ncjrs.gov/pdffiles1/nij/grants/251583.pdf>.

3 James Frank et al., CTR. FOR CRIMINAL JUSTICE RESEARCH, *Collateral Consequences of Criminal Convictions in Ohio* 2, <https://www.ocjs.ohio.gov/CollateralConsequences.pdf> (last visited Oct. 5, 2019).

4 See Stephen Metraux et al., *INCARCERATION AND HOMELESSNESS* (2007), <https://www.huduser.gov/portal/publications/pdf/p9.pdf>; Deborah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 937 (2003), <https://scholar.harvard.edu/pager/publications/mark-criminal-record>; Jennifer Hickey Lundquist et al., *Does a Criminal Past Predict Worker Performance? Evidence from One of America’s Largest Employers*, 96 SOC. FORCES 1039 (2018), <https://academic.oup.com/sf/article/96/3/1039/4802355>.

5 Brown, *supra* note 1.

6 THE SENTENCING PROJECT, *State By State Data: State Imprisonment Rate*, <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR> (hover over Ohio portion of map) (last visited Oct. 6, 2019).

7 U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF [hereinafter THE GUIDANCE].

8 Congress passed the FHA, 42 U.S.C. §§ 3601–19 (2018), on April 11, 1968, one week after the assassination of Dr. Martin Luther King, Jr.

disparate impact of criminal convictions on African Americans and other people of color, housing providers cannot simply use an applicant's criminal convictions as a blanket exclusion to disqualify an applicant from housing. The Guidance applies to all housing providers, including private landlords, not just those who receive a federal rent subsidy.

This report relays information of importance not only to people reentering from incarceration and their families and housing providers, but to those in the judicial system, members of the criminal defense bar, and organizations seeking to address their needs. Likewise, community activists, prison abolitionists, and those interested in criminal justice reform are invited to consider the findings of this report. While the purpose of this report is to describe, rather than prescribe, it concludes with recommendations:

1. Project-Based Section 8 housing providers (“providers”) should revise their TSPs to eliminate criminal convictions as grounds to disqualify an applicant, to the extent that federal law permits.
2. Providers should use the analysis presented in the Guidance when fashioning their TSPs.
3. Providers should collaborate with other groups to develop additional affordable housing to deal with an increase of eligible applicants.

This report and its recommendations are based solely on a review of the TSPs for 108 Cuyahoga County Project-Based Section 8 properties. HUD requires each Project-Based Section 8 housing provider to develop a TSP which states the eligibility requirements and the criteria used to evaluate prospective tenants for housing, including criminal background screening. By systematically reviewing and summarizing these TSPs pertaining to criminal background screening, we hope to further move our community to a new reality in which people with criminal records obtain permanent, affordable housing, whether subsidized or unsubsidized. The outcomes for people reentering who obtain housing are predictable: lower individual risks for recidivism, restored familial relationships, stronger community relationships, and protecting children whose parents were incarcerated from an increased risk of incarceration in their adult lives.⁹

Although this report is based on the legal scaffolding of the FHA vis-à-vis The Guidance, it also briefly discusses the Universal Declaration of Human Rights (UDHR).¹⁰ Our hope is that a right to housing will emerge as a fundamental right in the United States.¹¹ Treating housing as a human right lends support to our recommendation that Project-Based Section 8 housing providers in Cuyahoga County should use the analysis of The Guidance instead of using criminal convictions to disqualify applicants in a manner more prohibitive than HUD requires.¹²

⁹ CHRISTY A. VISHER & SHANNON M. E. COURTNEY, ONE YEAR OUT: EXPERIENCES OF PRISONERS RETURNING TO CLEVELAND 11 (2007), <https://www.urban.org/sites/default/files/publication/43021/311445-One-Year-Out-Experiences-of-Prisoners-Returning-to-Cleveland.PDF>; Faith E. Lutze et al., *Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State's Reentry Housing Program for High Risk Offenders*, 41 CRIM. JUST. & BEHAV., 471, 475 (2014), <https://s3.wp.wsu.edu/uploads/sites/436/2014/11/Criminal-Justice-and-Behavior-2014-Lutze-471-91.pdf>.

¹⁰ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

¹¹ *Lindsey v. Normet*, 405 U.S. 56 (1972), presented an opportunity for the U.S. Supreme Court to recognize that tenants facing eviction in summary proceedings (no later than six days after service of the complaint) have a right to due process and equal protection. However, the Court held that the Oregon statute did not violate the tenants' right to due process.

¹² Commercial companies that provide criminal background checks for employment have the option to include non-conviction arrests for a lookback period of seven years. OHIO JUSTICE & POLICY CTR. & OHIO POVERTY LAW CTR., UNDERSTANDING AND SEALING CRIMINAL RECORDS IN OHIO 2 (2011). Additionally, Clerk of Courts' websites allow members of the public to search arrest and conviction records for free and without the permission of the applicant. Both of these are avenues of criminal background checks that add to the potential denial of housing applicants based on arrest record.

II. BACKGROUND AND FRAMEWORK

Federally subsidized housing is among the most affordable and accessible housing available in the U.S. However, for people with a criminal record, even this housing can be inaccessible. *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing* has been instrumental in spurring the national conversation on ending overly restrictive policies against people with criminal records.¹³ Such policies can “lead to a vicious cycle where ‘the difficulties in reintegrating into the community increase the risk of homelessness for released prisoners, and homelessness in turn increases the risk for subsequent re-incarceration’”¹⁴

In the country with the highest incarceration rate in the world—more than a 600% increase from the mid-1960s to the early 2000s—it is vital to understand the collateral consequences of this system.¹⁵ Michelle Alexander’s *The New Jim Crow* articulates how laws, rules, policies, and customs of the criminal justice system have served to perpetuate racial hierarchy—from slavery, to Jim Crow, to mass incarceration.¹⁶ Rather than ridding ourselves of the unjust racial caste in the United States, we continually reshape it. As Alexander explains, “[a] criminal record today authorizes precisely the forms of discrimination we supposedly left behind—discrimination in employment, housing, education, public benefits, and jury service. Those labeled criminal can even be denied the right to vote.”¹⁷ The barriers found in TSPs provide local, timely, real-life examples of how mass incarceration affects people long after they have served their time. The barriers found in the TSPs appear to mirror evidence found in similar research in private and public housing markets indicating

13 MARIE CLAIRE TRAN-LEUNG, *WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING* (2015), <https://www.povertylaw.org/wp-content/uploads/2019/09/WDMD-final.pdf>.

14 *Id.* at IV.

15 MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012).

16 *Id.*

17 *Id.* at 141.

