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***WHEN DISCRETION MEANS DENIAL:  
Criminal Records Barriers to Federally  
Subsidized Housing***

October 26, 2016  
Housing Action Illinois Conference

# Criminal Records & Public Safety

There is **NO** empirical evidence establishing a relationship between a **criminal record** and an **unsuccessful tenancy**.

On the other hand, **housing instability** is significantly associated with **recidivism**.

- In a Georgia study, every time a parolee changed his address, his likelihood of being re-arrested increased by **25%**

Ehman & Reosti, Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball, N.Y.U. J. LEGIS. & PUBLIC POL'Y *QUORUM* (Mar. 3, 2015).



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# Criminal Records & Homelessness

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In fact, there is ample evidence that **incarceration is a risk factor for homelessness, and vice versa.**

Because of this mutual relationship, the *U.S. Interagency Council on Homelessness* has called on PHAs to ease their criminal records screening criteria.



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# HUD Secretary's 2011 Letters

- **First Letter to PHAs** – stresses the importance of “second chances” for people with criminal records and a commitment to “helping ex-offenders gain access to one of the most fundamental building blocks of a stable life – a place to live.”
- **Second Letter to PHAs** – encourages PHAs to use their **wide discretion** to allow people with criminal records to rejoin their families in the public housing and HCV program, where appropriate.



# Mandatory Bans

PHAs and project owners **MUST** deny admission to:

- Anyone who has been convicted of **manufacturing methamphetamine on federally assisted property**;
- Anyone subject to **lifetime registration for a sex offense**;
- **Current users** of illegal drugs, abusers of alcohol, or pattern interfering with health, safety, peaceful enjoyment;
- Anyone who, ***within the last 3 years***, has been **evicted from federal housing for drug-related criminal activity** *unless* (1) drug rehabilitation or (2) circumstances leading to eviction no longer exist.



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# Discretionary Bans

PHAs and project owners **MAY** deny admission for:

- **Drug-related criminal activity** – manufacture, sale, distribution, use, or possession;
- **Violent criminal activity** – use of or threatened use of physical force that will cause serious bodily injury or property damage;
- Other criminal activity that would **adversely affect the health, safety, or right to peaceful enjoyment** of the premises by other residents, the owner, or public housing employees.



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## Discretionary Bans

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HUD notes that there are “a wide variety of other crimes that cannot be claimed to adversely affect the health, safety, or welfare of the PHA’s residents.”



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# Limits on Discretion

Although PHAs and project owners enjoy wide discretion, their discretion is subject to three important limits:

- **No Mere Arrests** – Arrests by themselves do not prove that criminal activity took place.
- **Time** – Criminal activity must have occurred during a “*reasonable time*” before the screening takes place. 42 U.S.C. § 13661(c)(2012).
- **Civil Rights Laws**, including federal *Fair Housing Act*





## Limits on Discretion: PIH Notice 2015-19

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HUD recognizes “the troubling relationship between housing barriers for individuals with criminal records and homelessness”

An arrest, without a subsequent conviction, is **insufficient proof of “criminal activity”** and therefore cannot be the basis of a denial of admission.

But an arrest record can trigger an inquiry into whether the criminal activity took place. According to HUD, acceptable evidence includes:

- Police report detailing the circumstances of the arrest
- Witness statements



# PIH Notice 2015-19

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## Goals:

- Providing “second chances to formerly incarcerated individuals where appropriate”
- “Ensuring that individuals are not denied access to HUD-subsidized housing on the basis of inaccurate, incomplete, or otherwise unreliable evidence of past criminal conduct”



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# PIH Notice 2015-19

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Refers to Shriver Center report generally, but does not specifically address:

1. Unreasonable lookback periods
2. Overbroad categories of criminal activity
3. Underuse of mitigating circumstances
4. Whether criminal records screening raises issues under the Fair Housing Act beyond discriminatory treatment



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## Limits on Discretion: No Arrests

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### *Landers v. Chicago Housing Authority*

- Landers, an African American homeless man, waited from 1995 to 2008 for public housing. During those 13 years, he went through long periods of homelessness, which gave rise to a series of arrests. However, he was never convicted of any crimes.
- CHA denied application on the basis of his arrest record.
- Illinois appellate court overturns CHA's denial: where a criminal record contained only dismissed charges, there was **no evidence** whatsoever that [he] engaged in criminal activity and **no evidence** that he was a threat to the health, safety, and welfare of other people.



# Limits on Discretion: Reasonable Time

- “**Reasonable time**” must be defined in written admissions policies.
- No definitive word from HUD
  - “While HUD considers that **five years** may be a reasonable period for serious offenses,” PHAs and owners are free to disagree.
  - Best practice: **12 months** for drug-related criminal activity; **24 months** for violent criminal activity and criminal activity that threatens health, safety and right to peaceful enjoyment by others



# Limits on Discretion: Civil Rights Laws

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Criminal records status is not a protected class.

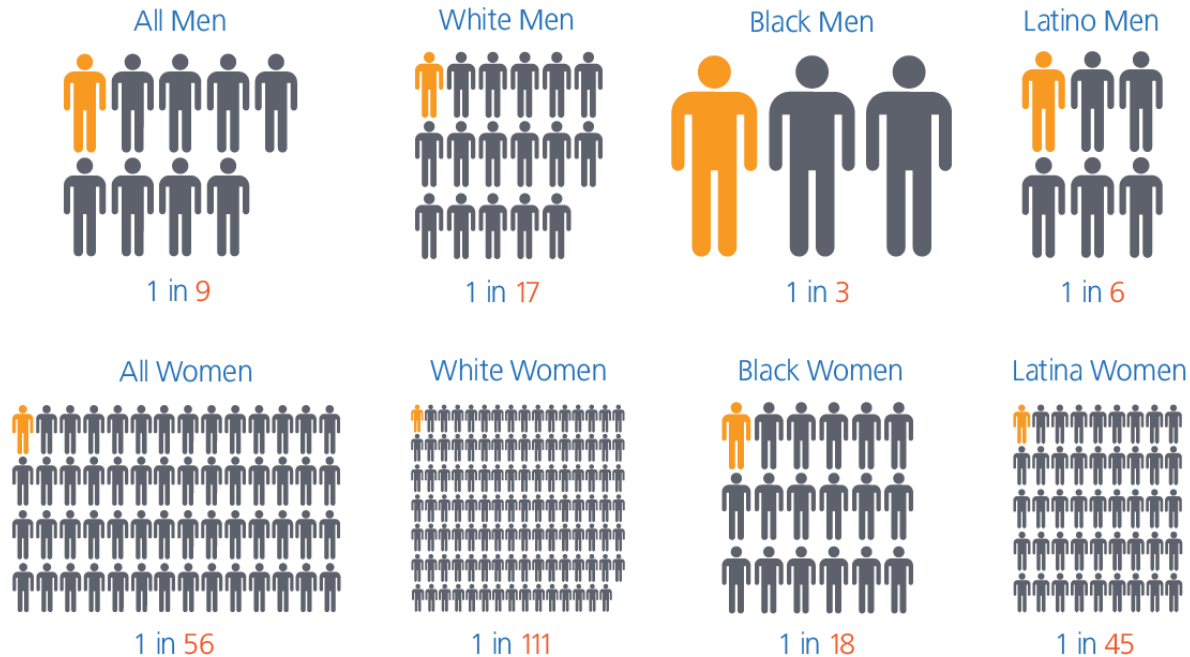
But criminal record screening may nevertheless violate civil rights laws.

- *Discriminatory treatment* – where criminal record used as pretext for race discrimination.
- *Disparate impact* – facially neutral policies that have an unjustified disparate impact on racial minorities.



# Limits on Discretion: The Fair Housing Act

## Lifetime Likelihood of Imprisonment



Source: Bonczar, T. (2003). *Prevalence of Imprisonment in the U.S. Population, 1974-2001*. Washington, D.C.: Bureau of Justice Statistics.



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## Limits on Discretion: The Fair Housing Act

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Some housing providers give themselves the authority to deny admission for ALL criminal activity.

- Creating exhaustive lists of criminal activity (*e.g.*, civil disobedience)
- “Misdemeanor or felony, on or off the property”
- Using the fact of incarceration, regardless of offense or conviction, as the basis of denial (pre-trial detention, debtor’s prison)





## Limits on Discretion: The Fair Housing Act

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Many PHAs and project owners impose **felony bans**.