AB’S STORY

AB, an African American woman, grew up in a stable family. She was involved in school and church as a young person. As a responsible adolescent, she worked through high school. When she graduated, she was prepared for employment and easily and quickly became a union steward. She married. Everything seemed smooth, until she faced the disappointment of infertility. She and her husband decided to adopt. Shortly after adopting a young child, she became pregnant. However, her baby was born with complications and only lived a few days. She and her husband were devastated. Their marriage quickly unraveled. Still battling grief and depression, she started using crack-cocaine. Throughout the 1990’s to 2002, she spiraled down. She lost custody of her son. She lost her job. She became homeless. She fought with her family over her drug use. The family disputes got so heated that she ended up with a misdemeanor domestic violence conviction. And she was convicted of felony drug possession and drug abuse several times and sentenced to prison. In her final conviction, the judge sentenced her to Ohio Reformatory for Women in Marysville, Ohio for eleven months. It was then and there that she decided that she did not want that path anymore. When she got out of Marysville, she was homeless again. She spent time in the women’s shelter and eventually found housing. She managed to live in the same place for fifteen years. Then a new landlord acquired the property and asked her to move. She had to start all over again. Despite having had a successful tenancy for fifteen years, multiple landlords denied her housing because of her convictions. The lookback period that affects someone depends on both type of crime and the housing provider’s preferences laid out in the TSP.

that “ostensibly race-neutral background screening criteria and technologies can reshape, amplify or conceal existing patterns of discrimination” in the rental housing market.¹⁸

African Americans’ reliance on rental housing is part and parcel of the legacy of the *de jure* discrimination. In *The Color of Law: A Forgotten History of How Our Government Segregated America*, Richard Rothstein documents that federal policy denied African Americans access to mortgages, and how restrictive covenants and zoning laws limited where African Americans could purchase homes, impeding wealth-building through home ownership.¹⁹ The lack of home ownership exacerbates the housing problem for African Americans returning from incarceration. African Americans often cannot live, even temporarily, with family members because they would risk eviction for a lease violation for having an “unauthorized occupant.”

A. RACE DISCRIMINATION AND DISPARATE IMPACT

Mary McLeod Bethune is known for saying, “The freedom gates are half ajar. We must pry them fully open.”²⁰ Prior to 2015, the freedom gates to fair housing were nearly closed to people who could not prove intentional discrimination. Then the U.S. Supreme Court decided *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*²¹ The issue before the Court was whether the district court used the correct standard for evaluating an FHA claim of discrimination based on disparate impact.²² The Court ruled that a policy or practice which has a disparate impact on a protected class can violate the FHA, unless the policy “is necessary to achieve a valid interest.”²³ The legal basis for using the FHA and a disparate impact claim to address the exclusion of people who have had contact with the criminal justice system (arrests and/or convictions) moved from being tenuous to viable.

HUD issued the Guidance, which relies on a disparate impact analysis, following *Inclusive Communities*. The Guidance concludes that screening out applicants based on criminal background can violate the FHA because of the disparate impact criminal convictions have on African American and Latinx²⁴ housing applicants. The Guidance states:

[W]here a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the [FHA] if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.²⁵

Whether a policy has a discriminatory effect is assessed under a three-step burden-shifting standard requiring a fact-specific analysis.

1. Does the policy or practice have a discriminatory effect?

18 Anna C. Reosti, *Tenant Screening and Fair Housing in the Information Age* iv (2018) (unpublished Ph.D. dissertation, University of Washington) (for information about Reosti’s dissertation: <https://soc.washington.edu/research/graduate/tenant-screening-and-fair-housing-information-age>).

19 RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

20 Mary McLeod Bethune, *Dr. Bethune’s Last Will & Testament*, BETHUNE-COOKMAN UNIVERSITY, https://www.cookman.edu/about_bcu/history/lastwill_testament.html (last visited Oct. 6, 2019).

21 135 S. Ct. 2507 (2015).

22 *Id.* at 2513.

23 *Id.* at 2523.

24 “Latinx,” pronounced /la-TEEN-ex/, is a gender-neutral alternative to Latina/Latino.

25 THE GUIDANCE, *supra* note 7, at 2.

2. Is the policy necessary to achieve a substantial, legitimate, nondiscriminatory interest?
3. Could the landlord's interest be served by a practice that has a less discriminatory effect?

Exclusions based on prior arrests not resulting in conviction are prohibited. A housing provider that wishes to exclude applicants based on “certain types of convictions must still prove that its policy is necessary to serve a ‘substantial, legitimate, nondiscriminatory interest.’”²⁶ A housing provider can avoid having a discriminatory effect by eliminating criminal conviction lookback periods used to disqualify applicants. Instead, a housing provider can address its legitimate interests by instituting a practice of conducting individualized assessments. Many housing providers use a similar process when vetting applicants with prior substance abuse by considering “mitigating circumstances.”

B. HOUSING AS A HUMAN RIGHT

The UDHR, ratified in 1948, enshrines rights and is useful in setting human rights norms.²⁷ Article 25 of the UDHR provides for the right to housing. Although the UDHR is not “enforceable” in U.S. courts, it is important to include the UDHR in any sustained dialogue about the rights of people reentering.²⁸

African-American organizations and individuals instantly recognized the rhetorical power and political potential of the emerging human rights discourse at its onset in response to the ravages of World War II and the Holocaust. Fully aware of the inherent contradiction of the United States’ ascension to moral world leadership—while the nation was holding on to a system of segregation in the South and practicing unequal access in a variety of areas, including housing and education—the National Association for the Advancement of Colored People (NAACP) and others had, in Carol Anderson’s words, ‘already decided that only human rights could repair the damage that more than three centuries of slavery, Jim Crow and racism had done to the African American community.’ . . . Yet the NAACP’s early efforts to establish human rights as the uncontested standard for equality in America were thwarted by several consecutive administrations who, in an effort to both protect the status quo and sanitize the nation’s public image in the midst of the Cold War struggle, offered great resistance to allowing for American political discourse to be informed with the truly emancipatory rhetoric embedded in such founding documents as the 1948 Universal Declaration of Human Rights.²⁹

In 1966, the Covenant on Economic, Social, and Cultural Rights honed-in on housing for all, in accordance with the UDHR.³⁰ While the U.S. signed the Covenant on Economic, Social, and Cultural Rights, the U.S. has not ratified it.³¹ Since the Covenant is unratified and neither the Covenant nor

²⁶ *Id.* at 6.

²⁷ Gillian MacNaughton, *Human Rights Frameworks, Strategies, and Tools for the Poverty Lawyer’s Toolbox*, 44 CLEARINGHOUSE REV. J. OF L. & POL. 437 (2011), https://www.researchgate.net/profile/Gillian_Macnaughton2/publication/313038944_Human_Rights_Frameworks_Strategies_and_Tools_for_the_Poverty_Lawyer's_Toolbox/links/58963e43aca2721f0dabc4fc/Human-Rights-Frameworks-Strategies-and-Tools-for-the-Poverty-Lawyers-Toolbox.pdf.

²⁸ *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm’n. H.R., Report No. 80/11 (2011), is an important precedent in holding the U.S. government accountable on human rights issues. *Gonzales* held that the U.S. violated the American Declaration in failing to protect victims of domestic violence who have obtained restraining orders against their abusers.

²⁹ Salimah Hankins & Balthazar Becker, *A Different Lens: Applying a Human Rights Framework to Disparities in the United States*, POVERTY & RACE, Jan./Feb. 2014, at 3, 3, https://www.prrac.org/pdf/JanFeb2014PRRAC_Hankins-Becker.pdf.

³⁰ G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

³¹ See *Human Rights & the U.S.*, THE ADVOCATES FOR HUMAN RIGHTS, <https://www.theadvocatesforhumanrights.org>.

the UDHR are treaties, the U.S. is not legally bound to enforce their mandates. Unless state or local legal systems enact laws reflecting the human rights assertions in the UDHR and the Covenant, the protections in these documents are aspirational. Unfortunately, even the Covenant leaves open the question about discriminating against people on grounds of their involvement with the criminal justice system.³²

C. KNOWING THE COLLATERAL SANCTIONS OF CRIMINAL CONVICTIONS AT THE PROSECUTION STAGE

An appropriate place to eliminate or mitigate the impact of collateral sanctions might be at the time of criminal prosecution. However, people who are facing criminal prosecution typically focus on defending against the charges. If the risk of trial is unacceptable, then they often try negotiating a plea bargain that will assure them of consequences less severe than losing at trial. The main problem with these plea negotiations is that most people are not in a position to factor in all possible collateral consequences when they are calculating the costs and benefits of entering a guilty plea to a lesser offense. Some collateral consequences are predictable; many others are not.

A May 2019 formal ethics opinion of the American Bar Association (ABA) states that prosecutors are obligated to inform criminal defendants of the collateral consequences of misdemeanor convictions prior to negotiating a plea bargain.³³

Except concerning impact on immigration status, there are no constitutional requirements that a judge inform a criminal defendant of collateral consequence of a conviction. In *Padilla v. Kentucky*, the U.S. Supreme Court ruled that José Padilla had ineffective assistance of counsel when he pleaded guilty to a crime without his attorney advising him of the risk of deportation.³⁴

The U.S. Supreme Court has yet to rule that it is ineffective assistance of counsel if counsel fails to inform criminal defendants of the collateral sanctions of a guilty plea. However, state trial courts have dealt with the issue of collateral sanctions when deciding whether a person has had ineffective assistance of counsel. One example is *People v. Becker*, which deals with the collateral consequence of a criminal conviction and the defendant's housing.³⁵ Becker claimed that his prior counsel gave him incorrect advice about the effect a guilty plea may have on a pending eviction case.³⁶ The eviction case included some of the same allegations as in the criminal disorderly conduct case.³⁷ Becker claimed that he would not have pleaded guilty if he had known of the effect of the guilty plea.³⁸ The Court recognized that "loss of housing, particularly public housing, is also a common collateral consequence of a criminal conviction."³⁹ The Court examined the standards for criminal defense in New York at that time.⁴⁰ The Court found that "although it may be objectively unreasonable to require an attorney to be familiar with all of the various possible collateral consequences which

org/human_rights_and_the_united_states#Major%20Treaties%20Not%20Ratified%20by%20US (last visited July 29, 2019).

32 This is reminiscent of the 13th Amendment of the U.S. Constitution, which likewise, has an exception: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

33 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 486 (2019), https://www.americanbar.org/content/dam/aba/images/news/2019/05/aba_formal_opinion_486.pdf.

34 See 559 U.S. 356, 360 (2010).

35 800 N.Y.S.2d 499 (N.Y. Crim. Ct. 2005).

36 *Id.* at 501.

37 *Id.*

38 *Id.*

39 *Id.* at 502.

40 *Id.* at 504.

may emanate from a particular guilty plea, it is not objectively unreasonable to require an attorney to consult with an expert or complete relevant research” when a defendant has asked for advice about a specific collateral consequence.⁴¹

D. FUTURE LEGAL DEVELOPMENT OF PROTECTION FROM COLLATERAL SANCTIONS

The rights of people with criminal convictions to reintegrate into society after a conviction is an emerging area of the law. The legal limits on excluding people with convictions from employment are more developed than in housing. Title VII, which prohibits discrimination against protected classes in employment, has afforded people with criminal convictions protection to a certain extent, whereas the FHA previously has not mirrored those protections. Also, more academic study has been conducted on race and the impact of criminal conviction on employment opportunities than on race and the impact of criminal conviction on housing opportunities.

Advocates, however, are working to gain similar protections under the FHA. The issuance of the Guidance was an important step. On the litigation forefront are three federal cases: (1) *Connecticut Fair Housing Center v. CoreLogic Rental Property Solutions, LLC*; (2) *Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp.*; and (3) *Alexander v. Edgewood Management Corp.*⁴²

Further research and advocacy is needed to ensure the fairness and accuracy of the screening services housing providers use. On March 25, 2019, in *Connecticut Fair Housing Center*, the federal district court ruled that credit reporting agencies are covered by the FHA and must comply with the Act when providing tenant screening services to housing providers.⁴³ As housing providers large and small increasingly use third-party screening services to evaluate applicants, the significance of this ruling cannot be overstated.

In *Fortune Society*, The Fortune Society sued to challenge “a policy or practice that automatically and categorically excludes applicants and prospective applicants who have a criminal record.”⁴⁴ The U.S. Department of Justice, which is not a party to the action, filed a “statement of interest” supporting the legal analysis that the FHA prohibits blanket bans based on criminal history.⁴⁵ In July 2019, the Court granted in part and denied in part Sandcastle’s motion to dismiss The Fortune Society’s suit. The issue of whether Sandcastle violated the FHA because excluding applicants with criminal convictions has a disparate impact on African Americans was pending when the parties notified the Court on October 16, 2019 that they had settled the matter wherein Sandcastle agreed to pay The Fortune Society \$1,187,500.⁴⁶

In *Alexander*, Maurice Alexander alleges that three federally-assisted housing providers violated the FHA because their tenant selection plans, which excluded him for a 1991 felony and a 2007

⁴¹ *Id.* at 504–05.

⁴² See *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC* (Arroyo v. CoreLogic), No. 3:18-CV-00705 (D. Conn. filed Apr. 28, 2018); *Fortune Soc’y, Inc. v. Sandcastle Towers Hous. Dev. Fund Corp.*, No. 1:14-cv-06410 (E.D.N.Y. 2019); *Alexander v. Edgewood Mgmt. Corp.*, No. 1:15-cv-01140-RCL (D.D.C. filed July 16, 2015), *appeal docketed* No. 19-07071 (D.C. Cir. Nov. 1, 2019).

⁴³ Memorandum of Decision On Defendant’s Motion to Dismiss [Dkt. 19], *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 369 F.Supp.3d 362, 372–75 (D. Conn. 2019) (No. 3:18-CV-00705).

⁴⁴ Motion for Summary Judgment and to Exclude Expert Testimony at 2, *Fortune Soc’y, Inc. v. Sandcastle Towers Hous. Dev. Fund Corp.*, No. 1:14-cv-06410 (E.D.N.Y. 2019), ECF No. 94.

⁴⁵ See United States of America’s Statement of Interest, *Fortune Soc’y, Inc. v. Sandcastle Towers Hous. Dev. Fund Corp.*, No. 1:14-cv-06410 (E.D.N.Y. Oct. 18, 2016), ECF No. 102.