- AIMCO includes public intoxication, shoplifting, and theft by check.
- Sometimes, denial on the basis of a prior felony will be justified. Therefore, more narrowly tailored criteria is required.



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## April 2016 OGC Guidance on Fair Housing and Criminal Records

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- As OGC guidance entitled to *Chevron* deference?;
- Applies to all housing covered by the FHA and their use of criminal histories in housing transactions;
- Applies Discriminatory Effect/Disparate Impact Test and Discriminatory Treatment/Intent Test to Criminal Records practices and policies.



## Evaluating if a Policy Has a Discriminatory Effect?

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Does the challenged policy actually or predictably result in a disparate impact?



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# Use of Statistical Data

- State/local statistics should be presented where available, but national stats may be used where state/local stats not available and no evidence they are different;
- HUD will investigate complaints using national stats;
- Applicant data, tenant files, census data, and local criminal justice data can help determine if national and local data are consistent;
- State/local stats required, see *Mountain Side Mobile Estates v. HUD*, 56 F. 3d 1243, 1253 (10<sup>th</sup> Cir. 1995).



# Housing Provider's Burden

- Burden shifts to the provider to prove with evidence that the challenged housing policy or practice is justified – that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider;
- Provider must also provide evidence that proving that the policy actually achieves that interest.
- Resident safety and protecting property may be legitimate interests if substantial, legitimate, and the actual reasons for the policy.
- Bald assertions based upon stereotypes that individuals with contact with the criminal justice system poses a greater risk than other individuals will not satisfy this burden.



# Exclusions Because of Prior Arrest

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- Providers with policy/practice of excluding individuals due to arrests w/o convictions cannot meet their burden;
- Not a reliable basis upon which to assess the potential risk to resident safety or property;
- Consistent with Title VII EEOC Guidance;
- Question: How to read this language in conjunction with PIH 2015-19?



# Exclusions Because of Prior Conviction

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- Record of conviction will generally serve as sufficient evidence to prove person engaged in criminal conduct;
- Notes however those conviction records may be erroneous (i.e. expunged, downgraded);
- Conviction ban policies must still be able to prove that the policy is necessary to serve a substantial, legitimate, and nondiscriminatory interest.



# Blanket Bans

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Consistent with Title VII caselaw:

Providers with blanket bans on any person with a conviction, no matter when it occurred, the underlying conduct, or what the person has done since the conviction **“will not be able to meet this burden.”**



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## Housing Providers Must Use More Tailored Policies

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- Policies that exclude individuals with certain types of convictions are still subject to scrutiny under the FHA.
- The provider must prove that its policy accurately distinguishes between criminal conduct indicating a demonstrable risk to resident safety/property v. conduct that does not.



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## Housing Providers Must Use More Tailored Policies

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- Policies or Practices Must Consider the Nature, Severity, and Recency of the Criminal Conduct to serve a substantial, legitimate, nondiscriminatory interest of the provider.
- HUD notes evidence that the likelihood of future criminal conduct decreases after 6 or 7 years to approximate the risk of new offenses among persons with no criminal records.



# Less Discriminatory Alternative

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If housing provider proves the policy is necessary to achieve a substantial, legitimate, nondiscriminatory reason, the burden shifts back to plaintiff to prove such interest could be served by another practice with a less discriminatory effect.



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# Less Discriminatory Effect

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- Case specific inquiry;
- Individualized assessment of mitigating information beyond the criminal record likely has a less discriminatory effect;
- Individualized assessment: facts & circumstances surrounding the criminal conduct; age of individual at the time; good tenant history before/after offense; evidence of rehabilitation.



# Timing of Considering Criminal History

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HUD suggests first considering a person's financial and other qualifications, in order to “minimize any additional costs that such individualized assessment might add to the applicant screening process.”



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# 807(b)(4) Exemption of the FHA

- FHA does not prohibit conduct against a person because of a conviction for the illegal manufacture and distribution of a controlled substance;
- No liability for discriminatory effect.
- Only applies to disparate impact claims on the basis of convictions, not arrests.
- Only applies to manufacturing and distribution convictions, not possession.