⁴⁶ See Joint Status Letter at 1, *Fortune Soc’y, Inc. v. Sandcastle Towers Hous. Dev. Fund Corp.*, No. 1:14-cv-06410 (E.D.N.Y. 2019), ECF No. 146 (“The matter has been resolved and a Stipulation of Dismissal with prejudice has been filed . . .”). Relman, Dane & Colfax PLLC, *The Fortune Society v. Sandcastle Towers Housing Development Fund Corp.*, <https://www.relmanlaw.com/cases-fortune> (last visited Nov. 6, 2019).

misdeemeanor—both non-violent, non-drug-related offenses—have a disparate impact on African Americans.⁴⁷ The housing providers moved to dismiss the case, arguing that the complaint “lacks any facts showing that the tenant selection policy disproportionately affected African Americans’ and that Mr. Alexander’s ‘general population statistics’ are insufficient as a matter of law.”⁴⁸ The court ultimately granted the housing providers’ motions for summary judgment after concluding that Mr. Alexander failed to make a *prima facie* case.⁴⁹ The Court found that Mr. Alexander failed to prove an actual statistical disparity between applicants and residents.⁵⁰ Mr. Alexander appealed the dismissal of his case.⁵¹ The parties reached a settlement on November 1, 2019.⁵²

Both housing providers and members of the reentry community are cautiously watching these cases as their litigation, which will probably continue for several years, unfolds with motions and expert reports. Many who advocate for the elimination of consideration of criminal background as grounds for exclusion of an applicant prefer to wait for a favorable outcome in these cases before bringing similar federal cases in their jurisdictions. However, all advocates encourage applicants to use the informal hearing process to request that the housing provider follow the Guidance’s “individualized assessment” for each applicant.

Some communities which have been grappling with reentry issues—often for years before HUD issued the Guidance—decided to pass their own laws to eliminate or reduce collateral consequences.⁵³ The National Housing Law Project lists Richmond, CA; Seattle, WA; San Francisco, CA; New York, NY; Newark, NJ; Washington, D.C.; Champaign, IL; and Urbana, IL as communities with “clean slate” ordinances that limit how landlords can consider past criminal convictions in selecting tenants.⁵⁴ In 2012, a coalition in Seattle mounted a campaign to eliminate employment and housing barriers that people with criminal convictions were facing.⁵⁵ The following year, Seattle passed an ordinance limiting how private employers could screen and use applicants’ criminal background; in August 2017, the city passed legislation in an attempt to similarly regulate the use of criminal history in rental housing.⁵⁶ The ordinance authorizes the Seattle Office for Civil Rights to enforce the ordinance and expands the Seattle Human Rights Commission’s duties. Introductory paragraphs describe the rationale for adopting the ordinance, including significant information about racial disparities and pointing to the racial inequities and racial bias in the criminal justice system that African Americans, Latinxs, and Native Americans experience.⁵⁷ The ordinance relies on reentry studies: it cites a Vera Institute of Justice study that concludes that “people with stable housing are more likely to successfully reintegrate into society and are less likely to reoffend.”⁵⁸

47 Memorandum Opinion at *1, *Alexander v. Edgewood Mgmt. Corp.*, No. 1:15-cv-01140-RCL (D.D.C. July 25, 2016), 2016 WL 5957673, *appeal docketed* No. 19-07071 (D.C. Cir. Nov. 1, 2019).

48 *Id.* at *2.

49 *Id.* at *16.

50 *Id.* at *10.

51 *See* Notice of Appeal, *Alexander v. Edgewood Mgmt. Corp.*, No. 19-07071 (D.C. Cir. July 29, 2019), ECF No. BL-2.

52 Notice of Settlement at 1, *Alexander v. Edgewood Mgmt. Corp.*, No. 19-07071 (D.C. Cir. Nov. 1, 2019), ECF No. BL-20.

53 NATIONAL HOUSING LAW PROJECT, *Local Anti-Discrimination Reentry Policies*, <https://www.nhlp.org/initiatives/housing-opportunities-for-people-reentering/lifetime-registered-sex-offenders> (last visited Aug. 1, 2019).

54 *Id.*

55 REOSTI, *supra* note 18, at 1.

56 SEATTLE, WASH., MUNICIPAL CODE ch. 14.17 (2019), https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.17THUSCRHIEMDE; SEATTLE, WASH., MUNICIPAL CODE ch. 14.09 (2019), https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.09USCRREHO.

57 “African Americans are 3.4% of Washington’s population but account for nearly 18.4% of Washington’s prison population; Latinos are 11.2% of Washington’s population but account for 13.2% of Washington’s prison population; and Native Americans are 1.3% of the state population but account for 4.7% of Washington’s prison population . . .” City Council B. 119015, at 2 (Seattle, Wash. 2017) (enacted as Ordinance 125393).

58 *See id.* at 1 (citing MARGARET diZEREGA & SANDRA VILLALOBOS AGUDELO, VERA INSTITUTE OF JUSTICE,

In relevant part, the introductory paragraphs point out:

[T]here is no sociological research establishing a relationship between a criminal record and an unsuccessful tenancy; and . . . an Urban Institute study stated, “men who found [stable] housing within the first month after release were less likely to return to prison during the first year out”; and . . . a study performed in Cleveland found that “obtaining stable housing within the first month after release inhibited re-incarceration”⁵⁹

The Seattle ordinance prohibits landlords from requiring disclosure, asking about, rejecting an applicant, or taking an adverse action based on any arrest record, conviction record, or criminal history, unless the landlord has a legitimate business reason for taking such action, which is defined as

when the policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. To determine such an interest, a landlord must demonstrate, through reliable evidence, a nexus between the policy or practice and resident safety and/or protecting property, in light of the following factors:

- A. The nature and severity of the conviction;
- B. The number and type of convictions;
- C. The time that has elapsed since the date of the conviction;
- D. Age of the individual at the time of conviction;
- E. Evidence of good tenant history before and/or after the conviction occurred; and
- F. Any supplemental information related to the individual’s rehabilitation, good conduct, and additional facts or explanations provided by the individual, if the individual chooses to do so.⁶⁰

The ordinance mandates that the Office of the City Auditor evaluate whether “the program should be maintained, amended, or repealed;” the evaluation is to be submitted to City Council by the end of 2019.⁶¹

Four nonprofit affordable housing developers in Minnesota, in partnership with Wilder Research, conducted a first of its kind longitudinal study assessing the likelihood of success in housing based

SECTION 8

In popular vernacular, “Section 8” refers to housing in which the federal government provides the housing provider a monthly rental subsidy so that their tenant’s rental obligation does not exceed 30% of their income. Under this broad definition, Section 8 includes both **Project-Based housing** and the **Housing Choice Voucher Program (HCVP)**. Whereas the **HCVP** provides participants with a rental subsidy that “follows” the tenant, who leases directly from private landlords, in **Project-Based Section 8** housing, the federal government provides the subsidy directly to the housing provider; if a tenant moves, the federal subsidy remains with the physical unit of housing.

This report assesses the **Tenant Selection Plans of Project-Based Section 8** housing. Multiple types of subsidies, including federal (as well as local and state, i.e. tax credits/abateements) subsidies could be attached to a single unit of housing.

PILOTING A TOOL FOR REENTRY: A PROMISING APPROACH TO ENGAGING FAMILY MEMBERS (2011), <http://archive.vera.org/sites/default/files/resources/downloads/Piloting-a-Tool-for-Reentry-Updated.pdf>.

⁵⁹ *Id.* at 2.

⁶⁰ SEATTLE, WASH., MUNICIPAL CODE § 14.09.025(A)(3) (2019), https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.09USCRREHO_14.09.025PRUSCRHI; § 14.09.010, https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.09USCRREHO_14.09.010DE.

⁶¹ § 14.09.110, https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.09USCRREHO_14.09.110EV.

on a tenant's criminal convictions.⁶² Among many notable findings, the research concluded that 11 of 15 categories of criminal offenses have no significant effect on housing outcomes.⁶³ The findings of this study support the passage of other local ordinances or amending the FHA.

E. FEDERAL REGULATIONS APPLIED TO PROJECT-BASED SECTION 8 HOUSING

Federal regulations related to criminal background stipulate only two permanent bans on eligibility for Project-Based Section 8 applicants:

- 1) If any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing;
- 2) If any household member is subject to a lifetime registration requirement under a State sex offender registration program.⁶⁴

Project-Based Section 8 housing providers must also deny admission to applicants who have been evicted from federally assisted housing for drug-related criminal activity within the past three years unless the household member who engaged in such activity has successfully completed a supervised drug rehabilitation program or the circumstances leading to eviction no longer exist.⁶⁵

Finally, Project-Based Section 8 housing providers must deny admission to applicants' households wherein any family member currently engages in the illegal use of a drug or if there is reasonable cause to believe that a household member's abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.⁶⁶

62 CAEL WARREN, WILDER RESEARCH, SUCCESS IN HOUSING: HOW MUCH DOES CRIMINAL BACKGROUND MATTER? (2019), https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf.

63 *Id.* at 23.

64 42 U.S. Code § 13661; and 24 § 5.854 and § 5.856

65 § 5.854.

66 *Id.*

OPPORTUNITY TO APPEAL DENIALS

Housing providers must individually assess applicants. Applicants to Project-Based Section 8 housing have the right to appeal denials through the process of an informal hearing.

In 2013, The Legal Aid Society of Cleveland laid out appropriate steps to take so applicants can request and prepare for this meeting. Individuals need to request the meeting in writing and should ask for a copy of the landlord's TSP, verification of the requested meeting, and a copy of the information used to deny the application. Before the meeting, applicants should gather witnesses and all documentation to support their application, as well as character reference letters if possible.⁶⁷

TENANT SELECTION PLAN

A tenant selection plan is “[a] formal written policy statement, developed by the owner and available to the public, that clearly states the procedures and criteria the owner will consistently apply in drawing applicants from the waiting list, screening for suitability for tenancy, implementing income targeting requirements, and offering housing assistance and/or assisted housing units. The Tenant Selection Plan also includes policies applied to residents of the property such as how unit transfers are carried out.”⁶⁸

HUD does not review or approve TSPs. Nor does HUD have a central repository for TSPs. The HUD Handbook provides the topics that TSPs are supposed to include and sketches out guidance about these topics, but does not include a template or sample TSP.⁶⁹

F. REENTRY AND SUBSIDIZED HOUSING IN CUYAHOGA COUNTY

The numbers of people incarcerated in Ohio are among the highest in the U.S. The Sentencing Project ranks Ohio as the fifteenth largest prison population in the country, with a high number of those also on probation and parole.⁷⁰

From 2013 to 2015, according to the Ohio Department of Rehabilitation and Correctional Research, 9,837 individuals were released from Ohio correctional facilities and returned to Cuyahoga County.⁷¹ In 2016 and 2017, a total of 53,827 individuals returned to Cuyahoga County after being released from local jails.⁷² As James R. Wesson, Correctional Specialist of Grafton Correctional Institution, states:

These are staggering numbers. This is also a clear indication of the importance of providing housing options to the returning citizens of Cuyahoga County. Current research has indicated that having a stable place to live only enhances the chances of a returning citizen to be successful in their re-entry attempt.⁷³

With so many formerly incarcerated individuals returning to the community and to Cuyahoga County in particular, it has become apparent that housing options must be considered as a strong pathway to a successful return to society. Rates of recidivism increase when reentrants face homelessness or housing insecurity.⁷⁴

Current strategies to mitigate the effect of present housing barriers for reentrants include increasing transition services, providing dedicated housing for reentrants, and coordinated discharge planning. Patricia McKernan, President of the Reentry Coalition of New Jersey, stated that these “can play a critical role in improving housing stability, especially for those [reentrants] who have a mental health diagnosis or a history of addiction, or who have been convicted of a sexual offense.”⁷⁵

Returning to the community after incarceration presents numerous obstacles regarding housing, employment, connections with family and friends, and wellbeing of mind and body—all of which are key components to a successful return to society. While homelessness alone is not the cause of all recidivism, a lack of safe and stable housing is a core concern that complicates other pieces of successful reentry for formerly incarcerated individuals.⁷⁶ In such cases, associations with

67 Maria Smith, *What to Do When a Landlord Denies Public Housing Based on a Criminal Record*, 29 THE ALERT 2, 2 (2013), <https://laslev.org/wp-content/uploads/FINAL-Alert-v29-no2-Summer-2013.pdf>.

68 U.S. DEP’T OF HOUS. & URBAN DEV., HUD OCCUPANCY HANDBOOK GLOSSARY at 34, <https://www.hud.gov/sites/documents/43503HSGH.PDF>.

69 *See id.* at 4-4.

70 THE SENTENCING PROJECT, *supra* note 6 (select “State Rankings”).

71 E-mail from James R. Wesson, Corr. Specialist, Ohio Dep’t of Rehab. & Corr., to Maria A. Smith, Supervising Attorney, The Legal Aid Society of Cleveland (Apr. 2, 2018) (on file with Maria A. Smith).

72 Cuyahoga Cty. Sheriff’s Dep’t Ann. Rep. 6 (2017), https://sheriff.cuyahogacounty.us/pdf_sheriff/en-US/AnnualReports/2017AnnualReport.pdf.

73 Wesson, *supra* note 71.

74 D.A. ANDREWS & JAMES BONTA, *THE LEVEL OF SERVICE INVENTORY—REVISED* (Toronto: Multi-Health Systems 1995).

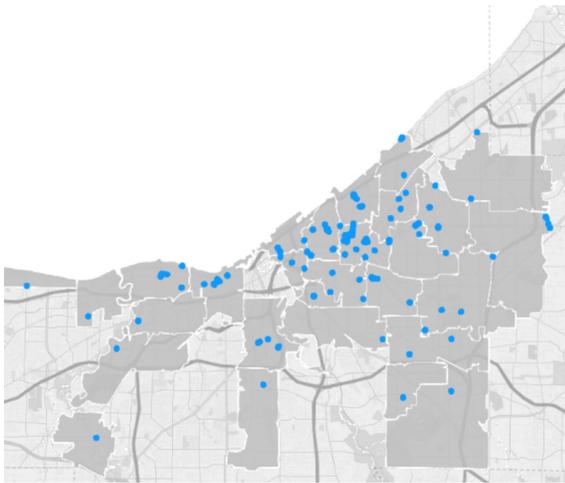
75 Patricia McKernan, *Homelessness and Prisoner Reentry: Examining Barriers to Housing Stability and Evidence-Based Strategies That Promote Improved Outcomes*, J. OF COMMUNITY CORRECTIONS, Fall 2017, at 7, https://www.voa.org/pdf_files/homelessness-and-prisoner-reentry-examining-barriers-to-housing-stability-and-evidence-based-strategies-that-promote-improved-outcomes.