# Intentional Discrimination

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- Differential treatment because of race, etc., in the use of criminal history.
- Rejecting a Hispanic applicant due to criminal record but admitting White applicant with comparable record.
- No convictions policy but exceptions for whites.
- Leasing agent aiding a white applicant with a record but not a African American applicant.
- Discouraging African American applicants from applying due to criminal records but not discouraging White applicants.



# Intentional Discrimination

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If no direct, overt evidence of discrimination –

Traditional burden shifting applies:

1. Plaintiff is a member of protected class;
2. Applied for a dwelling;
3. Plaintiff rejected because of criminal history;
4. Provider provided housing to similarly situated applicant with comparable criminal record.

Then burden shifts to the provider to show evidence of legitimate, nondiscriminatory reason.

Plaintiff can still show criminal record was pretext for discrimination.



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# Examples of Pretext

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- Acting on criminal histories differently for different protected classes;
- Provider did not actually know of a person's criminal record at the time of decision;
- Shifting explanations by a provider for the denial;
- Particular facts of the case;
- 807(b)(4) exemption does not apply to intentional discrimination claims.



## Recent FHA/Criminal Records Litigation

*Fortune Society v. Sandcastle Towers Housing Development, et al.* (E.D.N.Y.) – Relman, Dane & Colfax

- Challenge to a private landlord's blanket ban on renting apartments to people with criminal records
- Owner automatically denied admission to anyone with a criminal record regardless of nature of conviction, time elapsed, evidence of rehabilitation, or other factors to determine if the person would be a serious threat.
- Blanket ban disproportionately and overwhelmingly impacts African-Americans and Hispanics.
- One of the first cases to challenge a blanket ban on housing imposed by a private landlord as a civil rights violation.



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## Limits on Discretion: Reasonable Accommodation

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- FHA Guidance did not cover
- Persons with disabilities may request a reasonable accommodation.
- Includes persons who are **recovering from addiction** and have successfully completed or are undergoing substance abuse treatment.
  - *But not* **current users** of illegal substances
  - *But not* persons who are a **direct threat to health and safety of others**
  - *But not* persons whose tenancy would result in **substantial physical damage to the property of others**



# Practice Tips: Get A Copy of the Criminal Record

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Before denying admission, PHAs must notify the applicant of the proposed denial and give the applicant:

- **Copy of the criminal record, and**
- **Opportunity to dispute its accuracy and relevance.**

Criminal background checks, especially from private screening companies, are often **inaccurate and incomplete**. Some problems include wrong person, no disposition, misclassifying offenses, and revealing sealed/expunged records.



# Practice Tips: Get A Copy of the Criminal Record

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**Fair Credit Reporting Act** requires landlords, before denying admission on the basis of a third-party screening report, to notify applicants of the screening company that provided the report and its contact information.

Applicants might also try to obtain a copy of the criminal background check before reaching the top of the waiting list.



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# Practice Tips: Present Mitigating Circumstances

For public housing:

- PHAs must consider mitigating circumstances
  - Time, nature & extent of applicant's conduct
  - Seriousness of the offense
- PHAs **may also** consider factors that indicate a reasonable probability of favorable future conduct (i.e., rehab evidence, family attendance or willingness to attend social services, counseling, and program availability).

For all other HUD programs, HUD encourages consideration of mitigating circumstances.

PHAs should reconsider denial if sufficient evidence of no on going criminal activity during reasonable time before applying.



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# Practice Tips: Present Mitigating Circumstances

In listing best practices for PHAs, HUD listed the following factors:

- Whether the applicant's offense bears a relationship to the safety and security of other residents
- The level of violence, if any, of the offense for which the applicant was convicted
- Length of time since the conviction
- If the applicant is now in recovery for addiction, whether the applicant was under the influence of illegal drugs or alcohol at the time of the offense;
- Any rehabilitation efforts that the applicant has undertaken since the time of the conviction



## Selected Resources

- Shriver Center, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing* (2015), <http://povertylaw.org/sites/default/files/images/publications/WDMD-final.pdf>
- National Housing Law Project, *An Affordable Home on Reentry* (2008), <http://nhlp.org/resourcecenter?tid=86>
- Merf Ehman, *Fair Housing Disparate Impact Claims Based on the Use of Criminal and Eviction Records in Tenant Screening Policies* (2015), <http://www.columbialegal.org/DisparateImpactManual2015.pdf>





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