76 *Id.* at 7.

recidivism, community supervision, and other public safety concerns were linked with high rates of housing instability.⁷⁷

Being homeless is not just a public safety issue but a public health issue as well, both of which significantly impact the wellness of a community and its members. Children are often overlooked as members of the community impacted by incarceration. Almost half of all children in the United States have a parent with a criminal record and securing housing is imperative for these returning parents to be able to support their families successfully.⁷⁸

III. TSP COLLECTION PROCESS & METHODOLOGY FOR REVIEW



NEOCH sent letters to every Cuyahoga County Project-Based Section 8 housing provider requesting a copy of their TSP. The HUD Handbook states that “when requested, the owner must make the tenant selection plan available to the public;”⁷⁹ thus, all providers should have made their TSP available. NEOCH received seventy-nine TSPs in response to the request by April 6, 2018. Additional TSPs received after this date were not included in this report’s analysis. The Committee also reviewed and analyzed twenty-nine TSPs previously obtained for this purpose for properties that did not respond to NEOCH’s 2018 request bringing the total number of TSPs collected and analyzed to 108.

The Committee developed a system and coding scheme prior to beginning the TSP review process. To ensure the integrity of the analysis, it was critical that all readers understood and agreed to use the same parameters for their reviews. A shared Excel spreadsheet outlined thirty-one categories of interest. Each TSP was read with each of these thirty-one offense categories in mind. Readers documented the lookback period for each category in the spreadsheet for each TSP reviewed. For example, for the category “Violent Misdemeanor,” if the TSP indicated that a violent misdemeanor conviction would result in denial of an application (or make the applicant ineligible) for X number of years, the reader entered the number X in the appropriate cell. “0” was used in cases where a TSP was silent on a particular category or did not explicitly specify a time period for an offense. “99” was used in instances where the offense may bar an applicant for life.

Each TSP was read at least twice by two unique readers. Any discrepancies noted between the readers were discussed and reconciled. When discrepancies could not be settled within the pair, the issue was taken to the entire team for resolution.

⁷⁷ *Id.* at 8.

⁷⁸ REBECCA VALLAS, MELISSA BOTEACH, RACHEL WEST, & JACKIE ODUM, CTR. FOR AM. PROGRESS, *REMOVING BARRIERS TO OPPORTUNITY FOR PARENTS WITH CRIMINAL RECORDS AND THEIR CHILDREN: A TWO-GENERATION APPROACH 1* (Dec. 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf>. See also SEATTLE, WASH., MUNICIPAL CODE § 3.14.931 (2019), https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT3AD_SUBTITLE_IIDEOF_CH3.14EXDE_SUBCHAPTER_VIIIOFCIRI_3.14.931SEHURICOUT.

⁷⁹ U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 68 at 4-10.

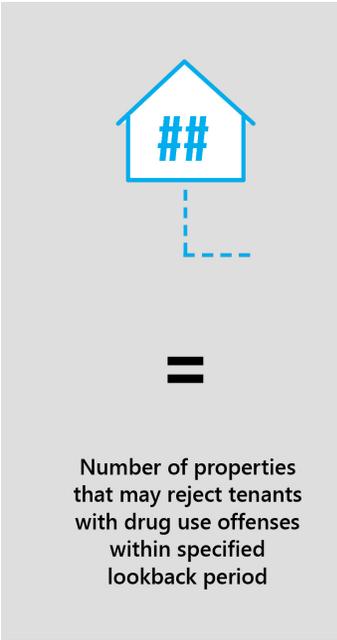
IV. DATA FINDINGS AND ANALYSIS

EF'S STORY

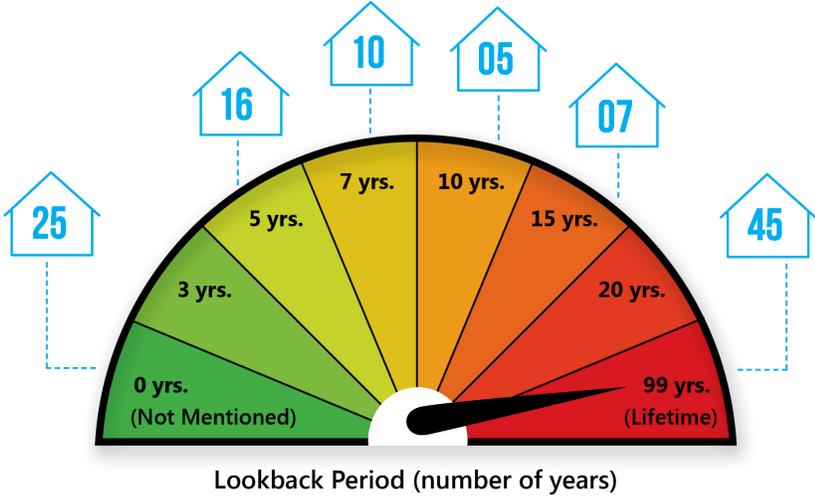
EF is an African American who was employed in an affluent, predominantly white Cleveland suburb in 2001. His job required that he use an angle, box cutter, drawing board, exacto-knife, and T-square. He had all of those tools in the back seat of his car one evening. A police officer eyed him when he was putting gas his car before heading home from the suburb. The police officer stopped EF, searched the car, and arrested him for carrying concealed weapons. Initially EF plead not guilty. The docket states that he waived his right to a speedy trial. After spending two weeks in jail awaiting trial, he lost his job. The Court appointed counsel to represent EF. Upon the advice of counsel, EF decided to change his plea from “not guilty” to “no contest”. The Court found him guilty of a fourth degree misdemeanor of carrying a concealed weapon. The docket states: “Deft agrees that exacto knife (sic) and 2 wooden clubs involved herein are forfeited to be disposed of by” the police department. (The “2 wooden clubs” referred to the angle and T-square.) When EF applied for Project-Based Section 8 housing in 2018, he was denied solely because of the 2001 “no contest” conviction. EF feels strongly that he, as countless others, was victimized because he was “driving while Black”. That people of color and lower-income populations have disproportionately been criminalized and policed—as evidenced by RF’s story—exacerbates the existing struggles for them to obtain subsidized housing.

After examining the TSPs collected, the Committee highlighted data concerning the lookback periods for felonies, misdemeanors, and drug use. Over seventy-six percent of properties surveyed (83/108) noted that they *may* deny tenancy to people with a history of drug use, with lookback periods from five years to permanently. As mentioned in the TSP Review Process, “0” indicated that a TSP was silent on a particular category or did not explicitly specify a time period for an offense, and “99” indicated that the offense may bar an applicant for life. This is troubling because the FHA protects people who have a disability—which includes people in recovery from alcohol and/or substance abuse—from discrimination on those grounds and affords the right to reasonable accommodation.⁸⁰

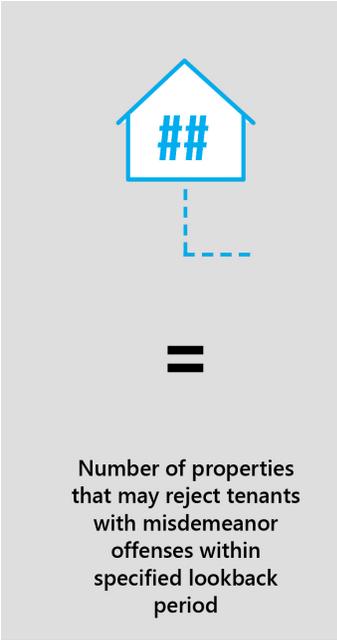
⁸⁰ OHIO REV. CODE ANN. § 4112.02(H) (West 2019); U.S. DEP’T OF HOUS. & URBAN DEV. & U.S. DEP’T OF JUSTICE, REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT (2004).



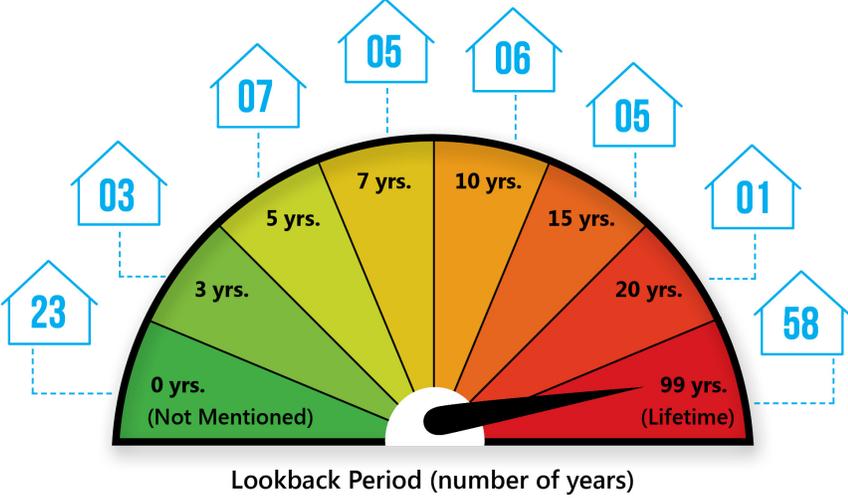
LOOKBACK PERIODS: DRUG USE



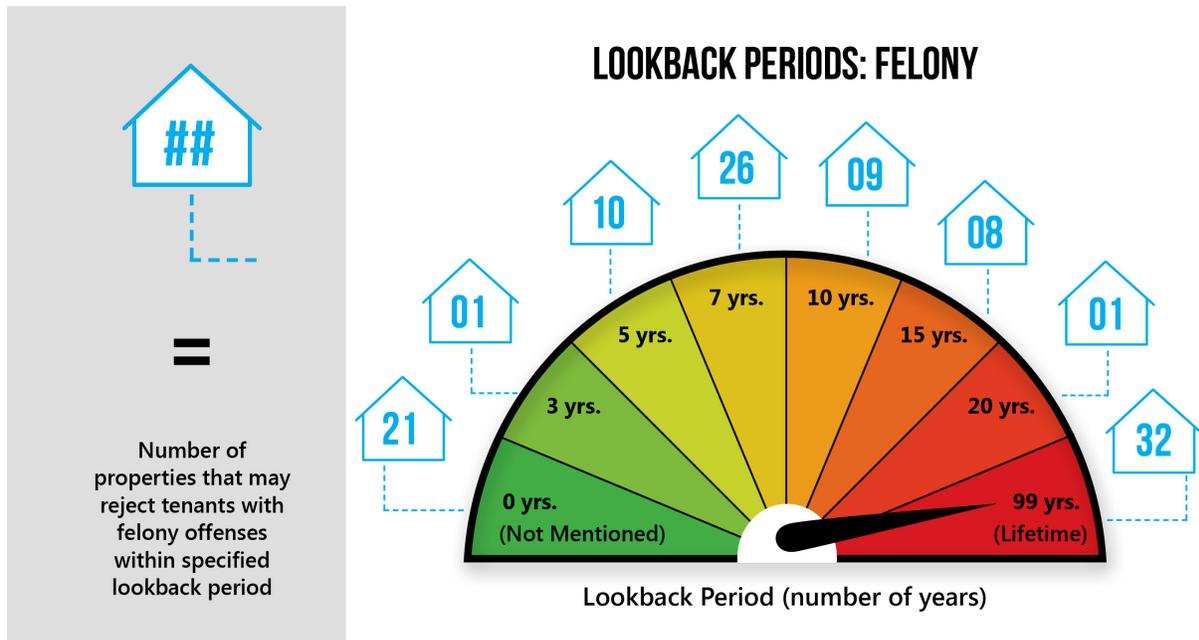
More than seventy-eight percent of properties surveyed (85/108) may deny admission to people with misdemeanor convictions. The majority (58/108) of housing providers' TSPs noted that a misdemeanor conviction may make an applicant permanently ineligible for their housing.



LOOKBACK PERIODS: MISDEMEANOR



Of the properties surveyed, eighty percent can ban applicants with felony convictions from admission (87/108), with lookback periods that span from three years to permanently.



The HUD Handbook states: “All screening criteria adopted by the owner must be described in the tenant selection plan and consistently applied to all applicants in a non-discriminatory fashion and in accordance with all applicable fair housing and civil rights laws.”⁸¹

The HUD Handbook mandates consistency but does not provide rules of construction or rules of interpretation for the TSPs. For example, it is common for TSPs to have sweeping language that broadly excludes applicants who have convictions and additional language with lookback periods that apply to specific felony convictions. The TSPs do not explicitly state that applicants will only be denied if their specific conviction excludes them. Instead, the broad, sweeping statements regarding conviction lookback periods could be interpreted as grounds to deny applicants with convictions that are not specifically mentioned in the TSPs.

In another instance of broad and sweeping statements, more than fifty-seven percent of properties surveyed (62/108) indicate that they reserve the right to permanently deny an applicant if the applicant has been convicted of a crime against people or property. Several TSPs explicitly state that the management company has the right to deny an applicant based on subjective criteria such as “suitability” or “potential for disruptive behavior.” The vagueness of these categories creates space for housing providers’ own biases/discretion to influence decisions.⁸²

⁸¹ U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 68 at 4-17.

⁸² Though HUD mandates a minimum of a three-year lookback for those evicted from subsidized housing for drug-related criminal activity, about thirty-seven percent of housing providers (40/108) whose plans were reviewed chose to increase the lookback period.

The discretion that the TSPs afford to the housing providers typically tilts towards rejecting an applicant. Nearly all of the TSPs include the broad language that a housing provider may reject an applicant. None of the plans that the Committee reviewed state a policy of providing an individualized assessment in order to override an exclusion. The predominant tack of the TSPs currently is contrary to the direction of The Guidance.

CD'S STORY

In 2001, CD went on a destructive drinking binge. The plan was to drink himself to death. In the meantime, his judgment was seriously impaired. He received several pornographic videos that included children. An undercover police officer caught CD with an unopened, never-viewed video that contained child pornography. He was convicted of importuning and was required to register as a sex offender for ten years.

In 2006, CD started attending Alcoholics Anonymous (AA). His AA sponsor tenaciously helped him to achieve and sustain his sobriety. However, his AA sponsor could not do anything about CD's conviction. Countless landlords refused to rent to him. CD spent numerous years either sleeping in his van or renting rooms in dilapidated boarding houses. In 2013, during a stint of homelessness, but nonetheless maintaining his sobriety through it all, CD pulled into the parking lot of a fast food restaurant. The lot had a space designated for truckers to sleep in their cabs and CD decided to park and sleep in his van. Unfortunately, someone called the police. The police report states there was a "suspicious vehicle" parked in the lot. CD was arrested and convicted of misdemeanor criminal trespass.

In 2018, seven years after he no longer needed to register as a sex offender, CD applied for Project-Based Section 8 housing. Under the TSP, CD's felony conviction for importuning was too old to disqualify him, but he did not qualify under the TSP based on his 2013 criminal trespass conviction. CD was connected to homeless advocates who knew that

he needed to appeal the denial. He had an informal hearing to discuss the denial. His AA sponsor attended and confirmed CD's story. CD's counsel argued that the TSP violated fair housing law. The landlord reversed the denial and offered CD a unit.

HOUSING AND SEXUAL OFFENSE CONVICTIONS

If his crime had been anything but a sex offense, CD would have been able to request a reasonable accommodation under fair housing law, as the conduct that led to his conviction was directly related to his alcoholism. However, the FHA does not afford the same protection for sex offenses as it does to other conduct arising from a disability.

Federal law only requires that HUD-assisted housing providers deny applicants who have a lifetime registration requirement based on a conviction for a sex offense.⁸³ The majority of Project-Based Section 8 Housing providers in Cuyahoga County have chosen to make their rules even more restrictive. In the TSP review, 56% (61/108) permanently disqualify applicants with any type of sexually based criminal conviction and 41% (45/108) of properties did not have a specified lookback period. This severely limits affordable housing options for those with lifetime registry requirements.

⁸³ 24 C.F.R. §§ 5.856, 960.204(a)(4), 982.553(a)(2) (2019).

V. CONCLUSION AND RECOMMENDATIONS

Although it is obvious that safe, decent, and affordable housing is essential to an individual's stability, social relationships, and economic productivity, in the United States housing is not deemed a "human right." Federal law and a patchwork of home ownership programs historically discriminated against African Americans. The FHA sought to end that discrimination, but it did nothing to address the wealth that past discrimination denied to African Americans. That discrimination has made African Americans more dependent on rental housing. Further, the new manifestation of discrimination in the trend of mass incarceration has assaulted African Americans, and collateral sanctions from criminal convictions have again denied African Americans housing.

The review of TSPs shows that criminal convictions, even from misdemeanors, have a long-term impact on access to Project-Based Section 8 Housing in Cuyahoga County.

The Guidance affirms that blanket bans, policies, and practices that fail to provide for an individualized assessment of an applicant's criminal history have a discriminatory effect on African American and Latinx applicants. None of the plans the Committee has reviewed for this report stated a policy of providing an individualized assessment as part of the consideration when criminal background otherwise would disqualify an applicant.

There are some innovative alternatives for providing housing to formerly incarcerated individuals who are experiencing homelessness which will promote the safety and health of everyone in the community. In order to successfully decrease rates of homelessness for reentrants, successful housing models should be investigated, and begin with eliminating collateral sanctions and diminishing unique risk factors of people reentering.⁸⁴

This report makes the following recommendations to end collateral consequences related to housing in Cuyahoga County:

I. Global Recommendations:

- Approach housing as if it were a universal, enforceable right and reflect that in laws and funding allocations;
- Recognize that African Americans have not been compensated for past *de jure* housing discrimination and the legacy of exclusion from home ownership continues to unfairly disadvantage people reentering from incarceration;

II. Community-wide Recommendations:

- Commission a study on the impact of collateral consequences on housing in Cuyahoga County (including unsubsidized private, tax credit, government assisted (such as tax abated, development loans) and HUD-assisted housing);
- Promote the organizing of tenants (consider reentry and housing as a subset of other tenant issues, such as affordability, quality of housing stock, choice of location, proximity to schools, medical care, employment, affordability of utilities, such as water, electric and gas, transportation, etc.);

⁸⁴ TRAN-LEUNG, *supra* note 13, at 28–29.

- Address landlords’ concerns about risks and potential liability (models are available from federal employment programs, such as bonding, and private enterprise has developed relatively new insurance products, such as default of rent insurance);
- Improve rights of housing applicants (Clean Slate laws in other cities provide examples);
- Educate the public in broad-based media campaigns to create awareness (to help to end NIMBYism and fear);
- Use synergy from other populations (student housing, high-end housing) to build more affordable housing that does not exclude tenants based on criminal background;
- Develop subsidies to promote landlords renting to people who are returning from incarceration or have criminal backgrounds;
- Create housing ownership/home renovation options for people who are returning from incarceration or have criminal backgrounds;

III. Project-Based Section 8 Housing Recommendations:

- Project-Based Section 8 housing providers (“providers”) should revise their Tenant Selection Plans (TSPs) to eliminate criminal convictions as grounds to disqualify an applicant, to the extent that federal law permits;
- Providers should use the analysis presented in the Guidance when fashioning their TSPs;
- Providers should collaborate with other groups to develop additional affordable housing to deal with an increase of eligible applicants;
- Train owners and property managers on how to eliminate implicit bias;
- Eliminate lookback periods;
- Individually assess applicants to provide an equitable pathway to safe and secure housing;
- Deal with owners’ and property managers’ concerns that individualized assessments expose them to charges of discrimination or unfairness (e.g., rubrics for scoring and tracking decisions);
- Create an online repository for TSPs that is updated quarterly;
- Build housing to specifically address the needs of the reentry community;

IV. Recommendation for judiciary, prosecutors, and defense bar:

- Know the impact a plea or conviction may have on a defendant’s housing and housing options when discussing and recommending a plea arrangement;
- Realize the impact that a misdemeanor record has on applying for subsidized housing in Cuyahoga County. Those charged with crimes should be fully informed of the consequences a misdemeanor has on housing opportunities;
- Create more opportunities for individuals to avoid convictions;
- Study the disparate impact of criminal convictions;
- Study and eliminate arbitrariness of convictions;
- Advocate for probation and parole budgets to include funding for housing subsidies.

V. Recommendation for reentry organizations:

- Encourage clients to tell their stories regarding housing discrimination. Speaking on their experiences will help shine a light on this important topic and promote action. Link clients to agencies (such as the Fair Housing Center and Legal Aid) for help with the application appeal process, as well as providing additional support and resources.
- Organize people who are reentering and their families. Changing the way people are treated will require more people to come out of the shadows, voice their needs and make demands collectively.

Heather Pederson, from EDWINS Leadership & Restaurant Institute, calls us all to action with these words:



REENTRY IS HARD ENOUGH WITHOUT THE ADDITIONAL BARRIER OF HOUSING. EVERY CITIZEN RETURNING HOME DESERVES FAIR AND EQUAL HOUSING AND THE OPPORTUNITY TO RECONNECT WITH THEIR FAMILIES AND COMMUNITIES. WE ARE DOING OUR REENTRY COMMUNITY A GREAT DISSERVICE BY BARRING PEOPLE FROM HOUSING WHEN THEY HAVE ALREADY PAID THEIR DEBT TO SOCIETY AND ARE READY TO MOVE FORWARD WITH THEIR LIVES. THIS IS SOMETHING THAT NEEDS TO HAPPEN NOT NOW, BUT RIGHT NOW!

